UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs,	)	
v.	)	Civ. No. 08-1953 (BMK, RJL, RMC)
FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	)	SUPPLEMENTAL BRIEF

DEFENDANT FEDERAL ELECTION COMMISSION'S
SUPPLEMENTAL BRIEF REGARDING *CITIZENS UNITED v. FEC*

Pursuant to the Court's Order of January 26, 2010, Defendant Federal Election Commission respectfully submits this memorandum regarding the Supreme Court's decision in *Citizens United v. FEC*, --- S. Ct. --- (2010). *Citizens United* does not affect this case, for three reasons: The decision (1) explicitly distinguished political-party soft money from independent expenditures; (2) analyzed only a direct prohibition on speech, not a contribution limit; and (3) refused to adopt Plaintiffs' invented "unambiguously campaign related" test for political regulation. The Supreme Court thus confirmed the earlier precedents that control this case, as discussed in the Commission's prior briefs.

First, the Court in *Citizens United* could not have stated more clearly that its opinion was "about independent expenditures, not soft money." *Citizens United*, slip op. at 45, *available at* http://supremecourtus.gov/opinions/09pdf/08-205.pdf. Indeed, the Court noted that the extensive evidence from the record of *McConnell v. FEC*, 540 U.S. 93 (2003), had shown that soft money led to actual and apparent corruption, but this evidence was inapposite to justifying the prohibition on independent expenditures at issue in *Citizens United*. *See* slip op. at 45. Thus, by

the Court's own express declaration, the constitutionality of the soft-money contribution limits, as well as the wealth of evidence supporting that constitutionality, was outside the scope of the *Citizens United* decision.

Second, even if *Citizens United* had not explicitly distinguished soft-money donations from independent expenditures, the decision would not apply here because its constitutional analysis is not relevant to contribution limits. *Citizens United* addressed the constitutionality of independent expenditure limits, which are subject to strict scrutiny, slip op. at 23, and which are not justified by a governmental interest in preventing corruption. *See id*. at 40-45. Contribution limits, in contrast, are subject to intermediate scrutiny, *McConnell*, 540 U.S. at 134-37; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000), and the Court has upheld them repeatedly as valid anti-corruption measures. *See McConnell*, 540 U.S. at 136; *Buckley v. Valeo*, 424 U.S. 1, 23-30 (1976). Thus, the fact that an expenditure limit is found to be unconstitutional simply has no legal or factual bearing on the constitutionality of a separate contribution limit. *See, e.g.*, *Buckley*, 424 U.S. at 23-51 (upholding FECA's original contribution limits but striking down expenditure limits in same Act under different analysis). Because there is no law or regulation prohibiting Plaintiffs from financing *any* activity whatsoever, their attempt (Pls.' Supp. Mem. at 2-3) to conflate this case with the direct speech prohibitions subjected to strict scrutiny in *Citizens United* and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), must fail. In any event, as noted above, one of the Court's primary reasons for striking down the expenditure limit in *Citizens United* was the dearth of evidence showing that corruption arose from independent expenditures; there is no such dearth with regard to soft-money donations to political parties. *See McConnell*, 540 U.S. at 122-73.

Finally, the Court declined to adopt Citizens United's suggestion — the same one Plaintiffs propose here — that it impose a new test for political regulation: an "unambiguously campaign related" standard. *See Citizens United v. FEC*, S. Ct. No. 08-205, Jurisdictional Statement at (i) ("Whether BCRA's disclosure requirements impose an unconstitutional burden when applied to electioneering communications . . . not 'unambiguously related to the campaign of a particular federal candidate' . . . ."); *id*. at 16-19 (arguing for test on grounds that "the unambiguously-campaign-related requirement . . . confines government within the pale of its constitutional authority to regulate elections"); *see also Citizens United v. FEC*, S. Ct. No. 08-205, Brief of Amicus Curiae Committee for Truth in Politics, Inc. at 3-17 ("Campaign-Finance Laws May Only Regulate Unambiguously-Campaign-Related Activity."). The Supreme Court did not adopt this standard in *Citizens United*, and Plaintiffs do not appear to argue otherwise, as they identify nothing in *Citizens United* that supports the test they propose. (*See* Pls.' Supp. Mem. at 2-3, 8-9 (citing Plaintiffs' prior briefs and cases discussed therein).)

