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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

GARY E. JOHNSON, *et al.*,	
Plaintiffs,	Civ. No. 8:12-1626 (ODW-JC)
v.	
FEDERAL ELECTION COMMISSION,	MEMORANDUM IN OPPOSITION
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR MANDATORY INJUNCTION, OR IN THE ALTERNATIVE WRIT OF MANDATE, OR OTHER APPROPRIATE RELIEF

INTRODUCTION

Plaintiffs have filed an "application for a mandatory injunction, writ of mandate, or other appropriate relief" requesting a three-judge panel of this Court to direct the Federal Election Commission ("FEC" or "Commission") to disburse $747,115.34 to their Presidential campaign. The application should be denied for at least three reasons: (1) This Court lacks jurisdiction because the Court of Appeals for the D.C. Circuit has exclusive jurisdiction to review in the first instance the Commission's administrative determinations under the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq*. ("Fund Act"); (2) plaintiffs have failed to meet the Court's procedural and substantive requirements for ex parte relief; and (3) the claims in this lawsuit are frivolous.

Plaintiffs Gary E. Johnson, James P. Gray, and Gary Johnson 2012, Inc. are, respectively, the Presidential and Vice-Presidential nominees of the Libertarian Party and their campaign committee. Plaintiffs Johnson and Gray ("the candidates") applied for pre-general election funding pursuant to the Fund Act, which provides for the grant of public funds to eligible campaigns for President. The Commission is the agency of the United States government empowered with exclusive jurisdiction to administer and interpret the Fund Act, in addition to the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031 *et seq*., and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-57. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a)

and 437g.

In a final determination made pursuant to 26 U.S.C. § 9005(b), the Commission on September 18, 2012, ruled that the candidates "are not entitled to receive any pre-election payments of public funds for the general election pursuant to 26 U.S.C. § 9004(a) and 11 C.F.R. § 9004.2." (FEC, Statement of Reasons in Support of Final Determination on Eligibility and Entitlement (In the Matter of Governor Gary Johnson and Judge James Gray, LRA #905) at 1 ("Statement of Reasons"), Exhibit ("Exh.") 5 to Declaration of James P. Gray ("Gray Decl.").) In its Statement of Reasons, the Commission explained that the candidates were ineligible for such funding because neither they nor the Libertarian Party had received 5% or more of the vote in the 2008 Presidential election, as expressly required by the Fund Act.

Plaintiffs have now filed this lawsuit and a contemporaneous ex parte application. For the reasons discussed in this opposition, the ex parte application should be denied.

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE CONGRESS GRANTED ONLY THE D.C. CIRCUIT JURISDICTION TO REVIEW A COMMISSION DETERMINATION UNDER THE FUND ACT

This Court should first deny plaintiffs' application because the Court lacks statutory jurisdiction to hear this matter. Plaintiffs' complaint asserts that this Court has jurisdiction pursuant to 26 U.S.C. § 9011(b)(2), but that extraordinary provision — calling for a three-judge district court and a direct appeal to the Supreme Court — is inapplicable to judicial review of determinations and other actions by the Commission under the Fund Act. Here, there is no dispute that the Commission has made a "final determination" declining pre-election funding for Johnson and Gray. (Gray Decl. ¶ 12 &

Exh. 5 (FEC Statement of Reasons).) Such determinations are subject to review *only* under section 9011(a), which states: "Any certification, *determination*, or other action by the Commission made or taken pursuant to the provisions of [the Fund Act] *shall* be subject to review by the United States Court of Appeals for the District of Columbia . . . ." 26 U.S.C. § 9011(a) (emphases added). The D.C. Circuit thus has *exclusive* jurisdiction to review actions brought to review the kind of Commission determination at issue here.

As the Eleventh Circuit stated when addressing the identical issue:

> The statutory text clearly designates the D.C. Circuit as the forum for judicial review of "[a]ny certification, determination, or other action" by the Commission. 26 U.S.C. § 9011(a). Furthermore, a thirty-day time period is established for any petition seeking judicial review of such action by the Commission. *Id.* Section 9011(b), in contrast, gives district courts jurisdiction over suits that seek to implement the chapter. In order for the two subsections of section 9011 to have meaning, those actions covered by subsection (b), which may be entertained by courts other than the D.C. Circuit, must be suits that do not concern review of certifications, determinations, or other actions by the Commission.

