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 Reply
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 reply 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. Contrary to the Federal Election Commission's ("FEC") and Intervenors' contentions,[2] the Federal Funds Restriction, 2 U.S.C. § 441i ("the Restriction"), is a prohibition; the Supreme Court's narrow definition of corruption is applicable to the determination of the constitutionality of all regulations, not just the regulation of independent expenditures; and *Citizens United* did not reach the unambiguously-campaign-related standard before this Court.

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

[2] This reply responds to *Intervenor-Defendant DNC's Supplemental Brief*, Dkt. 97, *Defendant FEC's Supplemental Brief*, Dkt. 98 ("FEC Supp. Response"), and *Intervenor-Defendant Van Hollen's Supplemental Brief,* Dkt. 98 ("Van Hollen Supp. Response").

To be clear, although *Citizens United* dealt with a specific issue before the Supreme Court, the reasoning used to arrive at the majority opinion has a direct bearing on this case and overruled much of the reasoning relied upon in *McConnell v. FEC*, 540 U.S. 93 (2003). The FEC and Van Hollen mischaracterize Plaintiffs' argument as asking this Court to overturn the relevant portion of *McConnell*. *FEC Supp. Response* at 6, *Van Hollen Supp. Response* at 7-8. Unlike their cited case, *Rodriguez de Quijas v. Shearson/American Exp., Inc*., 490 U.S. 477, 479, where a Circuit Court applied a standard developed through a gradual jurisprudential shift, the Supreme Court has spoken directly on a core issue in the present case. Plaintiffs are asking this Court to *apply* the Supreme Court's clear definition of corruption to determine the constitutionality of the Restriction.

I. The Federal Funds Restriction, like the Corporate Expenditure Ban, is a Prohibition.

The FEC and Intervenors focus on the difference between the expenditures at issue in *Citizens United* and the contributions at issue here. They miss, however, the fundamental link – both cases deal with a prohibition. The statute in question in *Citizens United*, 2 U.S.C. § 441b, prohibited corporations and unions from using general treasury funds to conduct independent expenditures. Similarly, here, 2 U.S.C. § 441i prohibits political parties from using non-federal dollars for *any* activity. Although *McConnell* treated this prohibition as a contribution limit instead of an expenditure limit, 540 U.S. at 138-39, such a classification does not change the fact

that it is still a *prohibition* on the use of funds, one that is even more sweeping than the prohibition struck down in *Citizens United*.[3]

Under *Citizens United*, strict scrutiny is required for "[l]aws that burden political speech." *Citizens United*, slip op. at 23. Since the Restriction is an prohibition on Plaintiffs' political speech, the government must prove a substantial governmental interest in regulating Plaintiffs' speech. But, even if intermediate scrutiny is appropriate, the government must still show an important governmental interest in regulating Plaintiffs' speech. In light of the RNC's post-*McConnell* policies or, further, based on the Supreme Court's clarification of the prevention of corruption or its appearance, *see infra*, the government is unable to show even an important, let alone a *substantial*, government interest.

II. Regardless of Which Level of Scrutiny is Appropriate, the Prevention of Access and Gratitude is not a Cognizable Anti-Corruption Interest.

While the FEC and Intervenors admit that the Supreme Court has now excluded access and gratitude from the definition of corruption, they claim that the Court limited this definition to only the independent expenditure context. *FEC Supp. Response* at 4, *Van Hollen Supp. Response* at 5. In so doing, the FEC and Intervenors improperly create a universe where the definition of corruption varies depending on the regulation at issue. This cannot be so. The Supreme Court has now clearly defined what is and what is not a legitimate governmental anti-corruption interest.

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[3] Plaintiffs reiterate their previous argument that the removal of the corporate prohibition now places political parties at a disadvantage. *Supp. Mem.* at 5. Van Hollen responds by pointing to the Court's rejection of the RNC's equal protection claims in *McConnell*. *Van Hollen Supp. Response* at 9. While Plaintiffs are relying on First Amendment principles to argue the unconstitutionality of the Restriction, *McConnell*'s "equal protection" holding is now called into question by *Citizens United*, which may provide separate grounds for invalidating the Restriction.

Citizens United, slip op. at 44-45.

According to Intervenor Van Hollen, "[b]ecause *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." *Van Hollen Supp. Response* at 5. In this nonsensical argument, Van Hollen confuses the scrutiny analysis. Here, the "sufficiently important interest" is the government's desire to prevent corruption (which now, by definition, does not include access or gratitude). This Court must determine whether the *Restriction* is "closely drawn" to this interest. Van Hollen argues that the definition of corruption is relaxed when intermediate scrutiny is used. This is simply not true. Only the government's burden of showing the relationship (i.e. whether it is "closely drawn") between the regulation and the corruption interest is lessened under intermediate scrutiny. Therefore, regardless of which level of scrutiny is employed, the definition of corruption remains the same.

Because of *Citizens United*, the FEC may no longer rely upon evidence of access and gratitude from *McConnell* in order to justify the Restriction. "Ingratiation and access, *in any event*, are not corruption." *Citizens United*, slip op. at 45 (emphasis added). The Court noted, and Plaintiffs are fully aware, that evidence relating to the government's anti-corruption interest in this Restriction was not before the Court in *Citizens United*. However, the Supreme Court has now stated a clear definition of corruption which undercuts the FEC's arguments relating to even a "sufficiently important" government interest.[4]

[4] The FEC even goes so far to say that "Plaintiffs continue to sell access to donors." *FEC Supp. Response* at 7. Not only does the FEC blatantly ignore Plaintiffs' continued assertions that no access will be provided to donors of non-federal funds, 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-

Here, the FEC must provide evidence of quid pro quo corruption in order to justify the Restriction. *Citizens United*, slip op. at 43. Not only has the government not provided any evidence of quid pro quo corruption in its extensive briefing in this case, it is difficult to see how Plaintiffs' specific activities could *possibly* result in such corruption since they do not provide any direct benefit to federal officeholders or candidates.[5] *Pls.' Reply Mem.* at 21-24; *Pls.' Mem.* at 24-27.

