

June 6, 2011

By Electronic Mail

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2011-12 (Majority PAC / House Majority PAC)

Dear Mr. Hughey:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2011-12, a request submitted on behalf of Majority PAC and House Majority PAC (hereinafter, the “PACs”) seeking the Commission’s opinion as to the following questions:

1. Despite the Supreme Court’s decision in *McConnell v. FEC* upholding the soft money solicitation ban, may federal officeholders and candidates, and officers of national party committees (hereinafter, “covered officials”) solicit unlimited individual, corporate, and union contributions on behalf of the PACs without violating 2 U.S.C. § 441i?
2. If the answer to the first question is “no,” please confirm that covered officials do not violate 2 U.S.C. § 441i if they participate in fundraisers for the PACs at which unlimited individual, corporate, and union contributions are raised, provided that they do not solicit such contributions by complying with 11 C.F.R. § 300.64.

AOR 2011-12 at 1 (footnote omitted).

For the reasons set forth below, we urge the Commission to make clear that covered officials may not solicit unlimited individual contributions, nor any corporate and union contributions, on behalf of the PACs without violating 2 U.S.C. § 441i.

Section 441i(a) provides that a national party committee, and any officer or agent acting on behalf of such a national party committee, may not solicit any funds “that are not subject to the limitations, prohibitions, and reporting requirements” of the Federal Election Campaign Act (FECA). Similarly, section 441i(e)(1)(A) provides that a “candidate or an individual holding Federal office . . . shall not . . . solicit . . . funds in connection with an election for Federal office .

. . . unless the funds are subject to the limitations, prohibitions, and reporting requirements” of FECA.

These solicitation restrictions, enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), were challenged and upheld in *McConnell v. FEC*, 540 U.S. 93, 142-54, 181-84 (2003), including with the vote of Justice Kennedy who otherwise dissented in the case. *See* 540 U.S. at 308 (Kennedy, J. dissenting in part and concurring in part). No court has since invalidated or even called into question these solicitation restrictions.¹

As the requestor PACs acknowledge: “[T]he restrictions set forth at 2 U.S.C. § 441i would appear to prohibit covered officials from soliciting unlimited individual, corporate, and union contributions on behalf of the PACs.” AOR 2011-12 at 1-2. They not only “appear” to prohibit such solicitations, they in fact do so. As the PACs further explain:

[T]he plaintiffs in *Citizens United* and *SpeechNow*—the cases that led to the creation of Super PACs—did not even challenge the solicitation restrictions set forth at 2 U.S.C. §§ 441i(a) and 441i(e)(1)(A), which prohibit persons from raising funds in connection with a Federal or non-Federal election that do not comply with the amount limitations and source prohibitions of the Act.

AOR 2011-12 at 3.

This is entirely correct. After being upheld in *McConnell*, the solicitation restrictions were not challenged nor discussed in either the *Citizens United* or *SpeechNow* cases, and there is not a whisper by the Supreme Court or the D.C. Circuit in either opinion that questions or undermines the applicability or constitutionality of these provisions.

This Commission has no authority to speculate on the constitutionality of a duly enacted statute that has been squarely upheld by the Supreme Court. Under the plain language of the statute, covered officials are prohibited from soliciting funds in connection with a federal election unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA. It is the Commission’s job to give effect to this language, and to enforce it. Since the funds at issue here are not subject to the limitations and prohibitions of the Act, they fall within the scope of the solicitation restriction.

An argument has been made by another commenter, the Republican Super PAC (RSPAC), that the solicitation provision applies only to “soft money,” while the funds at issue here are “hard money” since those funds can lawfully be raised by a federally registered political committee. Whatever label one gives to the funds raised by a Super PAC does not, however, determine the application of the solicitation restriction. That restriction instead applies to funds that are not “subject to the limitations [and] prohibitions” of the Act—and the funds raised by a Super PAC are not. Although this language of section 441i(e)(1)(A) does describe what had been referred to as “soft money” when it was raised by the political parties prior to BCRA, it also

¹ *See also* *RNC v. FEC*, 698 F. Supp. 2d 150, 156-60 (D.D.C. 2010) (rejecting RNC’s as-applied challenge to the restrictions of 2 U.S.C. § 441i(a)), *aff’d* 130 S. Ct. 3544 (2010).

describes the funds that Super PACs intend to raise now. The fact that Super PACs themselves may lawfully solicit and accept such funds does not mean that federal officeholders and candidates can lawfully solicit those funds for them.

For the reasons we discuss below, the funds at issue here—contributions from individuals of unlimited size, and corporate and union contributions—pose exactly the same threat of corruption and the appearance of corruption when solicited by federal candidates and officeholders for Super PACs that solicitations for party “soft money” by federal candidates and officeholders posed prior to BCRA. As Congress recognized in prohibiting such solicitations, and as the Supreme Court recognized in upholding the solicitation restriction, “the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.” *McConnell*, 540 U.S. at 182.

To be sure, the threat is even more pointed here than it was with pre-BCRA “soft money” since the funds raised by a Super PAC can be spent directly on express advocacy in federal elections, whereas pre-BCRA party “soft money” could not be. And not only is the money at issue here likely to be spent by Super PACs to influence federal elections generally, it is likely to be spent for the benefit of the very candidate who would be soliciting the funds.

Indeed, according to public statements by its founders, RSPAC plans to formally commit itself to spending money solicited by a federal candidate, earmarked for that candidate by the donor, for the benefit of that candidate. Whether this is termed “hard” money or “soft” money, it surely is corrupting money, when federal candidates are licensed to solicit million dollar contributions with the knowledge that the Super PAC receiving those funds has committed itself to spend the money for express advocacy ads or other campaign purposes to directly benefit that candidate’s race. This will, in an even more direct fashion, recreate the myriad problems that existed prior to BCRA when federal candidates and officeholders were free to solicit million dollar contributions to their political parties. The record of the *McConnell* case, which we discuss at length below, is replete with evidence of the corruption that resulted from a system of such solicitations. Even Justice Kennedy concluded that “[t]he making of a solicited gift is a quid both to the recipient of the money and to the one who solicits the payment (by granting his request).” *McConnell*, 540 U.S. at 308 (Kennedy, J.) (emphasis added).

