United States District Court
District of Columbia

Republican National Committee et al., ***Plaintiffs***, ***v.*** **Federal Election Commission** et al., ***Defendant.***	**Case No.** 08-1953 (BMK, RJL, RMC) THREE-JUDGE COURT

Plaintiffs' Supplemental Memorandum
Regarding *Citizens United v. FEC*

In accordance with this Court's January 26, 2010 order, Plaintiffs Republican National Committee ("RNC") et al. respectfully file this supplemental memorandum stating the impact of the Supreme Court's decision in *Citizens United v. Federal Election Comm'n*, ___ U.S. ___ (2010), 2010 WL 183856 ("*Citizens United*")[1] on the present litigation.[2] In *Citizens United*, the Supreme Court reaffirmed the First Amendment principles central to this case, stated that the prevention of access and gratitude is not a cognizable anti-corruption interest, and afforded corporations and labor unions more rights than presently enjoyed by political parties.

[1] The slip opinion is available at http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf

[2] Plaintiffs incorporate by reference their *Memorandum in Support of Summary Judgment* ("*Pls.' Mem.*") (Dkt. 21), *Reply Memorandum in Support of Summary Judgment* ("*Pls.' Reply Mem*.") (Dkt. 50), and *Memorandum in Opposition to Defendant Federal Election Commission's Motion to Dismiss* (Dkt. 27), *Memorandum in Opposition to Defendant FEC's Motion for Summary Judgment* ("*Pls.' Op.*") (Dkt. 61), *Supplemental Memorandum in Opposition to Defendant FEC's Supplemental Motion to Dismiss* (Dkt. 80), *Supplemental Reply Memorandum in Support of Summary Judgment* (Dkt. 86), and *Supplemental Memorandum in Opposition to Defendant FEC's Supplemental Motion for Summary Judgment* (Dkt. 87).

I. The Supreme Court Affirmed the First Amendment Principles Advanced by Plaintiffs.

In *Citizens United*, the Supreme Court facially struck down the federal ban on corporate independent expenditures and electioneering communications, overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and portions of *McConnell v. FEC*, 540 U.S. 93 (2003). Although the plaintiff in *Citizens United* was a corporation, the Court's rationale will affect other significant participants in our electoral democracy, including political parties. Recognizing the inadequacy of an as-applied holding, the Supreme Court stated that political speech is **so** important, that even corporations and unions, as associations of citizens, are protected by the First Amendment.

The Supreme Court emphasized that strict scrutiny is required for laws burdening political speech, *Citizens United*, slip op. at 23, thereby indicating that *McConnell* incorrectly applied intermediate scrutiny in facially upholding the Federal Funds Restriction, 2 U.S.C. § 441i ("the Restriction"), and incorrectly decided that the Restriction prohibited contributions rather than the ability of political parties to speak (for which they could use federal funds). 540 U.S. 138-39. However, the Court in *Citizens United* employed the scrutiny framework used in the more recent political speech case, *FEC v. Wisconsin Right to Life*, 551 U.S. 449 ("*WRTL-II*"). There, the Court, applying strict scrutiny, held that the ability to use federal funds did not eliminate the right to use non-federal funds where the First Amendment activity was not unambiguously campaign related. 551 U.S. at 477.

Similarly, here, the FEC has continuously argued that the Restriction does not unconstitutionally regulate speech because the Plaintiffs are able to speak using federal funds.

However, Plaintiffs are seeking to use non-federal funds for activities that are **not** unambiguously campaign related. *Pls.' Mem* at 9-14. As in *WRTL-II*, the "burdensome alternative" under which Plaintiffs may use federal funds for their intended activities does not remove the constitutional flaws present within the Restriction. *See Citizens United*, slip op. at 21 (rejecting a similar "solution" to the constitutional shortcomings of the expenditure ban).

