IN THE 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.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

SUPPLEMENTAL MEMORANDUM OF INTERVENOR-DEFENDANT CHRISTOPHER VAN HOLLEN, JR. IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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This Court ordered supplemental briefing on "the impact on the present litigation, if any, of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, __ S.Ct. __ (2010)." Dkt. No. 94 (Jan. 25, 2010). The *Citizens United* decision has no impact on this Court's consideration of the case for the following reasons:

First, and foremost, the disposition of the present case is controlled by the part of *McConnell v. FEC*, 540 U.S. 93, 133-89 (2003), that upheld Title I of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), in general, and the limits on soft money *contributions* to political parties, in particular. Because *Citizens United* dealt with the distinct question whether Congress may regulate *independent expenditures* by corporations, nothing in it calls into question the relevant holding of *McConnell*. The Supreme Court has long distinguished between the regulation of expenditures and contributions, and nothing in *Citizens United* calls into question that fundamental distinction or Congress's authority to regulate contributions.

Second, plaintiffs' contention that the combination of *Citizens United* and the soft money ban will unconstitutionally disadvantage political parties is at odds with settled precedent and common sense. Since *Buckley v. Valeo*, 424 U.S. 1 (1976), the political parties have been subject to contribution limits not applicable to other groups, yet the Supreme Court has never suggested that these restrictions must be relaxed to equalize the parties' voice with competing speakers. Instead, it has considered whether the limitations are so low that they "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21; *McConnell*, 540 U.S. at 135 (same). Here, there is no risk that the political parties, whose national committees raised more than a billion dollars in the aggregate in the 2007-2008 election cycle, will be unable to engage in vigorous and extensive campaign speech. *See* Mem. in Opp'n to Pls.' Mot. for Summ. J., Dkt. No. 41, Exhibit 3 ("Ornstein Decl.") ¶ 25.

I. *CITIZENS UNITED* DOES NOT UNDERMINE THE REASONING OF THE PORTION OF *MCCONNELL* THAT UPHELD TITLE I OF BCRA

McConnell's affirmation of BCRA's political party/soft money restrictions rests on two premises, neither of which is undercut by *Citizens United*: First, contribution limits "'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication,'" *McConnell*, 540 U.S. at 134-35 (quoting *Buckley*, 424 U.S. at 20), and are thus subject to a "less rigorous standard of review" than expenditure limits, *id.* at 137. Second, the government has a sufficiently important interest in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption," *id.* at 136 (quoting *FEC v. National Right to Work Committee* ("*NRWC*"), 459 U.S. 197, 208 (1982)), which provides ample support for contribution limits. In light of "the 'unity of interest,' 'close relationship,' and 'close ties' among candidates, officeholders, and political parties," *EMILY's List v. FEC*, 581 F.3d 1, 22 (D.C. Cir. 2009), the rationale for limits on contributions to political candidates and officeholders extends to political parties, *McConnell*, 540 U.S. at 145, 152, 154, 155, 156 n.51.

A. *Citizens United* Does Not Change The Level Of Scrutiny Applicable To Restrictions On Soft Money Donations

In upholding BCRA's Title I, *McConnell* reaffirmed—and relied upon—the principle established "[i]n *Buckley* and subsequent cases" that "restrictions on campaign expenditures [are subject] to closer scrutiny than limits on campaign contributions." 540 U.S. at 134. Applying this framework, *McConnell* subjected the contribution limits challenged in this action, Section 323, to "*Buckley*'s 'closely drawn' scrutiny," *McConnell*, 540 U.S. at 137, under which "a contribution limit . . . is . . . valid if it satisfies the 'lesser demand' of being 'closely drawn' to match a 'sufficiently important interest,'" *id.* at 136 (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)); *see also Buckley*, 424 U.S. at 25.