Here, the plan is for federal candidates to solicit million dollar contributions to a Super PAC instead of to a party committee, but the “quid” that Justice Kennedy identified is just as toxic when the recipient is a Super PAC instead of a party committee, and it poses just as serious a threat of a return “quo” to the million-dollar donor from the grateful candidate who solicited the funds (and who will benefit from the spending of them).

Finally, we urge the Commission to make clear that covered officials will violate section 441i if they solicit any contributions at fundraisers for Super PACs at which unlimited individual contributions, and corporate and union contributions, are raised. The provisions of 11 C.F.R. § 300.64 authorize covered officials to participate in “non-Federal fundraising events” and in “publicity for non-Federal fundraising events,” 11 C.F.R. § 300.64(b)-(c) (emphasis added), but these regulations do not authorize covered officials to participate in federal fundraising events

for registered federal PACs “at which unlimited individual, corporate, and union contributions are raised.” AOR 2011-12 at 1.

Unlike the non-federal fundraising events covered by section 300.64, where the funds raised are not spent to directly benefit federal candidates and officeholders, the events to be held by the requestor PACs are federal fundraising events so the funds raised will directly benefit federal candidates and officeholders including, most likely, those who are participating in the event. “Construed as reasonably understood” in this context, *see* 11 C.F.R. § 300.2(m), any request by a covered official that attendees contribute funds to the PACs—even a request purportedly limited by a “disclaimer”—will constitute an impermissible solicitation of funds not subject to the limitations and prohibitions of FECA. The so-called “disclaimers” permitted by section 300.64 to limit solicitations may be a sufficient safeguard in the context of non-federal fundraising events but they are insufficient as a means to credibly and effectively limit solicitations at the federal fundraising events to be held by the requestor PACs. While federal candidates and officeholders may be entitled to attend such federal fundraising events, the Commission’s existing regulations, which, on their face, apply only to non-federal fundraising events, do not permit candidates and officeholders to solicit funds at federal events, and the Commission here should not stretch its rules to allow them to do so.

I. Although *SpeechNow* and Commission advisory opinions permit Super PACs to solicit and accept unlimited contributions, these precedents do not permit solicitation of such funds by covered officials.

The heart of the argument made by requestors and those who support the request is that the D.C. Circuit opinion in *SpeechNow* authorized federal PACs that make only independent expenditures to accept unlimited contributions from individuals (and by extension, any contribution from prohibited corporate and union sources). *See SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). Thus, requestors reason, if these federal PACs can lawfully receive such contributions, federal candidates and officeholders must therefore be able to solicit them.

The flaw in the argument is that the core premise of the *SpeechNow* court was that these “independent expenditure only” PACs were, in fact, going to operate independently of candidates and officeholders. This was not a premise the court casually assumed—it was shot through the representations that *SpeechNow* repeatedly made to the court, as it stressed over and over again not just that its expenditures would be independent, but that its operations as a whole would be independent of candidates and officeholders. Indeed, in service of its argument about how independently it would operate, one of the points *SpeechNow* stressed to the court was that federal candidates and officeholders would not solicit funds for it because of the solicitation restriction: “In any event, with the solicitation ban in place, candidates cannot solicit funds for *SpeechNow.org*”²

Thus, the requestors here ask the Commission to make a fundamental re-interpretation of the *SpeechNow* decision by assuming that a key representation made repeatedly to the court by the plaintiff was not the least bit relevant to the court’s decision. In other words, the gravamen

² *SpeechNow*, Reply Brief of Appellants 13-14, Case No. 08-5223, Doc. No. 1222740 (Dec. 29, 2009) (D.C. Cir.)

of the requestor’s position is that if SpeechNow had told the court that candidates would be working hand-in-glove with it to solicit unlimited contributions for it that it would then spend independently of those candidates but for their benefit—a representation that is the exact opposite of what SpeechNow did repeatedly tell the court—the court nonetheless would have decided that SpeechNow could accept those unlimited contributions. Simply put, nothing supports the wildly unreasonable assumption that this material change in the fundamental premise of the case would have made no difference in its outcome.

In 2007, SpeechNow filed an advisory request with the Commission, explaining that its purpose is to make independent expenditures advocating the election or defeat of candidates to federal office and maintaining that it “will operate wholly independently of candidates, political party committees, and any other political committees.” AOR 2007-32 at 2 (emphasis added). We note that SpeechNow did not represent simply that its expenditures will be done independently of candidates and parties, but that it “will operate” independently of candidates and parties. These representations plainly establish SpeechNow’s commitment to conduct the entirety of its operations, including its fundraising, exclusive of candidates and parties. SpeechNow sought the Commission’s opinion as to whether it was required to register as a political committee and abide by the contribution limits of 2 U.S.C. § 441a(a)(1)(C). *See* AOR 2007-32 at 1.

At the time SpeechNow filed its AOR, the Commission had only two commissioners and, consequently, was unable to issue an advisory opinion. *See* FEC, Letter Re: Advisory Opinion Request 2007-32 (Jan. 28, 2008). SpeechNow proceeded to file a declaratory judgment action challenging the constitutionality of the political committee registration and reporting requirements, as well as the contribution limits as applied to the organization. *See SpeechNow v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008); *see also SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). The D.C. Circuit Court, sitting *en banc*, explained:

[T]he district court certified the constitutional questions directly to this court for *en banc* determination. Thereafter, the Supreme Court decided *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which resolves this appeal. In accordance with that decision, we hold that the contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals’ contributions to SpeechNow. However, we also hold that the reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a) and the organizational requirements of 2 U.S.C. § 431(4) and 431(8) can constitutionally be applied to SpeechNow.

SpeechNow, 599 F.3d at 689 (parallel citations omitted).