FEC v. Reform Party of the United States, 479 F.3d 1302, 1308 (11th Cir. 2007).

"It is well settled that if Congress, as here, specifically designates a forum for judicial review of administrative action, that forum is exclusive, and this result does not depend upon the use of the word 'exclusive' in the statute providing for a forum for judicial review." *UMC Indus., Inc. v. Seaborg*, 439 F.2d 953, 955 (9th Cir. 1971); *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) ("[W]ith regard to final FCC actions, a statute which vests

jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (footnote omitted)). Allowing litigants to file for review of an agency action in multiple jurisdictions runs the risk of duplicative litigation. *Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422, 85 S. Ct. 551, 558, 13 L. Ed. 2d 386, 13 L. Ed. 2d 386 (1965) ("A rejection of this [exclusive jurisdiction] doctrine here would result in unnecessary duplication and conflicting litigation.").[1]

Plaintiffs' filing before this Court is an attempt to evade section 9011(a)'s explicit and exclusive grant of jurisdiction to the D.C. Circuit for review of determinations under the Fund Act, precisely what plaintiffs seek to review here. Plaintiffs wrongly assert that this Court has jurisdiction pursuant to section 9011(b)'s jurisdictional grant, which allows the "Commission, the national committee of any political party, and individuals eligible to vote for President" to bring actions "*as may be appropriate* to implement or construe any provisions of this chapter." 26 U.S.C. § 9011(b)(1) (emphasis added). As the Supreme Court has explained, however, "'appropriate' actions [under § 9011(b)] by private parties are actions that do not interfere with the FEC's responsibilities for *administering* and enforcing the Act." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 486-87, 105 S. Ct. 1459, 84 L. Ed. 2d 455, 53 U.S.L.W. 4293 (1985)

[1] This case presents exactly this kind of unnecessarily duplicative and conflicting litigation. On September 26, 2012, FEC counsel left a voicemail for plaintiffs' counsel Paul Rolf Jensen after learning that plaintiffs intended to file this case in the Central District of California. (*See* Declaration of Paul Rolf Jensen at ¶ 3.) The voicemail indicated to Jensen that the case should be filed in the D.C. Circuit and even provided him with the citation to *FEC v. Reform Party of the United States*, 479 F.3d 1302, 1308 (11th Cir. 2007), which makes clear that there is no district court jurisdiction for this case. Plaintiffs nonetheless filed in this Court. On October 3, 2012, FEC counsel Seth Nesin had another telephone conversation with plaintiffs' counsel, who informed Mr. Nesin that plaintiffs would also be filing a separate action in the D.C. Circuit regarding the same legal issues.

(emphasis added). The kind of routine determination at issue here — whether a particular candidate is eligible for public funding, and if so, for what amount — is not the kind of issue of "great importance" that Congress intended be resolved by a three-judge court and direct appeal to the Supreme Court. *Id.* at 487. Rather, it is precisely the kind of ordinary administrative determination identified in section 9011(a) that must be reviewed by the D.C. Circuit.

Plaintiffs also rely on 28 U.S.C. § 1651, the All Writs Act, as a source of jurisdiction for their ex parte application. The All Writs Act, however, is not an independent source of jurisdiction. *See Malone v. Calderon*, 165 F.3d 1234, 1237 (9th Cir. 1999) ("Contrary to Malone's argument, the All Writs Act does not operate to confer jurisdiction and may only be invoked in aid of jurisdiction which already exists."); *Stafford v. Superior Ct. of Cal.*, 272 F.2d 407, 409 (9th Cir. 1959) ("The All Writs Act . . . does not operate to confer jurisdiction . . . since it may be invoked by a district court only in aid of jurisdiction which it already has."). The All Writs Act "'is not a grant of plenary power to the federal courts. Rather, it is designed to aid the courts in the exercise of their jurisdiction.' An order is not authorized under the Act unless it is designed to preserve jurisdiction that the court has acquired from some other independent source in law." *Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993) (citation omitted). Because this Court has no source of statutory jurisdiction, the All Writs Act cannot provide jurisdiction or otherwise be invoked to "preserve" jurisdiction that does not exist. Accordingly, plaintiffs' application must be dismissed for lack of subject-matter jurisdiction.