Regarding the corporate spending prohibition, the Court relied on the same strict-scrutiny analysis it has employed for expenditure limits since *Buckley*, not an all-purpose, unambiguously-campaign-related test. *See Citizens United*, slip op. at 23. In the disclosure context, the Court affirmatively rejected Citizens United's argument that BCRA's electioneering-communication disclosure provisions were constitutional only with respect to communications that were the "functional equivalent of express advocacy" — the restriction that *WRTL*, 551 U.S. at 469-76, had imposed as to expenditure limits. *Citizens United*, slip op. at 53-54. Instead, *Citizens United* upheld the constitutionality of BCRA's disclosure requirements as to *all* electioneering communications, including those reasonably interpreted as something other than campaign speech. *See id*. ("Even if [Citizens United's] ads only pertain to a commercial

transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election."). And the Court bolstered its conclusion by noting the constitutionality of lobbyist disclosure requirements, which certainly would not meet Plaintiffs' "unambiguously campaign related" standard. *See id*. (citing *United States v. Harriss*, 347 U.S. 612 (1954)). This Court should likewise reject Plaintiffs' attempt to create a new constitutional test by importing language from one campaign-finance context into another, and should instead apply the usual intermediate scrutiny applicable to contribution limits.[1]

As Plaintiffs note (Pls.' Supp. Mem. at 3-4), there are two sentences in *Citizens United* that might seem to be in tension with one of the Commission's arguments in this case: The opinion states that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy," slip op. at 44, and that "[i]ngratiation and access, in any event, are not corruption." Slip op. at 45. But these statements relate only to the evidence of "influence," "ingratiation," and "access" *arising from independent expenditures*, as the full context of the quotations demonstrates:

> The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.
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> [T]here is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called

[1] In an extensive decision post-dating *Citizens United*, a district court held that the RNC's arguments in favor of its "unambiguously campaign related" test are "frivolous." *See Cao v. FEC*, Civ. No. 08-4887, slip op. at 56-62, 71-78 (E.D. La. Jan. 27, 2010), *available at* http://www.fec.gov/law/litigation/cao_order.pdf.

> "soft money," were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money.

Slip op. at 44-45 (internal citations and quotation marks omitted). Thus, each of the sentences on which Plaintiffs rely is followed immediately by an explanation of why *independent expenditures* do not give rise to corruption, and the opinion expressly notes that soft money — unlike independent expenditures — was, in fact, used to "gain access to elected officials." The Court then makes clear in the final sentence quoted above that this access arising from soft money was not relevant to the *Citizens United* decision, which was only "about independent expenditures, not soft money."

Plaintiffs contend that *Citizens United* overruled — in two sentences without citations — the extensive portion of *McConnell* that upheld BCRA's soft-money limits. *See* 540 U.S. at 142-54. That holding, however, relied not just on evidence of access, undue influence, and the appearance of such influence, but also on "the record . . . [of] real or apparent corruption," namely concrete examples of soft-money donations leading to "manipulations of the legislative calendar." *See id*. at 149-50. Members of Congress whose parties received soft money stopped legislation to which the parties' soft-money donors were opposed. *See id*. at 150. Plaintiffs make no argument regarding how *Citizens United* calls that portion of *McConnell*'s holding into question. *McConnell* also upheld the soft-money limits because of their ability to prevent corruption resulting from donations to political parties that provided access to elected officials and gave the appearance of undue influence on an officeholder's judgment. *See id.* at 150-54. The Court cited to "deeply disturbing examples" from the records of *Buckley*, *McConnell*, and other cases, where access attained from soft-money donations created situations in which the "potential for . . . undue influence" over officeholders was "manifest." *See id*. at 150-53. To read *Citizens United*'s statements regarding influence, ingratiation, and access as universal

declarations of judicially-found fact, as Plaintiffs do (*see* Pls.' Supp. Mem. at 3-4, 9-11), is at odds with an extensive Supreme Court holding explicitly distinguished in *Citizens United* itself.

Suggesting that *Citizens United* overruled this holding is extraordinary and mistaken: These issues were not included in the Court's precise briefing order in *Citizens United*, 129 S. Ct. 2893 (2009) (directing parties to address whether Court should overrule "the part of *McConnell* . . . which addresses the facial validity of *Section 203* of [BCRA]") (emphasis added), they were not briefed or argued by any party, and the Court expressly disclaimed opining on soft money. Thus, Plaintiffs' argument that *Citizens United* "implicitly" overruled the portion of *McConnell* addressing the actual and apparent corruption arising specifically from soft money is contrary to every indication from the *Citizens United* opinion and litigation.[2] Because this Court cannot hold in the first instance that a Supreme Court decision has been overruled — "implicitly" or otherwise — *McConnell*'s reasoning and holdings regarding soft money remain controlling here. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *United States v. Webb*, 255 F.3d 890, 897-98 (D.C. Cir. 2001) ("[Defendant] asks us to disregard the earlier [Supreme Court] case because he counts five Justices as no longer supporting its holding. That, of course, we may not do.") (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

In any event, the Commission has not argued that access and ingratiation standing alone always constitute corruption *per se*, but they do give rise to the appearance of corruption — an