SpeechNow did not challenge the statutory solicitation restrictions that prohibit covered officials from soliciting “funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements” of the Federal Election Campaign Act (FECA). 2 U.S.C. § 441i(e)(1)(A). Consequently, neither the district court nor the circuit court considered the constitutionality of 2 U.S.C. § 441i(e)(1)(A).

SpeechNow not only assured the Commission in its 2007 AOR that it would “operate wholly independently of candidates,” AOR 2007-32 at 2, but repeated this fact and elaborated on it throughout the course of its litigation.

For example, SpeechNow explained at length to the D.C. Circuit *en banc* that, if it were to prevail in the litigation, the solicitation ban of section 441i(e) would remain intact to prevent any threat of corruption.

The FEC also contends that the Court in *McConnell* recognized that nonprofits can create concerns about corruption. *See* FEC Merits Brief at 37-40. But the Court’s comments pertained to BCRA’s ban on candidates soliciting donations for nonprofits. *See McConnell*, 540 U.S. at 174-76. Those comments do not apply to SpeechNow.org, a group that is entirely independent of candidates and thus raises a question the Supreme Court has not directly addressed. The Court did not find that nonprofits as such were corrupting; it found that candidate solicitation for nonprofits raised the specter of corruption, again making clear that it is the connection to candidates that causes concerns about corruption. *Id.*

In any event, with the solicitation ban in place, candidates cannot solicit funds for SpeechNow.org or any other nonprofit, and the problem Congress sought to address is solved. Nonprofits are now even more independent of candidates than they were before. The fact that the Court upheld the solicitation ban cannot be the basis for upholding further restrictions on nonprofits for whom candidates are now not soliciting funds.

SpeechNow, Reply Brief of Appellants 13-14, Case No. 08-5223, Doc. No. 1222740 (Dec. 29, 2009) (D.C. Cir.) (underlined emphasis added; italics in original).

SpeechNow’s representation to the Circuit Court of its total independence from covered officials—including its reliance on the solicitation ban—is consistent with representations made throughout the litigation. SpeechNow noted this independence in its:

- District court complaint;³
- District court motion for preliminary injunction;⁴
- District court memorandum of law supporting its motion for a preliminary injunction;⁵

³ *See* First Amended Complaint 6, Case No. 1:08-cv-00248-JR, Doc. No. 28-2 (June 20, 2008) (D.D.C.) (“SpeechNow.org is independent of any political candidates, committees, and political parties, and its bylaws require it to operate wholly independently of any of these entities.”).

⁴ *See* Motion for Preliminary Injunction 2, Case No. 1:08-cv-00248-JR, Doc. No. 2 (Feb. 14, 2008) (D.D.C.) (“SpeechNow.org is independent of candidates, parties, and political committees.”).

⁵ *See* Memorandum of Law in Support of Motion for Preliminary Injunction 2-3, Case No. 1:08-cv-00248-JR, Doc. No. 2 (Feb. 14, 2008) (D.D.C.) (“[U]nder its bylaws, it is prevented from . . . coordinating with candidates or political parties in any way”).

- District court reply brief in support of its motion for preliminary injunction;⁶
- Circuit court opening brief on denial of preliminary injunction;⁷
- Circuit court opening brief on constitutional questions certified to *en banc* court, consolidated with appeal on denial of preliminary injunction;⁸ and
- Circuit court reply brief on constitutional questions certified to *en banc* court, consolidated with appeal on denial of preliminary injunction.⁹

SpeechNow explicitly stated that, notwithstanding the relief from contribution limits that it sought and received in court, the solicitation ban would remain in place and candidates would not be permitted to solicit funds for SpeechNow or any similar nonprofit. *See SpeechNow*, Reply Brief, *supra*. SpeechNow was correct in its understanding of this point of law, which remained unchanged by the district or circuit court decisions in *SpeechNow*.

Less than two months after the D.C. Circuit decided *SpeechNow*, Club for Growth filed AOR 2010-09 seeking confirmation from the Commission that it was permitted under the principles established in the *SpeechNow* case to operate an independent expenditure-only political committee (“Super PAC”) that, in turn, was permitted to “solicit and accept donations from the general public.” AOR 2010-09 at 3. Club for Growth made no mention of covered officials soliciting contributions for its new Super PAC. The Commission, in turn, advised Club for Growth that “the Club may establish and administer the Committee, and the Committee may solicit and accept unlimited contributions from individuals in the general public” AO 2010-09 at 1 (emphasis added). The Commission made no mention of solicitation by covered officials for the Club’s new Super PAC.

⁶ *See* Plaintiffs’ Reply In Support of Motion for Preliminary Injunction 16, Case No. 1:08-cv-00248-JR, Doc. No. 20 (Mar. 12, 2008) (“Each of these cases involved limits on contributions directly to candidates or to groups that could be used to funnel money to candidates or that worked closely with candidates and could provide access to them. All of these groups are distinctly different from SpeechNow.org, which is independent of candidates and any entities that present concerns about corruption or its appearance.”).

⁷ *See* Brief of Appellants 1, 8, 40, Case No. 08-5223, Doc. No. 1202536 (August 24, 2009) (D.C. Cir.) (“Did the district court err by failing to preliminarily enjoin contribution limits that apply to SpeechNow.org, a group that accepts funds only from individuals, spends those funds only on independent political advocacy, and is independent of political candidates and party committees?”) (“Finally, SpeechNow.org’s bylaws require it to operate wholly independently of political candidates, committees, and parties.”).

⁸ *See* Brief of Appellants 4, 5, Case No. 09-5342, Doc. No. 1215999 (Nov. 16, 2009) (D.C. Cir.) (“In sum, the Supreme Court has long recognized a basic distinction in the campaign-finance laws between entities that are composed of, work with, or donate to candidates and those that do not. The former create concerns about corruption or circumvention of the campaign-finance laws that justify more burdensome and extensive regulation. The latter—individuals and groups like SpeechNow.org that are independent of candidates and spend their money on their own speech—do not.”(emphasis added)).