Plaintiffs now contend that *Citizens United* should be construed to hold that "*McConnell* incorrectly applied intermediate scrutiny in . . . upholding" the political party/soft money restrictions contained in BCRA. Pls' Supp'l Mem. at 2, 8-9. It is startling to suggest that the Supreme Court overruled not only the soft money holding of *McConnell*, but also the framework for evaluating constitutional challenges to contribution limits employed in over thirty years of precedent, without so much as mentioning that it was doing so.[1] To the contrary, *Citizens United* repeatedly distinguished between the regulation of *independent expenditures*, which was at issue there, and the regulation of *contributions*, which was not. Removing any possible confusion on this point, the Court observed that "Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subject to rigorous First Amendment scrutiny." __ S. Ct. __, slip op. at 43.

Moreover, *Citizens United* does not alter any of the considerations underlying the "less rigorous standard of review" applicable to contributions. *McConnnell*, 540 U.S. at 137. *First*, "contribution limits, *unlike limits on expenditures*, 'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication.'" *Id.* at 134-35 (quoting *Buckley*, 424 U.S. at 20) (emphasis added). *Second*, "*[u]nlike expenditure limits*, . . . which 'preclud[e] most associations from effectively amplifying the voice of their adherents,' *contribution limits* both 'leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates,' and allow associations 'to aggregate large sums of money to promote effective advocacy.'" *Id.* at 135-36 (quoting *Buckley*,

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[1] *See Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion of Breyer, J., joined by Roberts, C.J. and Alito, J.) (applying "closely drawn" scrutiny to contribution limits); *McConnell*, 540 U.S. 93 (same); *Beaumont*, 539 U.S. 146 (same); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (same); *California Med. Ass'n. v. FEC*, 453 U.S. 182 (1981) (plurality opinion) (same); *Buckley*, 424 U.S. 1 (same). *See also FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431 (2001) (same to coordinated expenditures).

424 U.S. at 22) (emphasis added). *Third*, the more deferential treatment accorded to political contributions appropriately "reflects the importance of the interests that underlie *contribution* limits—interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'" *Id.* at 136 (quoting *NRWC*, 459 U.S. at 208). *Fourth*, a less demanding level of scrutiny shows "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *Id.* at 137. Nothing in *Citizens United* addresses, much less questions, these long-recognized considerations.

B. *Citizens United* Does Not Reject The Anti-Corruption Interest Supporting BCRA Title I's Restrictions On Soft-Money Donations

In upholding BCRA Title I, *McConnell* reaffirmed that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell*, 540 U.S. at 143. With respect to political contributions, the relevant understanding of corruption has, since *Buckley*, included not only "actual *quid pro quo* arrangements," but also "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. Accordingly, in assessing the potential for corruption inherent in soft money contributions, *McConnell* considered not only "'*quid pro quo* arrangements,'" but also "'improper influence' and 'opportunities for abuse'" in the sense of "'the broader threat from politicians too compliant with the wishes of large contributors.'" 540 U.S. at 143 (quoting *Shrink Missouri*, 528 U.S. at 389); *see also Colorado II*, 533 U.S. at 441 (acknowledging that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment").

Plaintiffs contend that, in holding restrictions on independent expenditures unjustified, *Citizens United* implicitly rejected the anti-corruption interest that *Buckley*, *Shrink Missouri*,

Colorado II and *McConnell* found "sufficiently important" to support *contributions* restrictions. Pl. Supp'l Mem. at 3-5. In plaintiffs' view, after *Citizens United*, Congress may only limit contributions if they present a risk of *quid pro quo* corruption. Plaintiffs' argument has no merit.

Citizens United did not address the types of government interests that may support restrictions on contributions. The Court's analysis, moreover, does not extend to contribution limits for several important reasons. First, unlike expenditure limits, contribution limits need only be "closely drawn" to serve a "sufficiently important interest." *Buckley*, 424 U.S. at 25. Because *Citizens United* applies strict scrutiny, it says nothing about whether the "influence and access" that comes with political contributions meets the less rigorous demands of "closely drawn" scrutiny—and it certainly did not overrule three decades of cases holding that contribution limits, including limits on contributions to political parties, may be sustained based on Congress' judgment that they are needed to address actual or apparent corruption and to prevent the circumvention of the campaign finance laws. *See Buckley*, 424 U.S. at 26-28.