II. PLAINTIFFS FAIL TO MEET THE STANDARDS FOR EX PARTE RELIEF

Plaintiffs have filed their application on an ex parte basis, but ignore the well-settled law in this district regarding the appropriate procedural and

substantive requirements for ex parte relief.

First, plaintiffs have not met the most basic procedural requirement of filing — separately from its motion requesting relief — a motion explaining "why the regular noticed motion procedures must be bypassed." *See Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995) ("*These are separate, distinct elements for presenting an ex parte motion and should never be combined. The parts should be separated physically and submitted as separate documents*" (emphasis in original, footnote omitted)). Instead, plaintiffs have filed a single document that purports to be a combined "ex parte application" for an injunction or "writ of mandate" and memorandum in support.

Second, ex parte relief is appropriate in this district, if the Court has jurisdiction, only if the moving party can establish both (1) that its cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures, and (2) that it is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect. *Id.* Plaintiffs have failed to meet either prong of this two-part test.

Regarding the "irreparable prejudice" prong, "it will usually be necessary to refer to the merits of the accompanying proposed motion, because if it is meritless, failure to hear it cannot be prejudicial." *Id*. Here, as discussed in Parts I & III, there are two independent reasons why plaintiffs' application must be denied, so plaintiffs would not be irreparably prejudiced if this Court were to hear their motion under the regular procedures: the Court lacks jurisdiction and plaintiffs' legal position is completely meritless. In other words, because plaintiffs have brought suit in the wrong court and because their legal arguments are not colorable, they would suffer no prejudice if the Court were to deny them ex parte relief and instead hear this matter according to normal

procedures. Regarding the "fault" prong, plaintiffs also fail to establish that they are "without fault, or guilty only of excusable neglect" for the alleged crisis in which they now find themselves. *Id.* at 493. As described in the Declaration of James P. Gray and plaintiffs' exhibits, plaintiffs' own choices and dilatory actions led to the timing problem plaintiffs now perceive. Johnson and Gray received the nominations of the Libertarian Party on May 5, 2012. (Gray Decl. ¶ 5). Three days later, on May 8, 2012, their counsel sent a letter to the FEC's General Counsel requesting funding and acknowledging that the FEC "website states that no third party candidate this cycle will qualify for federal general election public funding, because during the 2008 cycle, no third party candidate received 5% of the vote in the general election." (Gray Decl. Exh. 1.) Thus, plaintiffs were put on notice at that time that the Commission's interpretation of the relevant statute precluded the funding they now request.

Even if plaintiffs were justified in waiting for a final determination by the Commission before filing suit, that determination was substantially delayed by plaintiffs' failure to follow the appropriate procedures before the Commission. The Fund Act specifies the exact steps that candidates must take to apply for funding. 26 U.S.C. § 9003. In particular, the candidates themselves must certify to the Commission in writing that they will abide by certain bookkeeping, audit, and other requirements to be eligible for public funds. 26 U.S.C. §§ 9003(a), (c); 11 C.F.R. §§ 9003.1, 9003.2. Rather than complying with these requirements in the first instance, plaintiffs instead had their counsel send a letter to the FEC General Counsel dated May 8, 2012, which purported to request the disbursement of funds. (Gray Decl. Exh. 1.) Commission staff contacted plaintiffs' counsel and referred him to the applicable requirements. Johnson and Gray then submitted a letter dated June 11, 2012, applying for public funds for the general election, but that letter also failed to meet all the

necessary requirements. (Gray Decl. Exh. 2.) Commission staff informed counsel that the candidates' letter was deficient in several respects, and provided a draft letter for the candidates to complete and submit. The candidates submitted an amended letter dated June 27, 2012, which was received on July 5, 2012. (Gray Decl. Exh. 3.) In sum, Johnson and Gray delayed the processing of their funding request *by nearly two months* by failing to follow the appropriate steps mandated by the statute and regulations.[2] Thus, plaintiffs' purported need for immediate judicial review is due largely to their own earlier conduct.

