UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, and Hillary for America, et al., Defendant-Intervenors.	Civ. No. 19-2336 (JEB) REPLY TO MOTION FOR STAY PENDING APPEAL

DEFENDANT FEDERAL ELECTION COMMISSION'S
REPLY IN SUPPORT OF MOTION FOR STAY OF REMAND
ORDER PENDING APPEAL

The Federal Election Commission ("Commission" or "FEC") has demonstrated in its Motion for a Stay of Remand Order Pending Appeal (Docket No. 13), that a stay of this Court's December 8, 2022, Order is warranted to permit the FEC to seek further review at the Court of Appeals.[1] In its opposition (Docket No. 75), plaintiff argues this order may not be a final

[1] The Commission is filing this reply brief on an expedited basis following the submission of plaintiffs' opposition on Wednesday January 4, 2023, at 11:53 p.m. The conformance period runs thirty days after the Court's December 8, 2022 order. Thirty days from that date is Saturday, January 7, 2023. Because the conformance period ends on a Saturday, however, the conformance window closes on Monday, January 9. *See* Fed. R. Civ. P. 6(a)(1)(C). The Commission seeks a stay order in advance of that date.

Contrary to plaintiffs' representation (Opp'n at 9 n.2), counsel for the Commission proposed a stipulated extension of the conformance period and an agreed briefing schedule in light of the intervening holidays. Counsel for plaintiffs indicated that the extension would be of insufficient benefit and declined.

appealable order, that the Commission has waived arguments, and it is unlikely to succeed. As explained below, circuit precedent dictates that the order here is appealable; the arguments presented by the parties, including the intervening defendants in this proceeding, may properly be reviewed on appeal; and the questions presented in this case are worthy of such consideration.

ARGUMENT

1. Contrary to what plaintiff argues in its opposition (Opp'n at 7-8.), absent a stay of the order remanding to the agency, the injury suffered by the agency satisfies the irreparable harm standard. The Commission has shown that irreparable harm is established by a "*de facto* deprivation of the basic right to appeal," which would be the case here. (Mot. at 3 quoting *Republican Nat'l Comm. v. Pelosi*, No. 22-659, 2022 WL 1604670, at *4 (D.D.C. May 20, 2022).) Here, without a stay the Commission would be forced to conform and give up the right to appeal or give up its exclusive jurisdiction over this case. (Mot. at 3-5.).

2. In response, plaintiffs are mistaken when they argue that the remand order at issue here is not an appealable order. (Opp'n at 9-13.) The Commission is permitted to appeal under an exception to the finality requirement because an "agency cannot later challenge its own actions complying with a remand order, whereas a private party dissatisfied with the action on remand may still challenge the remanded proceedings" after they are complete. *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656-57 (D.C. Cir. 2013). The D.C. Circuit has been able to decide cases the FEC appealed from remand orders to the agency and has determined that is the proper course. *See, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (appeal from remand order from district court); *Democratic Cong. Campaign Comm. v. FEC* ("*DCCC*"), 831 F.2d 1131, 1135 (D.C. Cir. 1987) (explaining that remand should be remedy rather than district court "dictating the ultimate outcome"). Indeed, if the FEC complied with the Court

order in a way that CLC urges here, the agency could hardly sue itself for further review of the initial decision. The *NRSC* case proves this point. CLC observes that the case establishes that "the D.C. Circuit may still defer to the views of the original controlling Commissioners" (Opp'n at 14 n.4), but points to no procedural mechanism by which *the FEC itself* could appeal the case to that court.

To illustrate the point, FECA requires the Commission to attempt conciliation prior to the filing of any enforcement action against an administrative respondent, and any conciliation agreement is a "complete bar to any further action by the Commission." 52 U.S.C. § 30109(4)(A)(i). If the Commission conformed with the Court order by reaching a conciliation agreement, it could not then appeal the Court's ruling.

True, the Commission could conform with the Court's ruling by asserting another basis for nonenforcement, which presumably CLC would challenge again. But it could not reassert the basis for dismissal previously relied on by the controlling Commissioners and rejected by the Court. The cases on which plaintiffs rely involved appeals by private intervening defendants, who do not come within the exception to finality. (*See* Opp'n at 10 (citing *CREW v.*, No.18-5136, 2018 WL 5115542, at *1 (D.C. Cir. Sept. 19, 2018) (per curiam); *see also CREW v. FEC*, No. 16-5300, 2017 WL 4957233, at *1 (D.C. Cir. Apr. 4, 2017) (per curiam); *Democratic Nat'l Committee v. FEC*, No. 99-5123, 1999 WL 728351, at *1 (D.C. Cir. Aug. 4, 1999) (per curiam)).