⁹ *See* Reply Brief of Appellants 13-14, Case No. 08-5223, Doc. No. 1222740 (Dec. 29, 2009) (D.C. Cir.) (“In any event, with the solicitation ban in place, candidates cannot solicit funds for SpeechNow.org or any other nonprofit.”).

The next step in the evolution of the Super PAC came weeks later, in June 2010, when the parent of the PACs at issue in this AOR, Commonsense Ten, filed AOR 2010-11 seeking affirmation from the Commission that it was permitted “to solicit and accept contributions from corporations and labor organizations.” AOR 2010-11 at 3. In response, the Commission noted that “[t]he Committee intends to solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations” and approved Commonsense Ten’s intended course of action. AO 2010-11 at 2 (emphasis added). Once again, neither the requestor nor the Commission made mention of covered officials soliciting contributions for a Super PAC.

Throughout the evolution of the Super PAC, one thing is clear: neither the D.C. Circuit Court in *SpeechNow* nor the Commission in its advisory opinions has discussed or permitted solicitations for Super PACs by covered officials, and with good reason. *SpeechNow* explicitly acknowledged the continuing vitality of the section 441i solicitation restrictions, and neither the D.C. Circuit nor the Commission has done anything to disturb that.

II. BCRA’s legislative history, structure and purpose make clear that section 441(i) prohibits covered officials from soliciting unlimited contributions.

BCRA amended FECA by adding new restrictions and prohibitions on national party, federal candidate, and federal officeholder activities pertaining to funds not in compliance with FECA’s amount limitations, source prohibitions, and reporting requirements. The linchpin of this BCRA prohibition on the use of unlimited funds by covered officials is the statute’s broad command that such covered officials may not “solicit” or “direct” such funds.¹⁰

¹⁰ The Republican Super PAC (RSPAC), in its comments in response to this AOR, argues that funds raised by RSPAC “are not soft money.” RSPAC Comments on AOR 2011-12 at 8 (May 27, 2011). On this basis, RSPAC argues that section 441i, the legislative record supporting enactment of section 441i and the Supreme Court’s discussion of section 441i in *McConnell* are irrelevant to the question of whether federal candidates and officeholders are permitted to solicit unlimited contributions for RSPAC and the requestor PACs.

Section 441i neither defines nor relies on the phrase “soft money,” which makes debate over the precise meaning of the phrase both unnecessary and irrelevant to the questions presented in AOR 2011-12. Instead, the Commission is obligated to apply the plain language of section 441i—*i.e.*, “subject to the limitations, prohibitions, and reporting requirements of [the] Act.” 2 U.S.C. §§ 441i(a)(1) and 441i(e)(1)(A).

Nevertheless, it is worth noting that RSPAC’s characterization of the manner in which the term “soft money” was understood and used during the enactment of and *McConnell* challenge to section 441i is inaccurate. For example, while it is indeed true that the Court in *McConnell* noted with concern the ability of parties to provide donors with access to candidates, it is not true, as RSPAC asserts, that “none of that would happen in the present situation” if federal candidates and officeholders were permitted to solicit unlimited contributions for the requestor PACs and RSPAC. *See* RSPAC Comments at 8. The coordination of solicitation efforts between officeholders and these PACs would present precisely the type of opportunities for big donors to use their large contributions as the way to gain access to candidates and officeholders that were facilitated by parties prior to the enactment of section 441i.

Also, RSPAC claims that “soft money” was defined as funds not subject to limits, prohibitions and reporting requirements and goes on to distinguish the funds it seeks to raise on the basis that its funds are subject to disclosure. *See* RSPAC Comments at 8. In fact, like the funds RSPAC seeks to raise, “soft money” raised by national parties before the enactment of section 441i was likewise subject to federal disclosure requirements as political committee receipts. As explained in detail herein, it was federal candidate solicitation of unlimited “soft

The national party solicitation restriction provides that a national party committee, any officer or agent acting on behalf of such a committee, and any entity that is directly or indirectly established, financed, maintained or controlled by such a national committee, “may not solicit . . . any funds[] that are not subject to the limitations, prohibitions, and reporting requirements of this Act.” 2 U.S.C. § 441i(a)(1)-(2).

Federal law further provides that a “national, State, district, or local party committee of a political party . . . shall not solicit any funds for, or make any direct donations to” a section 501(c) organization that makes expenditures in connection with a federal election, or to certain section 527 organizations. 2 U.S.C. § 441i(d).

Finally, a federal candidate or officeholder shall not “solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of [the] Act.” 2 U.S.C. § 441i(e)(1)(A). Similarly, federal candidates and officeholders are prohibited from soliciting or directing funds in connection with a non-federal election unless such funds are not in excess of amounts permitted by the contribution limits of the Act, and are not from sources prohibited by the Act. 2 U.S.C. § 441i(e)(1)(B).

According to BCRA’s sponsors, this ban on the solicitation or use of unlimited funds by covered officials was the heart of the legislation. Senator McCain stated: “The soft money ban is the centerpiece of this bill. Our legislation shuts down the soft money system, prohibiting all soft money contributions to the national political parties from corporations, labor unions, and wealthy individuals.” 147 Cong. Rec. S2446 (daily ed. Mar. 19, 2001). Senator McCain later explained:

We are prohibiting Federal officeholders, candidates, and their agents from soliciting funds in connection with an election, unless such funds are from sources and in amounts permitted under Federal law. The reason is to deter any possibility that solicitations of large sums from corporations, unions, and wealthy private interests will corrupt or appear to corrupt our Federal Government or undermine our political system with the taint of impropriety.

148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (emphasis added). Congressman Shays echoed this sentiment:

money” donations for parties that presented the threat of corruption and prompted enactment of section 441i—and that led the *McConnell* Court to uphold section 441i as constitutional.

For these reasons, the funds RSPAC seeks to raise through federal candidate and officeholder solicitations are indistinguishable from the “soft money” discussed in the legislative record supporting section 441i and by the *McConnell* Court in upholding section 441i. The Commission should ignore RSPAC’s strained efforts to distinguish *McConnell* by positing an inaccurate definition of “soft money” and then claiming that “soft money” is not at issue in this AOR.

