UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAUN MCCUTCHEON and MCCUTCHEON FOR FREEDOM,	)	Civ. No. 20-2485 (JDB)
Plaintiffs,	)	
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Introduction

The Federal Election Commission's brief fails to address the key structural components of this case. This case is a pre-enforcement action. *See, e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Plaintiffs Shaun McCutcheon and his candidate committee, McCutcheon for Freedom ("MFF") wish to make certain specific, concrete political contributions clearly set forth in the Complaint. *See* Compl. ¶¶ 17-18, 21, 38. Making such political contributions are an important type of political association protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (per curiam). Plaintiffs have been chilled from making their desired contributions by the threat of burdensome administrative proceedings under the Federal Election Campaign Act ("FECA"), *see* 52 U.S.C. § 30109(a); *cf. Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345-46 (2014); civil fines, 52 U.S.C. § 30109(d)(1)(A); criminal referral, *id.* § 30109(a)(5)(C); and even imprisonment, *id.* § 30109(d)(1)(A), (D).

Plaintiffs believe that, although there are several erroneous interpretations of federal law the FEC might adopt, *see* Compl. ¶ 19(a)-(c), his proposed transactions are likely legal. They seek

this preliminary injunction to suspend the chill to their First Amendment rights and enable them to make their desired contributions before the passage of the 2020 general election greatly reduces their meaning and practical effect. *See Citizens United v. FEC*, 558 U.S. 310, 334 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence.").

Congress itself has recognized the importance of obtaining timely, definitive legal guidance concerning people's legal rights and obligations under campaign finance law. "Needless to say, federal campaign finance law is complex . . . ." *Shays v. FEC*, 414 F.3d 76, 79 (D.C. Cir. 2005). And the Federal Election Campaign Act (the "FECA") regulates an area permeated with First Amendment concerns. *See generally Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). To "mitigate whatever chill" to First Amendment rights the FECA may "induce," Congress has allowed people to obtain advisory opinions from the FEC. *Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-85 (D.C. Cir. 1980); *see also Common Cause v. FEC*, 842 F.2d 436, 447 n.31 (D.C. Cir. 1988) (recognizing Congress' interest in ensuring the FECA does not "deter participation in the political process"). Upon receiving a "complete written request," the FEC must – not may, but ***must*** - provide an advisory opinion with 60 days. 52 U.S.C. § 30108(a)(1). An advisory opinion affirming the legality of a proposed course of conduct provides a statutory "safe harbor" that immunizes actors from potential enforcement proceedings by the Commission for engaging in the approved course of conduct. *Id*. § 30108(c)(2). Conversely, the denial of such an opinion provides equally clear guidance to those, like Plaintiffs, who seek to comport their behavior with the law.

The D.C. Circuit has previously held that, when questions arise concerning FECA's meaning or applicability, a litigant must first seek an advisory opinion from the FEC rather than immediately pursuing a declaratory judgment action directly in federal court. *See Nat'l Republican*

Cong. Comm. v. Legi-Tech Corp., 795 F.2d 190, 193-94 & n.7 (D.C. Cir. 1986). Here, Plaintiffs submitted an advisory opinion request, yet the FEC did not issue a response within the 60-day period, and eventually lost its quorum to do so. The FEC's failure to provide an advisory opinion "deprives the plaintiff[s] of a legal right— [52 U.S.C. § 30108(c)'s] reliance defense, which [they] would enjoy if [they] had obtained a favorable resolution in the advisory opinion process." *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010). Having afforded the Commission an opportunity to exercise primary jurisdiction over this matter and exhausted their administrative remedies, Plaintiffs now turn to this Court to provide pre-enforcement guidance concerning their legal rights before they incur potential civil and criminal liability until the expiration of the statute of limitations. *Cf. MedImmune v. Genentech*, 549 U.S. 118, 128-29 (2007).[1] The ability to obtain such pre-enforcement guidance is particularly crucial in areas permeated by the First Amendment right to engage in political speech and association. *See Nevagar, Inc. v. United States*, 103 F.3d

[1] The FEC's implication that Plaintiffs ask this Court to issue a constitutionally impermissible advisory opinion, *see* FEC Opp. at 28, is directly contrary to *MedImmune* and *Abbott Labs.*, which recognize the justiciability of pre-enforcement actions.

