UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

THE HISPANIC LEADERSHIP FUND, INC.,	)	Civ. No. 1:12-893-TSE-TRJ
Plaintiff,	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	SUPPLEMENTAL BRIEF
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S SUPPLEMENTAL BRIEF

Pursuant to the Court's Order of August 31, 2012 (Docket No. 31), defendant Federal Election Commission respectfully submits this supplemental brief addressing the questions specified in the Court's Order and responding to the Additional Brief of Hispanic Leadership Fund in Support of Its Motion for Preliminary Injunction (Docket No. 32) ("Pl.'s Add'l Br.").

I. THE COMMISSION DOES NOT CONTEST PLAINTIFF'S STANDING, THE COURT'S EXERCISE OF DISCRETION TO HEAR THIS CASE UNDER THE DECLARATORY JUDGMENT ACT, OR PLAINTIFF'S DECISION NOT TO REQUEST A THREE-JUDGE COURT

In light of *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), *overruled on other grounds, Real Truth About Abortion v. FEC*, 681 F.3d 544, 550 n.2 (2012), and other cases, the Commission does not dispute that HLF has alleged sufficiently concrete facts to demonstrate Article III standing in this pre-enforcement challenge.[1]

[1] We note, however, certain inaccuracies in the standing section of HLF's additional brief. First, HLF asserts that it has standing, in part, because "First Amendment speech is [being] chilled prior to enforcement," but there is no speech restriction at issue in this case. *See Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) ("Disclaimer and disclosure requirements may burden the ability to speak, but they . . . 'do not prevent anyone from speaking.'") (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). Second, contrary to HLF's broad statement (Pl.'s Add'l Br. at 4)

The Commission also does not dispute that, if HLF were entitled to any relief (which it is not), the Court would have the discretion to issue a judgment under the Declaratory Judgment Act. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) ("Where there is . . . a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised [under the Declaratory Judgment Act].").

Finally, the Commission agrees with HLF that as of January 1, 2007, constitutional challenges to provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), are no longer required to be heard by a three-judge district court in the District of Columbia. BCRA § 403(d)(2), 116 Stat. 114. A plaintiff may instead choose to file such a challenge before any federal district court that has jurisdiction and where venue is appropriate.

II. PLAINTIFF'S STATUTORY CLAIM FAILS BECAUSE THE CONTROLLING GROUP OF FEC COMMISSIONERS REASONABLY DETERMINED THAT PLAINTIFF'S ADVERTISEMENTS REFER TO PRESIDENT OBAMA

The Commission's response to plaintiff's statutory argument that none of its advertisements refers to a "clearly identified federal candidate" is set forth in full at pages 9-25 of the Commission's Opposition to Plaintiff's Motion for Preliminary Injunction (Docket No. 14) ("FEC Inj. Br."). As the Commission previously noted, the statutory interpretation of the

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that a "private right of action exists pursuant to" 2 U.S.C. § 437g, a private right of action can accrue only if the Commission dismisses an administrative complaint, *and* the complainant then convinces a court to declare that the Commission's dismissal was "contrary to law," *and* the Commission then fails to conform to the court's declaration. 2 U.S.C. § 437g(a)(8). To our knowledge, this exceptional set of circumstances has occurred no more than twice in the almost 40-year history of the Commission; it certainly is not open to all "individuals dissatisfied with the FEC's inaction." (Pl.'s Add'l Br. at 4.) Third, there is no merit to HLF's suggestion (*id.* at 4 n.4) that the position advocated by the Commission before this Court is inconsistent with that taken in prior cases. *See infra* p. 11.

three controlling FEC Commissioners is entitled to *Chevron* deference. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476-77 (D.C. Cir. 1992) (deferring to interpretation of controlling group of Commissioners when Commission votes 3-3 on a matter); *In re Sealed Case*, 223 F.3d 775, 779-81 (D.C. Cir. 2000) (same). As summarized below, those Commissioners reasonably determined that each of the ads HLF wishes to finance refers to a clearly identified federal candidate and therefore qualifies as an electioneering communication under the Federal Election Campaign Act ("FECA").