The basic rule in the bill is that federal candidates and officials cannot raise non-federal (or soft) money donations Thus, the rule for solicitations by federal officeholders or candidates for party committees is simple: federal candidates and officeholders cannot solicit soft money funds for any party committee—national, state, or local.

148 Cong. Rec. H408 (daily ed. Feb. 13, 2002).

Likewise, Senator Feingold made Congressional intent clear, stating: “The bottom line of our legislation is, we have to get rid of this party soft money that is growing exponentially.” 147 Cong. Rec. S2611 (daily ed. Mar. 21, 2001). Additionally, Senator Levin described at length the corrupting effect of soft money contributions and the need to prohibit solicitation of such funds. 147 Cong. Rec. S3246–49 (daily ed. Apr. 2, 2001). Senator Levin announced:

Passage of McCain-Feingold will bring an end to solicitations and contributions of hundreds of thousands of dollars in exchange for access to people in power — “lunch with the committee chairman of our choice for \$50,000,” “time with the President for \$100,000,” “participation in a foreign trade mission with Government officials for \$50,000.”

Id. at S3246 (emphasis added).

Opponents of BCRA likewise recognized that the law’s solicitation restrictions as a core provision of the legislation. Senator Hatch acknowledged: “The primary provision of McCain-Feingold essentially bans soft money by making it unlawful for national political party committees and federal candidates to solicit or receive any funds not subject the hard money limitations of the Federal Election Campaign Act.” 147 Cong. Rec. S3240 (daily ed. Apr. 2, 2001) (emphasis added).

Congress understood that the longstanding limits on contributions received by federal officeholders had proven to be an ineffective means of preventing real and apparent corruption. Federal candidates and officeholders circumvented the contribution limit by soliciting unlimited contributions for their political parties. For this reason, through adoption of BCRA, Congress imposed restrictions on the solicitation and direction of contributions by candidates, officeholders and party committees, unless those contributions were subject to the limits and source prohibitions of the law.

III. Section 441i(e) applies to solicitations by federal candidates and officeholders for Super PACs.

The fact that a Super PAC may accept unlimited contributions (because the contribution limit is unconstitutional as applied to a Super PAC) is not dispositive of the entirely separate question of whether a covered official may solicit those funds, where a separate statutory provision prohibits such solicitations and no court has ever held, or even hinted, that the solicitation restrictions are unconstitutional.

Applying section 441i(e) to solicitations by covered officials for Super PACs entails a threshold issue of statutory construction. Section 441i(e)(1)(A) prohibits covered officials from soliciting funds “unless such funds are subject to the limitations, prohibitions, and reporting requirements of this Act.”

Under *SpeechNow*, a Super PAC may accept contributions that are not subject to the limitations of the Act. But this fact simply reinforces the point that Super PACs seek to receive contributions that are not subject to the limitations of the Act. The fact that a Super PAC may accept such contributions does not mean that a covered official may solicit them. The plain language of section 441i(e) prohibits solicitations by covered officials of any funds that are not subject to the Act’s limitations. That plain language clearly describes the funds at issue here. Therefore the solicitation restrictions in section 441i(e) apply here.

If there is any real question as to how the statute applies, it is whether covered officials are limited to soliciting only contributions of \$5,000 from individuals for these Super PACs, or prohibited from soliciting any funds for these committees at all. As a matter of statutory construction, section 441i(e) is susceptible of two readings. It may be interpreted as prohibiting all solicitations by federal candidates and officeholders for Super PACs—because it states that a covered official “shall not” solicit funds “unless the funds are subject to the limitations, prohibitions, and reporting requirements of [the] Act.” Read literally, where the funds at issue are not subject to the limitations of the Act, this provision could be construed to mean that a covered official can engage in no solicitation of funds at all for a Super PAC.

In the alternative, section 441i(e)(1)(A) may be interpreted as prohibiting solicitations by covered officials for Super PACs unless the solicitations are for contributions that are subject to the limitations and prohibitions of the Act. In this regard, section 441i(e)(1)(A) impliedly cross-references the “limitations. . . of [the] Act” established by section 441a(a)(1)—the only contribution limitations established by the Act. So read, it would prohibit covered officials from soliciting contributions:

- For any federal candidate that exceed \$2,500 per election;
- For any national political party committee that exceed \$30,800 per year;
- For any state party committee that exceed \$10,000 per year; and
- For any other political committee that exceed \$5,000 per year.

With regard to Super PACs, the last contribution limit would be the applicable one for these purposes. Under this reading of the solicitation restriction, a covered official could solicit contributions of no more than \$5,000 for a Super PAC.

Similarly, section 441i(e)(1)(A) impliedly cross-references the prohibitions established by section 441b, and, consequently, prohibits covered officials from soliciting contributions from corporations or labor organizations for a Super PAC or for any other type of federal political committee.

Regardless of which of these interpretations the Commission subscribes to, under no circumstances may a covered official solicit unlimited contributions from individuals, corporations or labor organizations for a Super PAC. Doing so would constitute a clear violation of section 441i.

IV. The Supreme Court in *McConnell* relied on a vast evidentiary record compiled by the district court and upheld BCRA’s solicitation restrictions as necessary to reinforce and prevent circumvention of limits on contributions directly to candidates and parties.

Section 441i(e) is constitutional. Plaintiffs in *McConnell* challenged BCRA’s solicitation restrictions on constitutional grounds and the Supreme Court, relying on the vast evidentiary record compiled by the district court, upheld the challenged provisions in a decision the Court has never since called into question—including in *Citizens United*.

A. The district court record in *McConnell* is replete with evidence that solicitation of unlimited contributions by covered officials poses a serious threat of corruption—even when the funds are solicited for another entity and spent by that entity independently of the soliciting official’s campaign.