Citizens United reaffirmed that, under the First Amendment, courts "'must give the benefit of any doubt to protecting rather than stifling speech.'" *Id.* at 10 (*quoting WRTL-II*, 551 U.S. at 469). Here, the Restriction impermissibly regulates activities that are not unambiguously campaign related. *Pls.' Mem.* at 7-18; *Pls.' Reply Mem.* at 1-10. Since we begin with the premise that all speech is free, the government has the burden of showing a sufficient interest to justify the regulation of speech.

II. Access and Gratitude Do Not Constitute Corruption, and In the Absence of Quid Pro Quo Corruption, the Restriction Serves No Government Interest.

Regardless of the nature of the activity or speech at issue, there is no justifiable government interest in regulating Plaintiffs' intended activities. In *Citizens United*, the Court emphatically dismissed the government's fall-back argument in that case regarding corruption interests. Specifically, the Court rejected the theory that there is **any** corruption interest at all beyond quid pro quo corruption. *Citizens United*, slip op. at 43. According to the Court: "Ingratiation and access, in any event, are not corruption." *Id*. at 45. The Court further stated that all "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id*. at 42. Furthermore, an anti-circumvention

argument, reliant on the presence of access and gratitude, cannot stand as a valid justification for regulation under the First Amendment.

Here, when arguing that the Restriction is essential to prevent corruption or its appearance, the FEC relies solely on the potential for gratitude and access. The FEC claims that "[o]nce the federal officials know who the big donors are, 'those checks open the doors to the offices of individual and important Members of Congress and the Administration,' which 'gives [soft money donors] an opportunity to shape and affect governmental decisions.'" *FEC Summ. J. Mot.* at 8 (Dkt. 56) (*citing* FEC SMF ¶ 16). The FEC goes on to assert that any access leads to "inevitable system corruption" that merits governmental intrusion. *FEC Summ. J. Reply* at 4 (Dkt. 63). In fact, the FEC devoted at least 13 pages of summary judgment argument and 39 of their 83 findings of fact to the corrupting nature of access and gratitude, the very interests foreclosed by the Supreme Court in *Citizens United*. *See FEC Summ. J. Mot.*, *FEC Summ. J. Reply*, *FEC Supp. Summ. J. Mot. and Supp. Stmt. of Mat. Facts* (Dkt. 82).

Speaking directly to the FEC, the Court in *Citizens United* stated that evidence showing "that speakers may have influence over or access to elected officials does not mean these officials are corrupt" and "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy." *Citizens United*, slip op. at 43 and 44. Therefore, the Restriction is not narrowly tailored or closely drawn to any compelling or important government interest in preventing corruption or its appearance and the FEC finds itself without any legitimate government interest to justify the Restriction. *See Pls.' Mem*. at 30-45; *Pls.' Reply Mem*. at 10-25; *Pls.' Op.* at 4-8.

Even so, the FEC cannot so much as show that Plaintiffs' intended activities even pose a "threat" of the type of access or gratitude discussed in *McConnell*. Plaintiffs have repeatedly shown that, just as no preferential access is now provided to federal donors, the RNC will not provide non-federal donors with preferential access to any federal candidate or officeholder. Pls.' Exh. 1, *Beeson Aff.* ¶ 19, 30; FEC Exh. 4 at 7; FEC Exh. 1, *Josefiak Dep*. at 126:20-130:3; FEC Exh. 42, *Steele Dep.* at 51:10-18, 55:13-22, 111:12-21. Furthermore, Plaintiffs' intended activities pose no threat of gratitude that is anything more than generalized. The FEC fails to demonstrate how donations earmarked for and used for activities that do not directly benefit any federal candidate or officeholder give rise to undue influence. *Pls.' Reply Mem*. at 21-24; *Pls.' Op.* at 8-13.