The Commission also raises a potential objection to the validity of the $15,000 deposit McCutcheon made to MFF on May 22, prior to the Libertarian Party's Convention. FEC Opp. at 31; *see also* Compl. ¶ 10. It is generally known—and publicly available FEC records readily confirm—that political candidates typically raise funds up to the very day of a primary or general election. Since McCutcheon's campaign was entirely self-funded, *see* Compl. ¶ 10, making additional funding available to his campaign in the final stages in case unexpected developments occurred at the national convention was a prudent strategic choice and consistent with general political practice.

In any event, even if those funds are disregarded, McCutcheon's original deposit into MFF's account in early May was $50,000. *Id*. The FEC contends the campaign made a net total of $10,793.08 in disbursements. FEC Opp. at 31. That leaves over $39,200 of McCutcheon's original deposit in the account—in excess of the $35,500 limit on contributions to the general treasury account of a national political party by individuals or candidate committees. *See* 52 U.S.C. § 30116(a)(1)(B); 11 C.F.R. § 110.01(c)(1)(i) (establishing annual limit); *see also* 84 FED. REG. 2,504 (Feb. 7, 2019) (providing inflation adjustments). Thus, a justiciable controversy centered around a pure question of substantive campaign finance law exists.

994, 998-99 (D.C. Cir. 1997) (recognizing the special need for pre-enforcement review "when the challenged statutes allegedly 'chill' conduct protected by the First Amendment").[2]

A. Irreparable Injury

Here, Plaintiffs satisfy the requirements for a preliminary injunction. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). ***First***, Plaintiffs will suffer irreparable harm without a preliminary injunction. The Constitution protects the right to make political contributions as a form of political association. *See Buckley*, 424 U.S. at 22; *see also McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (invalidating aggregate contribution limits because a political contribution is an exercise of the First Amendment "right to participate in the public debate through political expression and political association"). The threat of burdensome administrative proceedings, civil fines, criminal referrals, and imprisonment has chilled them from engaging in constitutionally protected activity by making the contributions identified in their Complaint. Such chilling effect

[2] The FEC contends this Court should deny the preliminary injunction motion for technical reasons. *See* FEC Opp. at 15 n.6. As an initial matter, the Commission complains Plaintiffs "prejudiced the FEC's ability to timely respond." *Id*. This contention is disappointingly shocking in light of the fact that, as a professional courtesy, McCutcheon unilaterally chose to preemptively consent to an extra week of response time for the Commission. Concurrent with this Motion for a Preliminary Injunction, Plaintiffs simultaneously filed another document entitled *Plaintiffs' Consent Concerning Preliminary Injunction* which stipulated to "Defendants' Opposition Memorandum . . . being due ***within fourteen days of service***" (emphasis added), consistent with the usual rules for motion briefing, *see* D.C. LCvR 7(b), rather than the seven days for preliminary injunctions provided in D.C. LCvR 65.1(c). Moreover, the Commission fails to acknowledge that undersigned counsel e-mailed them a courtesy copy of Plaintiffs' filings on September 10, and the Commission was having its mail held at the D.C. post office due to COVID, exacerbating any delays.

The Commission further contends that McCutcheon failed to meet and confer with its attorneys despite the fact that, since this motion was filed simultaneously with the lawsuit, no attorneys for the Commission had yet entered an appearance in the matter, *see* D.C. LCvR 83.6(a), or were willing to accept service of process on the Commission's behalf. Since there quite literally was not yet any "opposing counsel" in this case at the time the instant motion was filed, no such duty to meet-and-confer had attached under Local Rule 7(m)'s terms. D.C. LCrR 7(m). The FEC also fails to identify any way in which any such conference may have "narrow[ed] the areas of disagreement" concerning this motion. *Id*.

constitutes irreparable harm. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This harm is exacerbated in this case, where waiting until either the FEC has a quorum or this Court enters final judgment will not only deprive plaintiffs of the type of statutory safe harbor Congress mandated, *see* 52 U.S.C. § 30108(c)(2), but substantially undermine the value of their speech and association because the election will be over.