District court Judge Kollar-Kotelly detailed the factual record in support of the solicitation restrictions in BCRA, and relied upon it in upholding the constitutionality of section 441i. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 651-709 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part, dissenting in part). Judge Kollar-Kotelly began her analysis by recounting the history of federal candidates, officeholders and national party committees raising money outside FECA’s contribution restrictions “for federal election purposes.” *Id.* at 652. Judge Kollar-Kotelly explained that Congress had enacted section 441i in an attempt “to shore-up the decades-old contribution restrictions in FECA, which had been eroded as a result of a series of FEC rulemaking and advisory opinions” that enabled national party committees to raise funds solicited by candidates and officeholders in excess of FECA’s limits and prohibitions, using Commission-sanctioned allocation systems. *Id.* at 653.

In the 2000 election cycle, national parties spent \$498 million in funds raised outside of federal contribution restrictions (42% of their total spending), with the top 50 donors of these unlimited funds during the 2000 cycle contributing between \$955,695 and \$5,949,000. *Id.* at 655. It was in response to this explosion of national party fundraising outside federal contribution restrictions—with federal candidates and officeholders soliciting many of the unlimited contributions—that Congress enacted the solicitation restrictions of BCRA. *Id.* “Prior to BCRA, federal candidates and officeholders, in conjunction with their political party committees, raised large amounts of nonfederal money for purposes directly related to federal elections.” *Id.* at 656.

Judge Kollar-Kotelly recognized that section 441i “was enacted to fulfill the same interests in ‘preventing corruption or the appearance of corruption’ that the *Buckley* Court had found to support FECA’s limitations on contributions” and continued:

The *Buckley* Court held that FECA's contribution limitations served the sufficiently important interests of "the prevention of corruption and the appearance of corruption spawned by the real or imagined *coercive influence* of large financial contributions on candidates' positions and on their actions if elected to office." Moreover, under the rubric of "preventing corruption or the appearance of corruption," the Supreme Court has also permitted Congress to enact contribution limitations that serve to "prevent evasion" of the individual financial contribution limitations already found constitutional by the Supreme Court.

Id. at 658 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25, 38 (1976) (emphasis added by Judge Kollar-Kotelly).

Judge Kollar-Kotelly summarized the huge body of evidence in *McConnell* supporting the fundraising restrictions of section 441i. *See id.* at 668-706. The *McConnell* record demonstrated that the primary purpose of the political parties is to get as many of their candidates elected to office as possible. *See id.* at 669. Former Senator Simpson testified that "[w]hen donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate." *Id.* at 670 (emphasis added). And a lobbyist testified in *McConnell*:

Although the [nonfederal] donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely to remember the donation and to recognize that such big donors' interests merit careful consideration.

McConnell, 251 F. Supp. 2d at 670.

The *McConnell* evidence demonstrates that federal officeholders knew exactly who was making large unlimited contributions to the parties in the pre-BCRA era. "Congressman Shays stated on the floor of the House that 'it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect.'" *Id.* at 671. Similarly, Senator McCain observed that "[l]egislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money," and that "[d]onors or their lobbyists often inform a particular Senator that they have made a large donation." *Id.* at 671-72. "Former Senator Simon candidly testifie[d] that he would likely return a telephone call to a large contributor before making other calls." *Id.* at 672.

Numerous prominent lobbyists testified in *McConnell* that in order to have access to federal officeholders in the pre-BCRA era, clients had to combine their lobbying efforts with

sizeable, unlimited donations to the parties. Lobbyist Robert Rozen explained that “relationships [with Members of Congress] are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship.” *Id.* Another lobbyist on record in *McConnell*, Daniel Murray, noted that large unlimited contributions to parties “ha[d] become the favored method of supplying political support,’ which ‘begets . . . access to law-makers’ because of the lack of any limit on how much may be donated.” *Id.* Lobbyist Wright Andrews testified that the “amount of influence that a lobbyist has is often *directly correlated* to the amount of money that he or she and his or her clients infuse into the political system.” *Id.* at 673 (emphasis in original).

Senator Rudman was blunt about the impact of large contributions in the pre-BCRA era:

Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: “We gave money so you should do this to help us.” No one needs to say it—it is perfectly understood by all participants in every such meeting.

Id. at 673-74.

The record in *McConnell* makes clear that big donors are savvy—they “understand the system” and “give donations for the purpose of obtaining access to federal lawmakers and thereby influence government policy.” *Id.* at 677. One wealthy political fundraiser observed that “many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction.” *Id.* He noted that some donors gave “\$250,000, \$500,000, or more, year after year,” and that for this kind of investment “you need to see a return,” just like any other investment. *Id.*

Even though the contributions being described in *McConnell*, solicited by federal candidates and officeholders, were spent independently of candidates, lobbyist Robert Rozen explained:

Many donors giving \$100,000, \$200,000, even \$1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect

your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed The bigger soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.

Id. at 679 (ellipsis in original).

The *McConnell* record demonstrates that federal candidates and officeholders placed great value on large contributions even when given to state party committees. The *McConnell* record contains a solicitation letter from Senator Mitch McConnell to one of his contributors. Senator McConnell wrote:

Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000 program This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year.

Id. at 680-81 (footnote omitted). Senator McConnell also handwrote: "This is important to me. Hope you can help." *Id.*

The *McConnell* record is not limited to instances of apparent corruption. Senator Paul Simon recounted an instance in which a large donor received a quantifiable benefit, explaining:

It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed \$1.4 million in the last 2-year cycle to incumbent Members of Congress and almost \$1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. *I do not think there is any question that this is the reason it passed.*

Id. at 681-82 (emphasis in original).

This abundant evidence in the *McConnell* record amply supports the conclusion that

solicitation of large, unlimited contributions by federal candidates and officeholders for other entities presents a serious threat of corruption. This evidence led Judge Kollar-Kotelly to “concur with Judge Henderson’s conclusion that Section [441i(e)] is constitutional under the First Amendment[.]” *Id.* at 707.

B. The Supreme Court in *McConnell* echoed Judge Kollar-Kotelly and upheld the solicitation restrictions of section 441i against constitutional challenge as valid anticircumvention measures.