3. The Commission, by not appearing earlier in this case, has not waived its arguments as plaintiffs claim. (Opp. at 8-9.). Courts of appeals, including the D.C. Circuit, have permitted defaulting governmental entities and other parties to appeal default judgments entered after non-appearance in the district court. *See Gates v. Syrian Arab Republic*, 646 F.3d 1, 3 (D.C. Cir. 2011) (holding appeal from default judgment in abeyance pending further district

court action and then ruling on the merits even though party had not first presented the arguments to the district court); *Stelly v. Duriso*, 982 F.3d 403, 406-07 (5th Cir. 2020) (permitting party who evaded service and did not appear in district court prior to default judgment to appeal without first moving for reconsideration and vacating the default judgment); *cf. Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695 (D.C. Cir. 1994) (concluding that government agency not named in original action had not timely challenged default judgment against non-appearing foreign entity because the agency "could have intervened after the [default] judgment and appealed within the time limit"); *Pulliam v. Pulliam*, 478 F.2d 935 (D.C. Cir. 1973) (faulting defaulting party for not immediately appealing default judgment). To be sure, a party subject to a default judgment is "unable to raise any fact questions that were not brought before the district court" and may forfeit other defenses not affirmatively pled, but "if the existing record and pleadings do not support the judgment, the defaulting party can prevail on appeal without having raised the issues first in the district court." *Stelly*, 982 F.3d at 407. Because this is a case on review of an agency nonenforcement action, the "entire case on review is a question of law, and only a question of law." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). There is, therefore, no inherent barrier to a defaulting agency from seeking review of that question of law on appeal.

The fact that this case was decided on summary judgment after an intervenor defendant appeared in the action, rather than a default judgment for non-appearance of the agency, only strengthens the argument that the Commission is permitted to raise on appeal arguments that were pressed or passed on by the district court. That intervenor made the arguments the FEC seeks to raise on appeal, so the unfairness plaintiff claims (Opp. at 8-9) is misplaced. As a general matter, litigants may not advance issues that have not been raised by the parties or passed

on by the District Court, but here the questions to be appealed all *were* raised and argued by the plaintiffs and the intervenor-defendants that appeared before this Court. These are the issues decided by the District Court and there is no bar to appellate consideration of these issues or unfair surprise for the plaintiff in having to respond to them. Furthermore, even if those issues had not been raised or decided, the appellate court may still consider them in "exceptional circumstances." *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992) (describing some qualifying circumstances). Here, the composition of a multi-member body of presidential appointees changed substantially. At the first decisional juncture thereafter, the agency approach to authorizing litigation here, a question committed to Commissioner discretion, switched from default to defense. 52 U.S.C. §§ 30106(c), 30107(a)(6,) (setting four-Commissioner voting requirements for certain decisions including defense of section 30109(a)(8) actions). That is an exceptional circumstance.

4. The questions presented in this case are at least worthy of consideration by the Court of Appeals (Mot. at 6-10.) As explained, the Commission is entitled to deference with respect to interpreting ambiguous regulations and the statute. Despite plaintiff's argument to the contrary, the internet exemption was plainly meant to exempt some input costs that result in unpaid internet communications. (*See* Mem. Op. 14-15 (acknowledging Commission precedent exempts certain "input costs" from regulation while concluding that other "creation and production costs" are nonexempt).) The issue here is how far that exemption extends, a question on which the controlling Commissioners should have received deference. At a minimum, the permissible scope of the exception is a question worthy of appellate review.

CLC's opposition devotes several pages to a straw-man argument about the text of the internet exemption regulation that the Commission did not make. (Opp'n at 15-19.) Contrary to

CLC assertions, the Commission nowhere said or suggested that the "relevant regulatory text" entirely controlled the controlling Commissioners' application of the internet exemption. (*Id.* at 16; *see* Mot. at 7 (stating only that "the controlling Commissioners' Statement of Reasons based its conclusion . . . on the 'plain text of' the internet exemption *and prior enforcement cases*" (citing J.A. 83-84 [SOR 12-13]) (emphasis added).) Indeed, the entire thrust of the Commission's argument was that the controlling Commissioners' application of that exemption in this case was permissible because it was not "'inconsistent with the regulation.'" (Mot. at 7 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).) As the Court held in *Kisor*, deference to Commission construction of an agency's own regulation "can arise only if a regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414. There would be no need to invoke such deference if the Commission were arguing that the text of the regulation unambiguously controlled the outcome here.

Rather, the Commission was making a different argument with which CLC apparently agrees, that neither FECA nor "the relevant regulatory text" dictates the outcome here because it "is silent as to the key legal issue in this case." (Opp'n at 16; *see* Mot. at 8 (noting that FECA "does not explicitly address how" to apply campaign finance rules "to internet communications and the costs to create them"). But precisely because neither FECA nor the Commission's regulations are inconsistent with the reasoning of the controlling Commissioners, their interpretation of the regulation should have received controlling weight. *Kisor*, 139 S. Ct. at 2415.

CONCLUSION

For the foregoing reasons, this Court should grant the Commission's motion to stay the judgment pending appeal.

Respectfully submitted,

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