Advertisement 1 (FEC Inj. Br. at 15-17) begins by referring to "this Administration," which is the administration of President Barack Obama. Although that phrase by itself is not specific to any one Administration official, the ad then narrows its reference by showing an image of the White House and discussing what "[t]he White House says" on the topic being discussed. Because the building at 1600 Pennsylvania Avenue does not speak, the ad can only be referring to a person at the White House. The ad then focuses even more narrowly by discussing certain "White House" and "Administration" decisions regarding energy production; by doing so, the ad clarifies that it is talking about a person in the Obama Administration at the White House who has control over energy decisions. Finally, the ad concludes by telling viewers to call the White House and demand a change to the "American energy plan." The person at the White House who decides nationwide policies and has the power to order them changed is the President of the United States. *See* U.S. Const. Art. 2 § 1 ("The executive Power shall be vested in a President of the United States of America.").

HLF asserts that this ad "refer[s] simply to the institutions at issue," not to the President because "[t]here are dozens or hundreds, if not more, persons within the Executive Branch that have control over, or the ability to impact, U.S. energy policy." (Pl.'s Add'l Br. at 24.) But the

ad does not refer to the "Executive Branch," or the Secretary of Energy, or any of these unnamed "dozens or hundreds of people"; it tells people to call *the White House* — at a phone number that the White House's website lists under the heading "*Call the President*"[2] — and demand a new policy for the country. The only elected official at the White House, and so the only person for whom constituent phone calls could ultimately make any difference, is the President.[3]

Advertisement 2 (FEC Inj. Br. at 17-18) contains an audio recording of President Obama's voice.[4] That recording is an unambiguous reference to President Obama because it is, in fact, President Obama. Thus, the audio clip makes "the identity of the candidate . . . apparent by unambiguous reference," 2 U.S.C. § 431(18)(C), just as a photograph would, *see* 2 U.S.C. § 431(18)(B).

Advertisement 3 (FEC Inj. Br. at 18-19) tells the viewer to "Call the White House" and demand a new American energy plan. Just like in Advertisement 1, this reference to the White House has no reasonable meaning other than telling people to call and communicate their views to the President. The fact that a viewer will not actually speak with the President himself (Pl.'s Add'l Br. at 28) is meaningless. The same could be said for any political ad imploring a viewer to "Call your Congressman": The fact that the Congressman is not personally going to answer the phone introduces no ambiguity as to whom the ad refers. Plaintiff's suggestion that its ad

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[2] *See* http://www.whitehouse.gov/contact/write-or-call (last visited Sept. 12, 2012).

[3] For a similar reason, HLF's discussion of a 1985 Commission finding that an ad did not clearly identify a candidate by referring to the "House" (Pl.'s Add'l Br. at 14-15) supports the Commission's position: There are 435 congressional candidates in the House of Representatives; there is only one presidential candidate at the White House.

[4] As it has done repeatedly in this case, HLF attacks a straw man by arguing that references in this ad and others to "the government" do not clearly identify a federal candidate. (Pl.'s Add'l Br. at 26-27.) The Commission notes yet again that "none of [its] analyses hinged on the advertisements' use of the word 'government.'" (FEC Inj. Br. at 12-13; *see also id*. at 17 n.5, 19 n.6, 21 n.8.)

refers only to "someone" who happens to be on phone duty at the White House switchboard borders on comical.

Advertisement 4 (FEC Inj. Br. at 19-20) shows a picture of the White House while instructing the viewer to "[c]all Secretary Sebelius, tell her it's wrong for her *and the Administration* to trample the most basic American right" (emphasis added). As in Advertisement 1, the combination of references to (1) "the Administration" (2) the White House (here, depicted visually but not mentioned audibly), and (3) changes in nationwide policy unambiguously refer to the White House official who has the power to set such policies — the President. HLF presents no specific opposition to the Commission's analysis regarding this ad, instead noting the obvious and uncontroverted point that "the Administration" *could be* ambiguous in other contexts. (*See* Pl.'s Add'l Br. at 28-29.) But that is irrelevant: In *this* context, the Commission reasonably determined that there is no ambiguity in the combination of these three simultaneous references.