The Supreme Court in *McConnell* considered the constitutionality of nearly every aspect of section 441i and, based on the evidentiary record compiled by the district court and detailed above, upheld it against First Amendment challenge. *See McConnell*, 540 U.S. at 142-54, 181-84. The *McConnell* Court emphasized the corruptive threat of unlimited “soft money” contributions solicited by federal candidates and officeholders for political party committees, noting:

Not only were . . . soft-money contributions often designed to gain access to federal candidates, but they were in many cases solicited by the candidates themselves. Candidates often directed potential donors to party committees and tax-exempt organizations that could legally accept soft money. For example, a federal legislator running for reelection solicited soft money from a supporter by advising him that even though he had already ““contributed the legal maximum”” to the campaign committee, he could still make an additional contribution to a joint program supporting federal, state, and local candidates of his party. Such solicitations were not uncommon.

The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA’s limitations on the source and amount of contributions in connection with federal elections.

Id. at 125-26 (footnotes omitted) (emphasis added).

Plaintiffs in *McConnell* explicitly challenged as unconstitutionally overbroad BCRA’s prohibition on national parties and party officials soliciting and directing soft money. The Court rejected this claim, finding:

The reach of the solicitation prohibition, however, is limited. It bars only solicitations of soft money by national party committees and by party officers in their official capacities. The committees remain free to solicit hard money on their own behalf, as well as to solicit hard money on behalf of state committees and state and local candidates. . . .

This limited restriction on solicitation follows sensibly from the prohibition on national committees’ receiving soft money. The same observations that led us to approve the latter compel us to reach the same conclusion regarding the former. A national committee is likely to respond favorably to a donation made at its

request regardless of whether the recipient is the committee itself or another entity.

Id. at 157–58 (footnote omitted) (emphasis added).

The *McConnell* Court also upheld against constitutional challenge BCRA’s prohibition on party committee solicitation and direction of soft money to certain section 501(c) and 527 organizations as an “entirely reasonable” means of preventing circumvention of the political party soft money ban. *Id.* at 174. The Court reasoned:

The history of Congress’ efforts at campaign finance reform well demonstrates that “candidates, donors, and parties test the limits of the current law.” *Colorado II*, 533 U.S., at 457, 121 S. Ct. 2351. Absent the solicitation provision, national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates. All of the corruption and appearance of corruption attendant on the operation of those fundraising apparatuses would follow. Donations made at the behest of party committees would almost certainly be regarded by party officials, donors, and federal officeholders alike as benefiting the party as well as its candidates. Yet, by soliciting the donations to third-party organizations, the parties would avoid FECA’s source and amount limitations, as well as its disclosure restrictions.

Id. at 174-75 (footnote omitted).

The Court continued: “Experience under the current law demonstrates that Congress’ concerns about circumvention are not merely hypothetical. Even without the added incentives created by Title I, national, state, and local parties already solicit unregulated soft-money donations to tax-exempt organizations for the purpose of supporting federal electioneering activity.” *Id.* at 176. The Court concluded that the solicitation restriction of section 441i(d) is “closely drawn to prevent political parties from using tax-exempt organizations as soft-money surrogates. Though phrased as an absolute prohibition, the restriction does nothing more than subject contributions solicited by parties to FECA’s regulatory regime, leaving open substantial opportunities for solicitation and other expressive activity in support of these organizations.” *Id.* at 177.

Finally, the *McConnell* Court examined the solicitation restrictions in section 441i(e) and found the “restrictions on solicitations are justified as valid anticircumvention measures.” *Id.* at 182. The Court explained:

Large soft-money donations at a candidate’s or officeholder’s behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on

solicitations, federal candidates and officeholders could easily avoid FECA’s contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities. As the record demonstrates, even before the passage of BCRA, federal candidates and officeholders had already begun soliciting donations to state and local parties, as well as tax-exempt organizations, in order to help their own, as well as their party’s, electoral cause. . . . The incentives to do so, at least with respect to solicitations to tax-exempt organizations, will only increase with Title I’s restrictions on the raising and spending of soft money by national, state, and local parties.

Id. at 182-83 (emphasis added).

The Court concluded that the soft money solicitation restrictions of section 441i(e) “address[] these concerns while accommodating the individual speech and associational rights of federal candidates and officeholders.” *Id.* at 183. Given “the substantial threat of corruption or its appearance posed by donations to or at the behest of federal candidates and officeholders,” the Court held that section 441i(e) is “clearly constitutional.” *Id.* at 183-84.

Indeed, even Justice Kennedy—who later authored the majority opinion in *Citizens United*—agreed that the solicitation restrictions in section 441i(e) are constitutional; in fact, for him, this was the “only one of the challenged Title I provisions [that] satisfies *Buckley*’s anticorruption rationale and the First Amendment guarantee.” *Id.* at 308 (Kennedy, J. concurring in part and dissenting in part). Justice Kennedy wrote:

This provision is the sole aspect of Title I that is a direct and necessary regulation of federal candidates’ and officeholders’ receipt of quids. . . . The regulation of a candidate’s receipt of funds furthers a constitutionally sufficient interest. More difficult, however, is the question whether regulation of a candidate’s solicitation of funds also furthers this interest if the funds are given to another.

I agree with the Court that the broader solicitation regulation does further a sufficient interest. The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates’ or officeholders’ solicitation of contributions are, therefore, regulations governing their receipt of *quids*. This regulation fits under *Buckley*’s anticorruption rationale.

Id. (emphasis added).

V. The *McConnell* decision makes clear that solicitation of unlimited contributions by covered officials for Super PACs poses precisely the threat of corruption that section 441i was enacted to prevent—and is prohibited by section 441i.