The FEC's only response is that Plaintiffs are not suffering irreparable harm because "the McCutcheon Committee could provide approximately $35,500 to the LNC immediately." FEC Memorandum in Opposition ("FEC Opp.") at 3, *see also id*. at 42-43. But under this cramped view of irreparable harm, a court could virtually never enter an injunction against a contribution limit, since a person would always be able to contribute up to that limit. Courts have consistently rejected this position, finding that improperly requiring litigants to comply with contribution limits inflicts irreparable injury. As one district court stated, "It should go without saying that ***if the plaintiffs are not able to contribute soon at the higher level, they will suffer irreparable injury***. Timing is everything in an election. Contributing after a successful trial—unlikely to occur this year and therefore not before the election—would be fruitless." *Woodhouse v. Me. Comm'n on Gov't Ethics*, 40 F. Supp. 3d 186 (D. Me. 2014) (emphasis added); *see also Fund for Louisiana's Future v. La. Bd. of Ethics*, 17 F. Supp. 3d 562, 575-76 (E.D. La. 2014) (holding improper enforcement of contribution limits inflicts "irreparable injury that cannot be compensated with post-election relief or after-the-fact monetary damages").

Moreover, the same standard of irreparable harm applies at both the preliminary injunction stage and permanent injunction stage, *see Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546

n.12 (1987) (recognizing the standards for preliminary and permanent injunctions are identical, except the former requires only likelihood of success on the merits, while the later requires actual success). Consequently, under the FEC's approach, McCutcheon would be categorically disqualified from obtaining injunctive relief *even if he won this lawsuit on the merits*.

This Court's ruling in *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), *permanent injunction entered*, 864 F. Supp. 2d 57 (D.D.C. 2012), confirms the invalidity of the Commission's position. There, this court entered a preliminary injunction barring the Commission from enforcing its contribution limits against separate, segregated independent-expenditure-only accounts of "hybrid" political committees. *Id*. at 136. The court specifically recognized that applying unconstitutional contribution limits to the plaintiff hybrid committee and its contributors inflicted irreparable harm on them, *id*. at 132-34, even though such contributor could make contributions to the hybrid committee up to the legal limit. The court held "the Commission's interference with [the plaintiffs'] First Amendment rights" through its contribution limits "constitutes irreparable harm." *Id*. at 134. Here the principle is the same: being chilled from making political contributions in the desired amount constitutes irreparable harm, even if a person is permitted to make contributions of smaller amounts. *Cf*. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1449 (2014) (recognizing that for the government to tell a person to "simply contribute less money" to the candidates or parties he supports "impose[s] a special burden" on First Amendment rights"). Thus, the chill to Plaintiffs' full exercise of their statutory and constitutional right to make contributions constitutes irreparable harm.

B. Likelihood of Success on the Merits

Second, Plaintiffs are likely to succeed on the merits of their claim.[3]

1. From an administrative law perspective, the Commission was required to issue an advisory opinion concerning the legality of Plaintiffs' proposed course of conduct within 60 days of receiving a complete written request. 52 U.S.C. § 30108(a)(1). The Commission failed to do so while it had a quorum, and subsequently became unable to do so due to the loss of its quorum. *See* Closeout Letter, Compl. Ex. 4, at 1.

Surprisingly, the Commission contends its failure to issue an advisory opinion in response to Plaintiffs' request does not constitute final, reviewable agency action. FEC Opp. at 27. To the contrary, the Closeout Letter of August 10, 2020 brought the administrative process for reviewing Plaintiffs' Advisory Opinion Request, docket number 2020-03, to a close. There will be no further agency proceedings on this matter. The only authority the FEC cites for its bizarre assertion is *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012). That opinion, however, merely stands for the proposition that the views of FEC Commissioners who vote against an advisory opinion request neither constitute the agency's official position nor are entitled to any form of administrative deference.[4] The court ruled that the views of the Commissioners who voted

[3] The FEC contends "plaintiffs advocated that the Commission issue an advisory opinion that their proposed transfers would actually be *unlawful*." FEC Opp. at 2 (emphasis in original). To the contrary, McCutcheon requested an advisory opinion on the legality of his proposed course of conduct and never requested the FEC declare it unlawful. Consistent with the spirit of D.C. Rule of Professional Conduct Rule 3.3(a)(3), McCutcheon—represented by a member of the D.C. Bar—candidly disclosed to the FEC potentially adverse authorities he feared could lead the Commission into concluding the proposed transactions are illegal. To the extent the Commission was unclear about the nature of his request, it was free to seek further information from him (as it did in several unrelated respects). *See* Compl. Ex. 3.

