UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL COMMITTEE'S SUPPLEMENTAL BRIEF REGARDING *CITIZENS UNITED V. FEC*

In accordance with the Court's January 26, 2010 order, Intervenor-Defendant the Democratic National Committee ("DNC") files this supplemental memorandum on the impact of *Citizens United v. Federal Election Commission*, 558 U.S. __ (2010), on this case.[1]

I. The Disposition of this Case Is Controlled by *McConnell*, the Relevant Parts of Which Are Unaffected by *Citizens United*.

Citizens United dealt solely with independent spending by corporations. It struck down a federal law banning corporations from making independent expenditures in connection with federal elections. It also invalidated a provision that prohibited corporations from sponsoring "electioneering communications" – issue communications that refer to candidates during the period 30 days before a primary election and 60 days before a general election, 2 U.S.C. § 434(f)(3) – that are conducted without candidate or party involvement. Slip op. at 50.

[1] The DNC incorporates by reference its Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. 42).

In reaching its ruling, the Supreme Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Slip op. at 50. *Austin* had upheld a state ban on corporate independent expenditures on the ground that there was a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. *Citizens United* also overruled the Court's prior decision in *McConnell v. FEC*, 540 U.S. 93 (2003), but only to the extent that *McConnell*, relying on *Austin's* antidistortion rationale, upheld the ban on corporate electioneering communications. Slip op. at 50.

Plaintiffs' challenge in this case involves an entirely different issue from the one addressed in *Citizens United* – the constitutionality of BCRA's provisions that limit soft money contributions to political parties. *See Citizens United*, slip op. at 45 ("This case . . . is about independent expenditures, not soft money."). This was squarely addressed in *McConnell*, where the Court upheld BCRA's soft money provisions against a facial challenge.[2] Nothing in *Citizens United* disturbs *McConnell's* holding to this effect. And, even if the reasoning of Citizens United has any bearing on this case – a proposition that the DNC rejects – this Court is still bound to follow *McConnell* unless *McConnell* is overruled by the Supreme Court. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application

[2] Plaintiffs argue that *Citizens United* transformed their suit, which was originally styled as an "as-applied" challenge, into a facial challenge. *See* Pls.' Supp. Memo. at 9-11. This requested relief further demonstrates that Plaintiffs' challenge is not a bona fide as-applied challenge but, rather, an attempt to re-litigate issues foreclosed by *McConnell*. *See* DNC's Opp'n to Pls.' Mot. Summ. J. (Dkt. 42) at 9-17.

in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Conclusion

For the reasons stated herein, the Court should deny Plaintiffs' motion for summary judgment.

Dated: Feb. 9, 2010.

Respectfully submitted,

PERKINS COIE LLP

By: /s/ Marc Erik Elias

Marc Erik Elias (D.C. Bar No. 442007)
MElias@perkinscoie.com
Andrew H. Werbrock (D.C. Bar No. 987693)
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003
Telephone: 202.628.6600
Facsimile: 202.434.1690

Attorneys for Intervenor-Defendant Democratic National Committee