Second, Plaintiffs' contention ignores the greater risk of corruption inherent in political contributions, as compared to independent expenditures—a distinction that *Citizens United*, *McConnell*, and *Buckley* all recognized. Plaintiffs point to language in *Citizens United* indicating that "'[i]ngratiation and access . . . are not corruption,'" and that "'[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.'" Pls' Supp'l Mem at 3, 4 (quoting *Citizens United*, slip op. at 43, 45). But *McConnell* itself had already observed that "mere political favoritism or opportunity for influence alone is insufficient to justify regulation." 540 U.S. at 153. *Citizens United* simply confirms this observation and concludes that any "ingratiation," "influence" or "access" that may result from independent expenditures is not corrupting, since "[b]y definition, an independent

expenditure is political speech presented to the electorate that is not coordinated with a candidate." __ S. Ct. __, slip op. at 44.

By contrast, contributions are solicited by and made to federal candidates and officeholders—or the political parties with whom they share a "unity of interest," *McConnell*, 540 U.S. at 145—and "it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence," *id.* at 153-54. As amply documented in *McConnell*, this process creates not only the perception of "generic" influence, but an actual market where influence is bought and sold. *Id.* at 146-52, 153-54. It is this market that turns benign political favoritism and influence into "*undue* influence" and actual or apparent corruption. *Id.* at 153-54 (emphasis added). Nothing in *Citizens United* undermines *McConnell*'s conclusion that the government has a sufficiently important interest in preventing such a market from flourishing—whether because that market is itself corrupt or because it creates a fertile ground for *quid pro quo* arrangements.

Third, if anything, *Citizens United* reaffirmed *Buckley*'s holding that the anti-corruption rationale for contribution limits extends beyond "quid pro quo" corruption. As the Court explained, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." __ S. Ct. __, slip. op. at 41 (citations omitted). *Citizens United* did not question this "preventative" function of contribution limits; it simply held that *Buckley* "did not extend this rationale to independent expenditures" and that it was not prepared to do so either. *Id.*

Finally, even if *Citizens United* did implicitly narrow the anti-corruption interest that may support restrictions on contributions—a question not even presented in that case—*McConnell*

was premised on a record that contained abundant evidence of real or apparent *quid pro quo* arrangements resulting from soft money donations to political parties:

> Plaintiffs argue that without concrete evidence of an instance in which a federal officeholder has actually switched a vote (or, presumably, evidence of a specific instance where the public believes a vote was switched), Congress has not shown that there exists real or apparent corruption. But the record is to the contrary. The evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation. *See, e.g.*, [*McConnell v. FEC*,] 251 F. Supp. 2d 176, 482 [(D.D.C. 2003) (three-judge court)] (Kollar-Kotelly, J.); *id.* at 852 (Leon, J.) . . . . To claim that such actions do not change legislative outcomes surely misunderstands the legislative process.

McConnell, 540 U.S. at 149-50 (record citations omitted); *see also EMILY's List*, 581 F.3d at 6-7 ("The Court has explained that contributions to a candidate *or party* pose a greater risk of *quid pro quo* corruption than do expenditures.") (emphasis added).

C. The Supreme Court's Holding In *McConnell* Would Be Binding On This Court Even If Plaintiffs' Reading Of *Citizens United* Were Correct

Plaintiffs' case turns on the contention that their "intended *activities* pose no threat of gratitude that is anything more than generalized." Pls' Supp'l Mem. at 5 (emphasis added). Regardless of whether that claim is true, the Supreme Court held in *McConnell* that BCRA's political party/soft money restrictions "regulate[] *contributions*, not activities," and that "it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect." 540 U.S. at 154-55 (emphasis in original). Plaintiffs cannot prevail as long as that eminently sound holding in *McConnell* stands.