[4] *See, e.g.*, *Chevron v. Nat'l Resources Def. Council*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

"no" do not constitute "final, reviewable agency action" for purposes of determining the agency's substantive policy position. *Id*. at 428; *see also id*. at 429 ("[H]ere there is no ruling, interpretation, nor opinion of the agency; there is only a deadlocked FEC and there is no reason to defer to the reasoning or conclusion of one side of the deadlock as opposed to the other.").

In contrast to *Hispanic Leadership Fund*, Plaintiffs are not asking this Court to accord any special weight to one side of an FEC deadlock or the other. Rather it is the agency's decision to terminate administrative proceedings on Plaintiffs' Advisory Opinion Request without issuing an advisory opinion within the statutorily mandated 60-day period that constitutes the final agency action. *See* 52 U.S.C. § 30108(a). The APA itself expressly defines "agency action" in part as including an agency's "failure to act." 5 U.S.C. §§ 551(13); 701(b)(2); *see, e.g.*, *Biodiversity Legal Found. v. Norton*, 180 F. Supp. 2d 7, 11 (D.D.C. 2001) (recognizing validity of APA claims against administrative agencies based on failure to act in violation of statutory deadlines). Moreover, regardless of whether Plaintiffs have a valid claim under the APA, having exhausted their administrative remedies and given the FEC the opportunity to assert primary jurisdiction over this issue, they are now entitled to turn to this Court to prevent irreparable injury to their First Amendment rights.

2. From a substantive perspective, putting aside the advisory opinion request and viewing this as a traditional request for a declaratory judgment and injunction, Plaintiffs' proposed contributions are likely legal. As a candidate, McCutcheon was, and is, permitted to transfer unlimited amounts of his personal funds to his candidate committee, MFF. 11 C.F.R. § 110.10; *see Mulloy*, A.O. 1984-60, at 2 (Jan. 11, 1985); *accord Collins*, A.O. 1985-33 at 1 (Nov. 22, 1985). And federal regulations permit candidate committees to transfer unlimited amounts of funds to national political party committees. *See* 11 C.F.R. § 113.2(c). Thus, MFF likely may transfer the

approximately $53,000 of McCutcheon's personal funds it retains to the general treasury of Libertarian National Committee ("LNC").

The FEC cagily does not even contend McCutcheon's proposed course of conduct in contributing the leftover funds already in MFF's account to the LNC's general treasury is ***actually*** illegal. *See* FEC Opp. at 31 (arguing Plaintiffs' proposed course of conduct "presents a challenging and apparently novel interpretive question" and Plaintiffs have not shown it is "lawful clearly enough"). Rather, the Commission contends a reconstituted Commission ***might someday*** decide Plaintiffs' proposed conduct is illegal. *See* FEC Opp. at 3 ("Some of [Plaintiffs'] proposed activity raises interpretive questions that are not straightforward and that the Commission has not had the opportunity to address."). And the Commission's brief then proceeds to lay out—without actually endorsing or officially advocating—the concerns Plaintiffs identified in their Advisory Opinion Request which had led them to seek an FEC Advisory Opinion in the first place! *See* FEC Opp. at 32-37.[5] The Commission's obfuscation on this issue confirms both the wisdom of Plaintiffs having sought an advisory opinion request, as well as the need for injunctive relief from this Court.

In short, the FEC seeks to show that Plaintiffs are unlikely to succeed on the merits of their claim without ever actually staking out a position concerning the legality of Plaintiffs' proposed transfer of the funds currently remaining in MFF's account to the LNC.[6] The Commission cannot show Plaintiffs are unlikely to succeed on the merits of their claims merely by pointing to hypothetical speculative possibilities about how the Commission might interpret the FECA. The

[5] The Commission also references a largely duplicative argument mentioned in a comment on the Advisory Opinion Request—also without actually embracing or advancing it. *See* FEC Opp. at 38.