While the Court in *Citizens United* did not examine the evidence in *McConnell* regarding the present Restriction, the FEC has not and cannot point to the remaining permissible corruption interest, quid pro quo corruption. *See Citizens United*, slip op. at 43. Since the FEC has not offered any evidence of quid pro quo corruption, let alone enough evidence to satisfy strict (or even intermediate) scrutiny, the Restriction is unconstitutional. *See* Transcript of Oral Argument at 5: 9-10:8, 16:10-18:9, *RNC v. FEC*, 08-1953 (FEC relying solely on the prevention of access and gratitude as governmental interests).

III. Political Parties Are Now Disadvantaged and Should Be Favored.

Citizens United granted corporations and labor unions greater protection under the First Amendment than presently afforded to political parties. This is contrary to our nation's historic treatment of political parties. Political parties have long held a favored status in law and society

because they serve the vital role of allowing citizens to advance "common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). A "political party's independent expression . . . reflects its members' views about the philosophical and governmental matters that bind them together." *Id.* at 615 (Breyer, J., joined by O'Connor & Souter, JJ.). As such, they have a "unique role in serving" the principles of the First Amendment, *Colo. Rep. Fed. Camp. Comm. v. FEC*, 518 U.S. 604, 629 (1996) ("*Colorado I*") (Kennedy, J., concurring, joined by Rehnquist, CJ., & Scalia, J.), and political party expression is protected "'core' political speech." *Id.* at 616 (citation omitted). The First Amendment protects a party's primaries, *California Democratic Party v. Jones,* 530 U.S. 567, 574 (2000) (describing constitutional importance of associating in political parties to elect candidates), internal processes, *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 230 (1989) (including how a party chooses to "organize itself, conduct its affairs, and select its leaders"), and rights of association generally, *Tashjian v. Rep. Party of Conn*., 479 U.S. 208, 224 (1986) ("The Party's determination of the . . . structure which best allows it to pursue its political goals, is protected by the Constitution") and *Randall v. Sorrell*, 548 U.S. 230, 256 (2006) (stating that the challenged provision's "insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a political party").

However, as a result of *Citizens United*, corporations and unions now have a substantial advantage over political parties. The Restriction improperly hinders political parties, entities vital to the nation's electoral process, from speaking. Because the RNC, the California Republican

Party ("CRP"), and the Republican Party of San Diego County ("RPSD"), like corporations and unions, are associations of citizens, the same analysis applied in *Citizens United* to strike prohibitive regulations should be applied here.

A. *Citizens United* Affords Corporations and Unions More Freedom to Speak

In *Citizens United*, the Supreme Court emphasized that political speech is "'indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation.'" *Citizens United*, slip op. at 33 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)). Applying strict scrutiny, the Court found no compelling government interest to maintain the expenditure restrictions in question. As stated above, the Court determined that only a quid pro quo corruption interest is sufficient, and the Court found insufficient threat of such corruption with regard to corporate independent expenditures and electioneering communications. *See Citizens United*, slip op. at 43-45. The Court determined that the First Amendment concerns are sufficient to protect corporate expenditures, even in situations where "the corporate funds may have 'little to no correlation to the public's support for the corporation's political ideas.'" *Id.* at 35 (*quoting Austin,* 494 U.S. at 660). This reasoning resulted in the striking down of the expenditure bans, thus allowing corporations and unions more freedom to exercise their First Amendment rights.

B. Political Parties, Like Corporations and Unions, Are Associations of Citizens

The holding in *Citizens United* reaffirms the right of association. Just as corporations and unions are associations, so too are local, state and the national party committees associations of

of citizens banding together for a common purpose. Individuals join a political party in order to speak collectively regarding common issues and beliefs. Applying the Court's rationale in *Citizens United* to the present case further strengthens Plaintiffs' argument. If corporate expenditures are afforded protection under the First Amendment, even if the funds are not attributable to individuals' support of the corporate platform, a political party, as the embodiment of its members' political beliefs, should be afforded at least equal — if not **greater** — protection under the Constitution.