[2] As a statutory matter, pursuant to BCRA's severability provision, the invalidation of BCRA Section 203 does not affect the remainder of BCRA or its "application . . . to any person or circumstance." BCRA § 401, 116 Stat. 112.

appearance that severely undermines American democracy and that the government has an undisputed interest in minimizing. *McConnell*, 540 U.S. at 150; *Buckley*, 424 U.S. at 27 ("Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."). Indeed, *McConnell* (like *Citizens United*) recognized that "mere political favoritism or opportunity for influence alone is insufficient to justify regulation," 540 U.S. at 153, but the fact that the parties "*sold* access" to soft-money donors seeking "to purchase just such influence" gave rise to "the appearance of *undue* influence." *Id*. at 153-54 (second emphasis added).[3] *Citizens United* does not speak in any way to parties' selling (or donors' buying) access through large contributions, much less to the "unique" features of political parties that place them in a "position, 'whether they like it or not,' to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id*. at 145 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001)). Instead, *Citizens United* found that *corporate expenditure limits* were not a proper means of combating the appearance of corruption, but the Court also reaffirmed the importance of this governmental interest and expressly did not foreclose other means of achieving it. *See Citizens United*, slip op. at 45 ("We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences."). Accordingly, *McConnell*'s extensive holding regarding the appearance of corruption arising from soft money donations to political parties is controlling here, and nothing in *Citizens United*'s analysis of independent expenditures stands to the contrary.

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[3] Plaintiffs continue to sell access to donors, with the amount of access increasing as the size of the donation increases. The RNC's claim that it has the same unwritten "policy" on preferential access to federal candidates that it did in the soft-money era does not provide a reason to overturn *McConnell*. (*See* FEC Opp. to Pls.' Mot. for Summ. J. at 31 (Doc. No. 39).)

Plaintiffs' final argument regarding *Citizens United* is that the soft-money restriction is unconstitutional because it advantages corporations and unions over political parties. (*See* Pls.' Supp. Mem. at 5-9.) Plaintiffs overlook, however, that *all* entities that have as their "major purpose" the election or defeat of candidates are subject to contribution limits: incorporated entities, unincorporated associations, and political parties. *See Buckley*, 424 U.S. at 79 (construing statutory definition of "political committee" to "encompass organizations . . . the major purpose of which is the nomination or election of a candidate"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (noting that corporation would be subject to contribution limits and other regulation if its major purpose were "campaign activity"). All such entities are "political committees" under the Act, and the contribution limits are, in fact, *more* favorable to political party committees than to other "major purpose" entities, including incorporated political committees, the corporations to which political parties should be compared. The committees established by each national party can together receive up to $30,400 per year from each individual donor, and the state, district, and local committees of a party can receive up to a combined $10,000 per year from each individual donor. By contrast, other political committees can receive only $5,000 per year from an individual donor. 2 U.S.C. § 441a(a)(1); FEC, *Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 74 Fed. Reg. 7435-37 (Feb. 17, 2009).

Corporations not devoted to candidate elections may now make independent expenditures using their general treasury funds, but the First Amendment permits political parties to be regulated differently because of the "real-world differences between political parties and interest groups," including the fact that "[p]olitical parties have influence and power in the Legislature

that vastly exceeds that of any interest group." *McConnell*, 540 U.S. at 188.[4] Plaintiffs contend in essence that all other financing restrictions must fall like dominoes because corporations may now be more involved in the political process, but the political party contribution limits are not so low as to "preven[t] candidates and political committees from amassing the resources for effective advocacy." *Buckley*, 424 U.S. at 21; *see also Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (same) (Breyer, J., joined by Roberts, C.J., and Alito, J.). The substantial sums that the national party committees have raised each election cycle since BCRA are sufficient to finance "effective advocacy," even if other actors may now engage in more speech regarding candidates than in previous election cycles. (*See* Def.'s Mem. in Support of Mot. for Summ. J. at 2-7 (Doc. No. 56).)[5]

For the foregoing reasons, as well as the reasons stated in the Commission's prior filings in this case, this action should be dismissed,[6] or summary judgment should be granted to the Commission.

Respectfully submitted,

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[4] Plaintiffs inaccurately claim (Pls.' Supp. Mem. at 9) that unlike corporations they are "prohibited" from engaging in their intended activities, but the contribution limits at issue here of course place no restraint on Plaintiffs' expenditures.

[5] While it is true that Justice Stevens states in dissent that Congress could theoretically remove BCRA's soft-money limits (Pls.' Supp. Mem. at 9), his point thus highlights that such a change would be a legislative prerogative, not a constitutional right.

[6] *Citizens United* does not change the fact that this case should be dismissed as *res judicata*.

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