Advertisement 5 (FEC Inj. Br. at 20-21) refers to the "White House" as the "parents" and "family" of "government run healthcare." HLF does not appear to dispute the Commission's determination that the "parent" of that legislation at the "White House" — legislation that HLF calls "Obamacare" (Compl. ¶ 36) — is President Obama. Instead, HLF's only response to this uncontroverted fact is to accuse the Commission of trying "to stretch and twist the law in whatever way was necessary to ensure regulation of the proposed communications." (Pl.'s Add'l Br. at 29.) That *ad hominem* attack demonstrates no flaw in the Commission's reasoning, much less any deficiency sufficient to overturn the Commission's determination under the deferential *Chevron* standard.

III. *CITIZENS UNITED* FORECLOSES PLAINTIFF'S CONSTITUTIONAL CLAIM

If the Court finds that the Commission was reasonable in its statutory interpretation that HLF's ads would be electioneering communications, plaintiff's constitutional challenge to that interpretation must fail. The only consequence of the ads being deemed electioneering communications is that they will trigger disclosure requirements if aired — and not that HLF will be prohibited from airing such advertisements. The plain holding of *Citizens United v. FEC*, 130 S. Ct. 876 (2010), is that Congress can constitutionally mandate disclosure for electioneering communications to further the important governmental interest in providing information to the public regarding who is financing candidate speech shortly before an election.

The question presented in *Citizens United* regarding disclosure was whether the government can constitutionally mandate disclaimers and financial reporting for electioneering communications that do not expressly advocate for or against candidates. The plaintiff in that case argued that the First Amendment limited the application of BCRA's disclosure requirements for electioneering communications to ads that are "the functional equivalent of express advocacy." *Id*. at 915. The Court flatly "reject[ed] this contention," *id*., and upheld the disclosure requirements as applied to electioneering communications that do *not* expressly advocate for or against a candidate. *Id*. at 915-16. Eight Justices applied intermediate scrutiny and agreed that disclosure is a constitutionally permissible method of furthering the public's important interest in knowing who is responsible for pre-election communications that speak about candidates. *See id*. As the Court explained, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id*. at 916; *see also Doe v. Reed*, 130 S. Ct. 2811,

2837 (2010) (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").

Indeed, the Court not only rejected the contention that ads must be express advocacy or its equivalent to be subject to disclosure requirements, but also held that the Constitution permits Congress to require disclosure for electioneering communications that merely *mention* federal candidates and contain *no* words of electoral advocacy. *Citizens United*, 130 S. Ct. at 915-16 ("Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election."); *see also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54-55 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012) ("[I]t [is] reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.").[5]

Even though *Citizens United* is dispositive here, HLF simply ignores the Supreme Court's holding that the government can lawfully mandate disclosure for non-campaign-

[5] The Eighth Circuit recently held unconstitutional a Minnesota statute requiring certain financial disclosure in connection with candidate advocacy, but the court noted that the requirements imposed by that statute "were *much different*" (and far more onerous) than the federal statute that was upheld in *Citizens United* and is at issue here. *Minn. Concerned Citizens for Life, Inc. v. Swanson*, No. 10-3126, slip op. at 16 n.9 (8th Cir. Sept. 5, 2012) (emphasis added), http://www.ca8.uscourts.gov/opndir/12/09/103126P.pdf. In contrast, an even more recent decision from the Seventh Circuit upheld a state statute that mandated disclosure for a category of advertising highly similar to FECA's definition of "electioneering communications," noting that "*Citizens United* made clear that the wooden distinction between [candidate] advocacy and issue discussion does not apply in the disclosure context." *Ctr. for Individual Freedom v. Madigan*, No. 11-3693, slip op. at 34 (7th Cir. Sept. 10, 2012), http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=11-3693_002.pdf.

advocacy electioneering communications. Instead, HLF raises three meritless constitutional arguments.