III. *Citizens United* Did Not Foreclose the Unambiguously-Campaign-Related Standard.

The FEC boldly states that the Supreme Court "refused to adopt Plaintiffs' invented 'unambiguously campaign related' test for political regulation." *FEC Supp. Response* at 1. The FEC is mistaken for two important reasons. First, Plaintiffs cannot be credited with the "invention" of the unambiguously-campaign-related standard. Second, the standard was not before the Court and therefore was not reached in *Citizens United*.

A. The Unambiguously-Campaign-Related Standard Stems from Supreme Court Precedent.

The unambiguously-campaign-related standard was first recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976), where the Supreme Court required the government to limit its election-related laws to reach only First Amendment activities "*unambiguously related* to the campaign of a

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18, 55:13-22, 111:12-21, but this attack shows how dependent the government is on evidence, real or conjured, of access.

[5] In regard to Plaintiffs California Republican Party and the Republican Party of San Diego, the regulation of federal election activity must fall with the Restriction since the regulation of state activity is based on the prevention of circumvention. If there is no governmental interest in upholding the Restriction, there is nothing to circumvent.

particular federal candidate," *id.* at 80 (emphasis added), in short, "unambiguously campaign related," *id.* at 81. The unambiguously-campaign-related requirement was also affirmed in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). It has since been affirmed by various circuit and district courts.[6]

Even Senator McCain, one of the chief sponsors of the Bipartisan Campaign Finance Reform Act, expressly argued *Buckley*'s unambiguously-campaign-related analysis in *McConnell*, insisting that the electioneering communication definition was a constitutional "adjustment of the definition of which advertising expenditures are campaign related." *Brief for Intervenor- Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93. He further argued that the "[d]isclosure rules . . . 'shed the light of publicity on spending that is unambiguously campaign related but would otherwise not be reported.'" *Id*. at 58 (quoting *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (emphasis added).

The analysis has also been recognized and used by the FEC General Counsel and by many FEC Commissioners. *See* Petition for Writ of Certiorari, *FEC v. Faucher* (No. 90-1923) (arguing authority to regulate an "expenditure that is unambiguously election related") and *Statement of Reasons* (Dec. 16, 2003) in Matters Under Review ("MURs") 5024, 5154, and 5146 (*available at* www.fec.gov) ("*SOR*"). Specifically, FEC Commissioners Weintraub, Thomas, and McDonald noted that "the *Buckley* Court explained the purpose of the express advocacy standard," which

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[6] *North Carolina Right to Life v. Leake,* 525 F.3d at 281 (4th Cir. 2008), *Nat'l Right to Work Legal Def. and Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1146 (D. Utah 2008); *Center for Individual Freedom v. Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *5, *9, *14, *17, *25 (S.D. W. Va. Oct. 17, 2008); *Broward Coal. of Condos., Homeowners Ass'ns and Cmty. Orgs. v. Browning*, No. 08-445, 2008 WL 4791004, at *7 (N.D. Fla. Oct. 29, 2008) (same), *clarified on other grounds,* 2008 WL 4878917 (N.D. Fla. Nov. 2, 2008).

"was to limit application of the . . . reporting provision to 'spending that is *unambiguously related* to the campaign of a particular federal candidate.'" *Id*. (*quoting Buckley*, 424 U.S. at 80) (emphasis in *SOR*). The Commissioners, quoting *Buckley*, stated: "[u]nder an express advocacy standard, the reporting requirements would 'shed the light of publicity on spending that is *unambiguously campaign related* . . . .'" *SOR* at 2 (*quoting* 424 U.S. at 82) (emphasis in *SOR*).

Most recently, in a January 22, 2009 *SOR* in MUR 5541 ("*November Fund SOR*"), current FEC Commissioners Petersen, Hunter and McGahn emphasized the need to "fully incorporate important principles in recent judicial decisions," including . . . the Fourth Circuit's persuasive decision in . . . [*North Carolina Right to Life v.*] *Leake*[, 525 F.3d 274 (4th Cir. 2008)]," *November Fund SOR* at 2, and stated that "the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach 'that spending that is unambiguously related to the campaign of a particular federal candidate' . . . ." *Id*. at 5.

B. *Citizens United* Did Not Reach the Unambiguously-Campaign-Related Issue Because It Was Not Before the Court.

While many courts and government entities have recognized the unambiguously-campaign-related standard, the fact that the Supreme Court did not mention it in *Citizens United* does not mean that the standard is rejected. The FEC states that the Court "did not adopt this standard" and argues that, since Plaintiffs cannot use *Citizens United* to bolster the unambiguously-campaign-related argument, the argument must fail. *FEC Supp. Response* at 3. Not only is this contrary to their wholesale assertions that "*Citizens United* does not affect this case," *id*. at 1, it also mischaracterizes the arguments that were before the Supreme Court.

The FEC cites the jurisdictional statement and an amicus brief for the contention that

Citizens United argued the unambiguously-campaign-related standard. *Id*. at 3. However, the FEC did not and cannot point to any portion of Citizens United's merits briefing or oral argument to support this contention. Accordingly, nothing in *Citizens United* suggests that the Court rejected the standard.

Conclusion

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

Respectfully submitted,

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