CASE ARGUED JANUARY 27, 2010, DECIDED MARCH 26, 2010

No. 08-5223 (L), 09-5342

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPEECHNOW.ORG, DAVID KEATING,
FRED M. YOUNG, JR., EDWARD H. CRANE, III,
BRAD RUSSO and SCOTT BURKHARDT,
***Appellants*,**

v.

FEDERAL ELECTION COMMISSION,

***Appellee*.**

On Appeal from the United States District Court
for the District of Columbia,
Case No. 08-cv-00248 (JR)

REPLY MEMORANUM IN SUPPORT OF APPELLANTS' MOTION FOR IMMEDIATE ISSUANCE OF THE MANDATE

Contrary to the Federal Election Commission's argument in its response, the *only* requirement that Plaintiffs must satisfy in order to gain expedited issuance of the mandate is to make a showing of good cause. D.C. Cir. R. 41(a)(1) (stating that a party may "move for expedited issuance of the mandate for good cause shown"). The Plaintiffs, who prevailed in a unanimous ruling from this *en banc* Court on the issue of contribution limits, have clearly met this requirement.

As Plaintiffs pointed out in their motion, they have been litigating this case for more than two years. Because the district court denied Plaintiffs' motion for a preliminary injunction to operate free of contribution limits, they missed their opportunity to speak during the 2008 election cycle. In vacating the district court's denial of a preliminary injunction, this Court implicitly recognized that Plaintiffs have suffered and continue to suffer irreparable harm due to their inability to speak out. Given the unanimous nature of this Court's decision, there is no reason for Plaintiffs to continue to suffer the infringement of their fundamental First Amendment rights to speak and associate—and thus miss out on the opportunity to speak during the current election season. With each passing day, Plaintiffs lose time they need for SpeechNow.org to receive contributions and then use those funds to plan, produce, and broadcast advertisements.

These circumstances clearly constitute good cause. Instead of attempting to rebut this showing, the FEC simply ignores it. It then stakes its defense solely on a different test that it asserts Plaintiffs must pass—a test that would allegedly require Plaintiffs to show both that this Court will not change its decision on rehearing and that it is unlikely that the Supreme Court would grant certiorari if the FEC appeals. Conceding (at least

implicitly) that Plaintiffs can meet the first prong of its test,[1] the FEC says that Plaintiffs cannot meet the second.

In support of the test it proposes, the FEC relies solely on a single statement that it takes out of context from this Court's decision in *Johnson v. Bechtel Assocs. Prof'l Corp.*: that a "court may order immediate issuance of the mandate when 'satisfied (1) that [the] Court would not change its decision upon hearing, much less hear the case *en banc*, and (2) that there is no reasonable likelihood that the Supreme Court would grant review.'" 801 F.2d 412, 415 (D.C. Cir. 1986) (quoting *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978)). But *Johnson* is completely inapposite because it did not concern a motion to expedite issuance of a mandate, much less the requirements for prevailing on such a motion. Rather, the case concerned the circumstances in which this Court will *sua sponte* issue a mandate immediately upon the entry of judgment.

In *Johnson*, the Court held that appellants' petition for rehearing was untimely because it had, *sua sponte*, exercised its discretion to issue the mandate immediately—that is, at the same time it issued its judgment. 801

[1] The Federal Election Commission, while arguing that Plaintiffs cannot demonstrate that the Supreme Court is unlikely to grant review, does not even attempt to argue that this Court might change its decision on rehearing. FEC's Opp'n to Pls.' Mot. 2.

F.2d at 415. As a result, there was simply no period of time in which the Court could have considered a petition for rehearing. *Id*. In describing why its decision to issue the mandate immediately upon entry of judgment was appropriate, the Court offered the above-quoted statement. The Court was not—as the FEC would have this Court believe—establishing a new test for the completely different situation (presented here) in which a party seeks expedited issuance of a mandate that has not yet issued.[2] Indeed, Plaintiffs have found no case citing *Johnson* as having adopted such a test in this context.

In sum, as this Court noted in its Order of March 26, whether to grant Plaintiffs' motion to expedite turns on a single factor: whether they have shown good cause. *SpeechNow.org v. Federal Election Commission*, No. 08-5223 (D.C. Cir. Mar. 26, 2010) (order concerning issuance of mandate). Furthermore, granting Plaintiffs' motion will in no way prejudice either

[2] Likewise, in the language from the Second Circuit decision quoted by *Johnson*, the court was not setting forth a test for a party moving for expedited issuance of the mandate. *Ostrer*, 584 F.2d at 598. Instead, it was simply describing why it had, in an earlier decision, ordered *sua sponte* that a mandate be issued "forthwith" upon entry of judgment. The court explained that a court may enter such *sua sponte* orders when it finds that "the issues presented on appeal by a defendant or habeas petitioner are meritless and that the likelihood of the appellant's prevailing in further proceedings in our court or of his obtaining review by the Supreme Court is slim." *Id*.

party. Plaintiffs are not moving for rehearing, and the FEC has implicitly conceded that it will not. FEC's Opp'n to Pls.' Mot. 2. It is highly unlikely that the Court would grant any such petition. Nor would granting Plaintiffs' motion in any way prejudice either party's right to petition for certiorari if they so choose. The issuance of a mandate by a court of appeals does not divest the Supreme Court of jurisdiction to review that court's judgment. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 467 (1947) ("Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction."); *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983). Nor would any action by the district court—such as entering judgment in this case and enjoining the application of 2 U.S.C. §§ 441a(a)(1)(c) and (a)(3) against Plaintiffs—affect the Supreme Court's jurisdiction. *Carr v. Zaja*, 283 U.S. 52, 53 (1931) (holding that fact that mandate was "issued to the District Court and spread upon its records" did not defeat the Court's jurisdiction); *see also The Conqueror*, 166 U.S. 110, 113 (1897) (stating that "[t]he fact that the mandate of the circuit court of appeals to the district court, affirming the decree of that court, had gone down, is immaterial").

The FEC has already had over one month to decide what future actions to take in this case; for the reasons described above, granting

Plaintiffs' motion will not prejudice the government. In light of the Supreme Court's clear ruling in *Citizens United*—in which the Court noted that two years is too long to have to wait to speak in an election, *see Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010)—this Court should issue the mandate immediately.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 27, 2010, a true and correct copy of REPLY MEMORANUM IN SUPPORT OF APPELLANTS' MOTION FOR IMMEDIATE ISSUANCE OF THE MANDATE was filed electronically using the Court's ECF system and sent via the ECF electronic notification system to the following counsel of record:

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