First, HLF cites the Supreme Court's observation in *Buckley* that FECA's "clearly identified candidate" provision "requires . . . an explicit and unambiguous reference to the candidate" and that "[s]uch other unambiguous reference would *include* use of the candidate's initials . . . , nickname . . . , his office . . . , or his status as a candidate." *Buckley v. Valeo*, 424 U.S. 1, 43 & n.51 (1974) (emphasis added). According to HLF, this footnote was a "limiting construction" intended to address "the 'vagueness concerns' present in *Buckley*, with respect to the term 'clearly identified candidate.'" (Pl.'s Add'l Br. at 25.)

That characterization is totally and unmistakably false. The Court expressed *no* vagueness concerns about the "clearly identified federal candidate" statute, which was not even at issue in *Buckley*. Indeed, the entire point of the footnote on which HLF relies was to note this provision as an example of statutory language that was *not* vague, and thereby to differentiate it from the different FECA provision that the Court *did* find to be vague in the text accompanying that footnote. *See* 424 U.S. at 39-44 (narrowly construing FECA's definition of expenditures "relative to" candidates).[6] In any event, the footnote merely states that unambiguous references to candidates "would *include*" certain types of descriptors, such as the candidate's office. *Id*. at 43 n.51 (emphasis added). That language manifestly does not purport to provide an exhaustive list of possible ways to meet the statutory standard. *See Jones v. Am. Postal Workers Union*, 192

[6] More generally, *Buckley* imposed numerous limiting constructions on FECA's provisions, and the Court each time explicitly stated that it was doing so. *See, e.g.*, 424 U.S. at 44 ("[T]o preserve the provision against invalidation on vagueness grounds, [it] must be construed . . . ."), 77-78 ("Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute . . . to avoid the shoals of vagueness."), 80 ("To insure that the reach of [the statute] is not impermissibly broad, we construe [it] . . . ."). There is no such statement in the Court's mention of the "clearly identified federal candidate" provision. *See id*. at 43 & n.51.

F.3d 417, 426 (4th Cir. 1999) (collecting cases holding that word "including" in statutory definition "merely provides a *nonexclusive* list" of items that satisfy definition) (emphasis added). Thus, plaintiff's argument (*see* Pl.'s Add'l Br. at 15) that *Buckley*'s dicta regarding possible ways to satisfy the statute is actually a holding setting forth the exclusive ways to satisfy it cannot be reconciled with the plain text of the opinion.

Second, HLF appeals to *FEC v. Christian Action Network* ("*CAN*"), which criticized the Commission's application of a statute that is not at issue here. 894 F. Supp. 946 (W.D. Va. 1995), *aff'd*, 92 F.3d 1178 (4th Cir. 1996). That case involved a statutory ban on certain express candidate advocacy, 2 U.S.C. § 441b, and the court found that the Commission's implementation of that ban was constitutionally impermissible because it conflated issue speech with candidate advocacy. *See CAN*, 894 F. Supp. at 953-55. HLF fails to mention that the Supreme Court in *McConnell* overturned the Fourth Circuit's holding on this issue. *See* 540 U.S. at 278 n.11 (Thomas, J., dissenting) ("The [majority] . . . has, in one blow, overturned every Court of Appeals that has addressed this question [including] *FEC v. Christian Action Network* . . . ."); *see also Real Truth About Abortion*, 681 F.3d at 550 n.2 (noting that *McConnell* overturned *Virginia Society for Human Life*, which relied on *CAN*).

But even if *CAN* were still good law, it would have no relevance here. *Citizens United* put to rest the notion that there is a constitutional distinction for *disclosure* purposes between issue advocacy that mentions candidates and candidate advocacy that mentions issues. *See supra* pp. 6-7. Congress can constitutionally mandate disclosure regarding both categories of advertising. Regardless, the specific linguistic question here is not remotely like the dispute in *CAN*, where the court declined to credit the testimony of an expert witness who testified that certain facially neutral terms in an ad were actually "codewords" conveying a normative

connotation about a candidate. 894 F. Supp. at 956 n.14 (noting expert's opinion that that "quota codeword . . . was unfavorable to [presidential candidate] Clinton"). There are no "codewords" here: The Commission has never suggested that the term "White House" is a coded message telling viewers to vote against the President. Rather, the term "White House" is simply a common way to denote the President of the United States (*see* Compl. Exh. 4 at 4 n.1 (noting metonymic use of "White House")), and the Commission reasonably determined that HLF's ads employ the term in that common manner. Thus, neither the constitutional analysis nor the interpretive methodology of *CAN* has any bearing on this case.