III. PLAINTIFFS' LEGAL ARGUMENT IS FRIVOLOUS

Even if the Court were to find that it has jurisdiction, it should deny plaintiffs' relief because their argument is completely inconsistent with the plain language of the Fund Act. Plaintiffs argue they are entitled to pre-election funding based on 26 U.S.C. § 9004(a)(2)(A), which provides funding for "eligible candidates of *a minor party* in a presidential election" (emphasis added). But the Libertarian Party is not a "minor party" *as defined by the Fund Act*.

According to the Fund Act, a "minor party" is a "political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office." 26 U.S.C. § 9002(7); *see* 11 C.F.R. § 9002.7. *See also Hassan v. FEC*, No. 11-2189-EGS, 2012 WL 4470304, at *1 (D.D.C. Sept. 28, 2012) ("A 'minor' party is one whose candidate received between 5 and 25 percent of

[2] On August 6, 2012, the Commission notified plaintiffs of an initial determination denying Johnson and Gray's application for pre-election funding, although the Commission indicated that it was willing to consider any additional information before finalizing the determination. (Gray Decl. Exh. 4.) Plaintiffs responded on August 18, 2012, and stated that they had "nothing more to submit." (Gray Decl. Exh. 4 at final page (unnumbered).)

the total popular vote in the preceding presidential election . . . . Candidates of parties receiving less than five percent of the vote receive nothing." (citations omitted)). Because the Libertarian Party received less than 5% of the vote in 2008, it does not meet the Fund Act's definition of a "minor party." Thus, it is a "new party," which the Fund Act defines as "a political party which is neither a major party nor a minor party." 26 U.S.C. § 9002(8). And section 9004(a)(2)(A), upon which plaintiffs rely, provides *no* pre-election funding to candidates of new parties.

Despite the Fund Act's clear definitions, plaintiffs argue that Congress did not intend for the term "minor party," as used in section 9004(a)(2)(A), to incorporate the meaning of the term "minor party" as defined in section 9002(7) of the same statute. Accordingly, they claim they are eligible for funding because, even though the Libertarian Party is not a "minor party" as defined in the Fund Act, that definition is purportedly "not relevant" to the minor party funding mechanism in 26 U.S.C. § 9004(a)(2)(A). (Ex Parte App. at 5.) The Court should reject plaintiffs' completely unsupported attempt to rewrite the Fund Act.

Plaintiffs' filing with this Court does not attempt to explain why the definition of "minor party" should be ignored when interpreting section 9004(a)(2)(A), but their reasoning was previously explained in correspondence to the Commission. In sum, plaintiffs argue that the Commission's interpretation would render sections 9004(a)(2)(A) and 9004(a)(2)(B) redundant (*see* Gray Decl. Exh. 1), but as explained in the Commission's Statement of Reasons, plaintiffs' argument misunderstands the difference between these two subparagraphs. (*See* Gray Decl. Exh. 5 at 3-8.)

Subparagraph (A) turns on the party's previous nominee's performance in the last election, no matter who that nominee was. If a party's nominee

received between 5% and 25% of the popular vote in the prior presidential election, then the minor party's candidate in the upcoming election is entitled to pre-election funding, regardless of whether the nominee is the same person in both elections. Thus, the entitlement belongs to "the eligible candidates of a minor party in a presidential election," 26 U.S.C. § 9004(a)(2)(A), with status as a "minor party" dependent on the party's past performance, 26 U.S.C. § 9002(7). Plaintiffs acknowledge that the Libertarian Party does not meet this definition. (*See* Gray Decl. ¶ 7.)

In contrast, subparagraph (B) turns on the *current* nominee's *individual* performance in the past election. The entitlement belongs to "the candidate of one or more political parties (not including a major party) for the office of President" if the candidate "was a candidate for such office in the preceding presidential election" and "received 5 percent or more but less than 25 percent of the" popular vote. 26 U.S.C. § 9004(a)(2)(B). Thus, for example, because Ross Perot received more than 5% of the popular vote in 1992, he was eligible for pre-election funding in 1996 if he obtained the nomination of any new or minor party, assuming he met the other conditions for eligibility. *See* FEC Advisory Opinion 1996-22, 1996 WL 341164, at *1.