Even if some language in *Citizens United* were stretched to call this holding into question, it still would not permit this Court to reject *McConnell*'s conclusions regarding Title I of BCRA. Where an earlier Supreme Court decision "has direct application in a case, yet

appears to rest on reasons rejected in" a subsequent decision, lower courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). Here, *McConnell* not only has "direct application," but actually considered and decided the precise question that plaintiffs raise in this case.[2] That plaintiffs here have at times characterized their claim as an "as applied" challenge, instead of a facial challenge, does not change this result. Indeed, now, plaintiffs expressly seek to invalidate the soft money ban on its face. Pls' Supp'l Mem. at 9-11.

II. THAT CORPORATIONS MAY NOW MAKE INDEPENDENT EXPENDITURES DOES NOT AFFECT THE CONSTITUTIONALITY OF BCRA'S TITLE I

Plaintiffs make much of the fact that, after *Citizens United*, corporations may spend unlimited general treasury money on ads supporting or attacking specific candidates, while political parties may not raise soft money to spend on ads of any kind. Pls' Supp'l Mem at 5-9. Plaintiffs' argument misconceives the nature of the soft money ban and ignores the enormous resources the political parties have at their disposal to engage in political speech.

As *McConnell* made clear, "Section 323(a), like the remainder of § 323, regulates *contributions*, not activities." 540 U.S. at 154. As a result, the political parties are as free as corporations or unions to spend money, without restriction, on electoral advocacy, grassroots advocacy, or any other political activities.

Moreover, the distinction in treatment about which plaintiffs object "has existed to some extent since *Buckley*," *EMILY's List*, 581 F.3d at 19, which upheld the $25,000 limit on

[2] *Compare McConnell*, 540 U.S. at 150 ("The record in the present cases is replete with . . . examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations.") *with* Brief of the Political Parties 26-27, *McConnell*, 540 U.S. 93 ("The record provides no support for the claim that 'access' to federal officeholders is *uniquely* granted to nonfederal donors as a result of their donations to political parties.").

aggregate yearly contributions to candidates, political committees, and parties, *Buckley*, 424 U.S. at 38. Since that time, various groups have "'remain[ed] free to raise soft money to fund'" just the type of "'voter registration, GOTV activities . . . ,' and advertisements" that plaintiffs complain that they cannot fund with soft money. *EMILY's List*, 581 F.3d at 19 (quoting *McConnell*, 540 U.S. at 187). Relying on this disparity, the RNC argued in *McConnell* that Title I of BCRA violated equal protection "because it discriminates against political parties in favor of special interest groups." *McConnell*, 540 U.S. at 187; *see* Brief of the Political Parties at 2, 91-99, *McConnell*, 540 U.S. 93. The Supreme Court, however, rejected that challenge, stressing that "BCRA actually favors political parties in many ways" and concluding that Congress was "fully entitled to consider the real-world differences between political parties and interest groups." *Id.* at 188. As the Court wrote, "[i]nterest groups do not select slates of candidates for elections," and "do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses." *Id.*

Finally, plaintiffs cannot reasonably maintain that the combined effect of § 323 and the participation of corporations (and unions) in electoral advocacy is "'so radical . . . as to . . . drive the sound of [the political parties'] voice below the level of notice.'" *McConnell*, 540 U.S. at 173 (citation omitted). In the 2007-2008 election cycle, the Republican National Party committees received hard money contributions of $640,308,267, and the Democratic National Party committees received hard money contributions of $599,113,650. Ornstein Decl. ¶ 25. Funds in excess of a total of a billion dollars are certainly sufficient to raise the voices of the national parties above "'the level of notice.'" *McConnell*, 540 U.S. at 173 (citation omitted). Given these numbers, it is far-fetched, to say the least, to suggest that the political parties will find it difficult to compete with corporate political speech.

CONCLUSION

For the foregoing reasons and the reasons stated in Intervenor's prior memoranda in this case (Dkt. Nos. 41, 83), plaintiffs' Motion for Summary Judgment should be denied and the Federal Election Commission's Motion for Summary Judgment should be granted.

Dated this 9th day of February 2010.

Respectfully submitted,

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