Third, HLF claims that the Commission has "alter[ed] both the long-established understanding of 'clearly identified' and the intended scope and operation of the 'electioneering communication' statute . . . with absolutely no prior notice to would-be speakers" in violation of the Due Process Clause of the Fifth Amendment. (Pl.'s Add'l Br. at 22-23 (citing *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012)).)[7] HLF's complaint states no claim under the Due Process Clause, and its argument should be rejected on that basis alone. *See Woody v. Bank of Am. Corp.*, 405 F. App'x 798, 799 (4th Cir. 2010) (holding that plaintiffs waived claim that they "failed to raise . . . to any legally discernible degree in their complaint" even though "they attempted to elaborate on it in subsequent filings"); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 563, 567 (E.D. Va. 2001) (rejecting plaintiff's attempt to seek summary judgment on claim not included in complaint).

[7] In the course of making this argument, HLF implies that the division among the FEC's Commissioners on the advisory opinion request related to this matter demonstrates the vagueness of the Commission's approach. (*See* Pl.'s Add'l Br. at 21.) As the Commission noted in its prior brief, however, the Fourth Circuit has rejected precisely this argument and held that the existence of close cases as to which reasonable people can disagree is to be expected in a content-based standard; such disagreements demonstrate no constitutional infirmity or vagueness. (*See* FEC Inj. Br. at 21-22 (discussing *Real Truth About Abortion*, 681 F.3d at 554).)

But even if the Court were to consider this argument on its merits, it would fail because the Commission has never interpreted the "clearly identified federal candidate" provision in a manner inconsistent with its position in this case. Indeed, HLF does not actually identify any such inconsistency, pointing instead to (1) statements of elected officials unconnected to the FEC (Pl.'s Add'l Br. at 18-19); (2) court briefs that take precisely the same position the Commission does here, *i.e.*, that there is no infirmity in the provision (Pl.'s Add'l Br. at 20-21);[8] and (3) the Commission's regulation noting that the statute encompasses "an unambiguous reference *such as* 'the President [and other examples]'" (Pl.'s Add'l Br. at 19-20 (quoting 11 C.F.R. § 100.17)). As discussed above in the context of *Buckley*, a non-exhaustive set of examples does not purport to identify every possible way in which an ad might refer to a clearly identified candidate. *See supra* pp. 8-9. Accordingly, HLF's allegations of inconsistencies in the Commission's position are meritless, as is the entirety of its newly found Due Process Clause claim — which fails to appear in HLF's complaint.

CONCLUSION

Congress has charged the Commission with implementing disclosure provisions to ensure that the public can learn who pays to broadcast electioneering communications shortly before an election. A controlling group of Commissioners reasonably determined that HLF's proposed advertisements would fall within the statutory definition of such communications because the ads refer to a candidate for President of the United States. Thus, as *Citizens United* made clear, HLF

[8] HLF's quotation (Pl.'s Add'l Br. at 20-21) of the Solicitor General's statement at the *McConnell* oral argument regarding the use of a candidate's name is patently disingenuous: The statute *explicitly* provides that a candidate can be clearly identified by means other than his or her name. 2 U.S.C. § 431(18)(B)-(C). The Commission accordingly has never taken — and could never take — the position that the only way to clearly identify a candidate is by name, and the Solicitor General's response to a question about whether the statute "in effect" provided a "safe harbor" for advertisers who omit candidate names cannot reasonably be understood to have adopted such an impossible position on behalf of the entire United States government.

has an undisputed First Amendment right to broadcast those ads — *and* the public has an equally important First Amendment interest in knowing who pays for them. Nothing in the Constitution prohibits the Commission from properly implementing its statutory directive to further this critical informational interest.

Respectfully submitted,

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September 13, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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