Political parties are formed around ideas and principles, which they advance in a variety of manners. Electing federal candidates is merely one of the ways parties promotes their platform. While candidates come and go, parties endure as a bulwark for the political philosophy upon which they were formed. Stated differently, political parties are ideological organizations that seek to promote principles through a variety of means; electing candidates to federal office is but one goal.

The Restriction, however, prohibits parties from soliciting and spending non-federal/state funds for *any* activity, including activities that promote a party's ideological platform in ways unrelated to any federal candidate or officeholder. For example, the New Jersey Account, Virginia Account, Redistricting Account, Grassroots Lobbying Account, Litigation Account, and the State Elections Accounts all further the RNC's platform in ways *other* than by electing federal candidates. As such, these accounts are not "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80. Similarly, CRP's planned communications regarding ballot measures and various state election activities all support CRP's platform in ways

other than electing federal candidates. As such, these activities are not "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80.

Additionally, despite the unique and important role of political parties, they are prohibited by the Restriction from engaging in these non-campaign activities while other organizations, namely corporations and unions, may engage in these activities freely. The disparity between corporations and political parties is illustrated by the fact that, because of *Citizens United*, all corporations and unions can now use non-federal funds for independent expenditures, while political parties are limited to federal funds. Even beyond the campaign activities permitted by *Citizens United*, corporations may also solicit and spend non-federal funds for grassroots lobbying, for example, while the RNC may not. Plaintiffs are similar to corporations or unions in that they are associations of citizens, but unlike these entities, Plaintiffs truly **speak** directly for their members as an embodiment of their collective political beliefs.

As Justice Steven's pointed out in his dissent, *Citizens United* "dramatically enhance[d] the role of corporations and unions –and the narrow interests they represent–vis-à-vis the role of political parties–and the broad coalitions they represent–in determining who will hold public office." *Citizens United*, Stevens, J., dissenting, slip op. at 21. Stevens goes on to note that the current imbalance between corporations and political parties created by the majority in *Citizens United* may be corrected by removing the very Restriction before this Court. *See id*., slip op. at fn. 22.

IV. In Light of *Citizens United*, the "Federal Funds Restriction" Should Be Overruled Facially.

As previously asserted by the Plaintiffs, to the extent *McConnell* found that contributions

to national political parties were "suspect," irrespective of their end use, it premised this conclusion on the historical practice of national parties to provide large donors of non-federal funds with preferential access to federal candidates and officeholders. *Pls.' Mem.* at 21-24; *Pls.' Reply Mem.* at 18-21. Now that the Supreme Court has stated that preventing access and gratitude is not a proper government interest, *Citizens United*, slip op. at 43-44, the Restriction is unconstitutional. Not only is the Restriction unconstitutional as applied to Plaintiffs' activities, it is facially unconstitutional since *McConnell*'s foundation of corruption cannot stand.

In *Citizens United*, the Court determined that the First Amendment interests at stake were so important that they required a facial holding, even though the plaintiff had brought an as-applied challenge. Instead of issuing a narrow holding regarding the medium through which the Citizens United was speaking, the Court "decline[d] to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Citizens United*, slip op. at 9. Due to the clear chill to political speech, the Court refused to "require[] intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject." *Citizens United*, slip op. at 12. As Chief Justice Roberts noted in his concurring opinion, justice required a facial holding regardless of "whether we label Citizens United's claim a 'facial' or 'as-applied' challenge," since "the consequences of the Court's decision are the same." *Citizens United*, Roberts, C.J., concurring, slip op. at 5.

Similarly, due to the determinations and reasoning in *Citizens United*, it is appropriate to now consider a facial challenge to the Restriction. Since the FEC's only justification for the

Restriction is based on the theory of access and gratitude as corruption or its appearance, this Court should recognize that the Supreme Court has now implicitly overruled the relevant portion of *McConnell* by stating that the prevention of access and gratitude is not a proper governmental anti-corruption interest. *Citizens United*, slip op. at 43-44. Therefore, the Restriction is unconstitutional.

Conclusion

For the reasons stated above, Plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

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