[6] In contrast, the Commission feels more confident in actually arguing that Plaintiffs' second and third proposed courses of action—involving McCutcheon's transfer of additional personal funds into MFF's account, followed by MFF's subsequent transfer of those funds to the LNC—would be illegal. *See* FEC Opp. at 38.

Commission is unwilling to even attempt to argue to this Court that Plaintiffs' proposed transfer to the LNC of McCutcheon's remaining personal that he had transferred to MFF's account (especially the funds he had transferred to that account in early May) is likely illegal. Thus, this Court should treat as conceded Plaintiff's argument that such a transfer is likely ***legal.***

The concerns Plaintiffs expressed in their Advisory Opinion Request should not preclude injunctive relief. The FEC apparently does not dispute the initial transfer of unlimited amounts of McCutcheon's personal funds to MFF was lawful. *See* 11 C.F.R. § 110.10; *see Mulloy,* A.O. 1984-60, at 2 (Jan. 11, 1985); *accord Collins,* A.O. 1985-33 at 1 (Nov. 22, 1985). And the plain text of its regulations allows candidate committees to transfer unlimited amounts of funds to 11 C.F.R. § 113.2(c). While Plaintiffs, out of an abundance of diligence, identified various potential contrary authorities and arguments for the Commission to consider in adjudicating their advisory opinion request, none undermine this fundamental chain of reasoning. And the Commission does not itself invoke any existing interpretations of current law that undermine Plaintiff's request. In light of the Commission's failure to provide Plaintiffs the safe harbor to which they are statutorily entitled to engage in this fully legal political activity without fear of the FEC's interpretive vicissitudes—or, alternatively, to provide a legal rationale concerning the purported illegality of Plaintiffs' conduct which they could then challenge—this Court should step in to grant injunctive relief.

C. Other Equitable Factors

The Commission conclusory curtly alludes to the balance of hardships and public interest factors at the end of its brief. FEC Opp. at 44-45. What the Commission completely ignores is the fact that both Plaintiffs and the general public have compelling interests in being able to engage in political expression, association, and speech without fear of burdensome administrative proceedings, civil fines, criminal referrals, and even imprisonment. Congress created the advisory

opinion process and accompanying safe harbor provisions specifically to alleviate the chill to legal, constitutionally protected activity that a statute as complex as FECA would create, *see Martin Tractor*, 627 F.2d at 384-85; *see also Unity08*, 596 F.3d at 865. Indeed, the FECA is apparently ***so*** complex, apparently not even the FEC itself knows what it means or how it applies to Plaintiffs. Providing clarity when the FEC has violated its legal duty to provide an advisory opinion, *see* 52 U.S.C. § 30108(a), would alleviate any unnecessary chill to Plaintiffs' rights without harming the Commission (which remains without a quorum). And allowing Plaintiffs to vigorously exercise their First Amendment rights to the maximum extent permitted by the law is in the public interest. *Guffey v. Duff*, 330 F. Supp. 3d 66, 80-81 (D.D.C. 2018).

The Commission contends that, if Plaintiffs are entitled to relief, this Court should only order a remand to the Commission to reconsider the advisory opinion request. FEC Opp. at 24 ("[T]he best plaintiffs could hope for would be an order remanding their Advisory Opinion Request to the Commission for an advisory opinion . . . ."). Such relief would be futile, of course, until the Commission regained—and retained—a quorum. And such delay would deprive Plaintiffs' intended contributions of much of their impact and value, since the 2020 general election would long be over. But most importantly, the Commission ignores the fact Plaintiffs have already exhausted their administrative remedies and given the Commission the "first opportunity" to exercise primary jurisdiction over this matter. *Marine Wonderland & Animal Park, Ltd. v. Kreps*, 610 F.2d 947, 949 (D.C. Cir. 1979). Particularly given the 60-day deadline on the advisory opinion process, 52 U.S.C. § 30108(a); Plaintiffs' inability to invoke the statutory safe harbor due to the Commission's inactivity, *see id.* § 30108(c)(2); and the irreparable harm caused by interference with political association and expression protected by the First Amendment, the Commission cannot demand a second and indefinite bite at the apple. This Court should enter a

preliminary injunction vindicating Plaintiffs' rights and allowing them to engage in their legally permitted political association and expression without the fear the FEC will capriciously resolve its apparent uncertainty over FECA's meaning against them.

Respectfully submitted,

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