Although the evidence in *McConnell* related to section 441i principally involved the corrupting influence of solicitations of unlimited contributions by covered officials for political

party committees, the Supreme Court upheld the statute's application to all funds raised by covered officials in connection with elections. The Court recognized that absent solicitation restrictions applied broadly to all funds raised in connection with elections, covered officials would simply "mobilize their formidable fundraising apparatuses" through "like-minded tax-exempt organizations that conduct activities benefiting their candidates." *McConnell*, 540 U.S. at 175. The Court explained:

All of the corruption and appearance of corruption attendant on the operation of those fundraising apparatuses would follow. Donations made at the behest of party committees would almost certainly be regarded by party officials, donors, and federal officeholders alike as benefiting the party as well as its candidates. Yet, by soliciting the donations to third-party organizations, the parties would avoid FECA's source and amount limitations, as well as its disclosure restrictions.

Id.

The Super PACs at issue in this AOR represent precisely this type of scheme—an attempt to mobilize the "formidable fundraising apparatuses" of covered officials to raise funds outside federal contribution restrictions to conduct activities directly benefiting candidates. Congress anticipated this kind of charade and enacted section 441i to prohibit it. The Supreme Court recognized the wisdom of Congress in doing so, and declared section 441i constitutional with respect to all fundraising by covered officials in connection with elections.

For this reason, the argument that covered officials are permitted to solicit unlimited contributions for Super PACs is entirely without merit.

Indeed, the evidence of real and apparent corruption recognized by Congress in passing BCRA's solicitation restrictions, and by the *McConnell* Court in upholding those restrictions, was less compelling than the potential corruption posed by this AOR. Whereas in the pre-BCRA era, covered officials were soliciting unlimited contributions that were used by parties to influence federal elections indirectly, here the Super PACs propose having federal candidates solicit unlimited contributions to pay for ads that directly and expressly advocate such candidates' election to federal office. Undoubtedly, the election activities of these Super PACs will be even more valuable to, and therefore potentially corruptive of, federal candidates and officeholders because their activities will be more directly related to their campaigns.

The announced plans of RSPAC, a commenter, not a requester in this AOR, illustrate the direction this matter will take if the Commission approves the solicitations at issue here. RSPAC has announced that not only will federal candidates solicit unlimited funds for it, but will do so based on an agreement that any money received by RSPAC in response to those candidate solicitations can be earmarked for spending by RSPAC in that candidate's race. Whereas, in *McConnell*, former Senator Simpson testified that "[w]hen donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate[.]" *McConnell*, 251 F. Supp. 2d at 670 (emphasis added), the RSPAC has explicitly stated its intention to have candidates solicit donors who would earmark their unlimited donations for spending to benefit those candidates.

The explicit promise that candidates will directly benefit from their solicitations for Super PACs certainly gives rise to more serious concerns of corruption than even those considered by the Court in *McConnell*, and most certainly justifies the application of section 441i(e) here.

For all of these reasons, section 441i(e) prohibits covered officials from soliciting funds in connection with a federal election “unless the funds are subject to the limitations, prohibitions, and reporting requirements” of FECA.

VI. Covered officials will violate section 441i if they solicit contributions at fundraisers for Super PACs at which unlimited individual, corporate, and union contributions are raised.

Finally, we urge the Commission to make clear that covered officials will violate section 441i if they solicit contributions at fundraisers for Super PACs at which unlimited individual, corporate, and union contributions are raised.

Although the provisions of 11 C.F.R. § 300.64 authorize covered officials to participate in “non-Federal fundraising events” and “publicity for non-Federal fundraising events,” 11 C.F.R. § 300.64(b)-(c), the regulation does not authorize covered officials to participate in fundraising events or publicity for fundraising events for registered federal PACs “at which unlimited individual, corporate, and union contributions are raised.” AOR 2011-12 at 1.

Section 300.64 is entitled “Participation by Federal candidates and officeholders at non-Federal fundraising events.” Subsection 300.64(b) is entitled “Participation at non-Federal fundraising events.” And Subsection 300.64(c) is entitled “Publicity for non-Federal fundraising events.” Section 300.64 does not address whether or how federal candidates and officeholders could participate in the federal fundraising events of Super PACs.

There is an important substantive difference between non-federal fundraising events covered by section 300.64 and the federal fundraising events of Super PACs. Unlike the non-federal fundraising events, where the funds raised are not spent to directly benefit federal candidates and officeholders, Super PAC fundraising events are federal fundraising events and the funds raised will benefit federal candidates and officeholders and indeed are likely to benefit the candidates who are participating in the event. “Construed as reasonably understood” in this context, *see* 11 C.F.R. § 300.2(m), any request by a covered official that attendees contribute funds to the Super PAC will constitute a solicitation of funds not subject to the limitations and prohibitions of FECA in violation of section 441i.

The so-called “disclaimers” permitted by section 300.64 to limit solicitations at non-federal fundraising events to federally permissible amounts are insufficient protections in the context of Super PAC fundraising events. Unlike non-federal fundraising events, where the purpose is to raise funds for state and local candidates and parties, the unambiguous purpose of a Super PAC fundraising event will be to raise funds to benefit federal candidates, particularly the federal candidates present at the event. This reality cannot be “disclaimed” away.

In its current regulations that are limited to solicitations at non-federal fundraising events, the Commission did not consider and does not address the distinct issues that are posed by solicitations by covered officials at Super PAC events where unlimited contributions are being raised to influence federal elections (including their own elections). The protections that the Commission assumes are effective in the context of non-federal events—such as the disclaimer regime—would not work in the context of federal fundraising events, and there is no basis on which the Commission can assume those protections would work without careful consideration of the issue in the context of a new rulemaking that addresses the distinct problems posed by solicitations made by covered officials at a federal Super PAC fundraising event.

To be clear, section 441i does not prohibit covered officials from merely attending or speaking at a Super PAC fundraising event. But it does prohibit covered officials from soliciting funds at such events. No “disclaimer” cure is available.¹¹

We appreciate the opportunity to provide these comments to you.

Sincerely,

/s/ Fred Wertheimer

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Copy to: Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission

¹¹ For the same reasons, federal officials should not be permitted to make any solicitation in a letter or other written communication on behalf of a Super PAC if a solicitation for contributions not subject to federal limits and prohibitions is made as part of the same written communication.