Therefore, rather than being redundant, subparagraphs (A) and (B) expressly contemplate two different scenarios where an eligible candidate of a non-major party may qualify for funding — based either on a minor party's performance or a candidate's personal performance in the prior presidential election — and adjust the formula for funding accordingly. The Commission's regulations at 11 C.F.R. § 9004.2 further clarify the statutory requirements for pre-election funding. Section 9004.2(b), applying 26 U.S.C. § 9004(a)(2)(A), provides that the eligible candidate of a "minor party *whose candidate for the office of President in the preceding election received at least 5% but less than*

25% of the total popular vote is eligible to receive pre-election payments." 11 C.F.R. § 9004.2(b) (emphasis added). Section 9004.2(c), implementing 26 U.S.C. § 9004(a)(2)(B), provides that the nominee of a new party is entitled to funds only "if *he or she* received at least 5% but less than 25% of the total popular vote in the preceding election" (emphasis added).

The Fund Act makes repeated references in numerous provisions to major parties, minor parties, and new parties. These three terms are separately and explicitly defined by the statute. Plaintiffs offer absolutely no basis for disregarding the plain language and meaning of "minor party" as defined in section 9002(7) and implemented in section 9004(a)(2).

IV. PLAINTIFFS' APPLICATION FOR A THREE-JUDGE PANEL SHOULD BE DENIED

Plaintiffs have asked for a three-judge court to decide this case, pursuant to 26 U.S.C. § 9011(b)(2), which provides that cases brought under the provision "shall be heard and determined by a court of three judges in accordance with the provisions of [28 U.S.C. § 2284]." However, because this Court lacks jurisdiction and plaintiffs' claim is frivolous, a three-judge panel would be inappropriate.

As explained *supra* Part I, plaintiffs' challenge should have been brought before the D.C. Circuit, and this Court lacks statutory jurisdiction. "[A]n individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel." *Wertheimer v. FEC*, 268 F.3d 1070, 1072 (D.C. Cir. 2001) (suit brought under 2 U.S.C. § 9011(b)) (citing *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 95 S.Ct. 289 (1974); *Reuss v. Balles*, 584 F.2d 461, 464 n.8 (D.C. Cir. 1978). A three-judge court is not required "where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez*, 419 U.S. at 100;

Carrigan v. Sunland-Tujunga Tel. Co., 263 F.2d 568, 572 (9th Cir. 1959) ("A fortiori, it is not required that the additional judges be summoned, when, as here, it appears from the complaint itself that the case is not one within the jurisdiction of the court."); *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 262-63 (D.D.C. 2002) (finding that convening a three-judge court was unwarranted since plaintiff lacked standing to bring his constitutional claims); *see also Gonzalez*, 419 U.S. at 96-97 ("interpretation of the three-judge-court statutes has frequently deviated from the path of literalism. If the opaque terms and prolix syntax of these statutes were given their full play, three-judge courts would be convened . . . in many circumstances where such extraordinary procedures would serve no discernible purpose." (internal footnote omitted).

Moreover, even if this Court had jurisdiction, plaintiffs' request for a three-judge court should be denied because this case fails to present a substantial claim. Section 9011(b) explicitly requires that it be construed in accordance with the three-judge-court provision in 28 U.S.C. § 2284. Courts have interpreted Section 2284 to require a three-judge court only if the complaint states a "substantial" claim. *Giles*, 193 F. Supp. 2d at 262. A three-judge court is not necessary if the claim is "wholly insubstantial," "frivolous," or "obviously without merit." *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *see also Wicks v. S. Pac. Co.*, 231 F.2d 130, 134 (9th Cir. 1956) ("We believe that a single district judge may dismiss a complaint [brought under a three-judge court statute] if he decides that a substantial constitutional issue is not raised therein."). For the reasons stated *supra* Part III, plaintiffs' claims are frivolous and therefore a three-judge panel is unwarranted.

CONCLUSION

For the foregoing reasons, plaintiffs' ex parte application should be denied.

Respectfully submitted,

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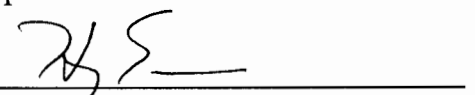

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