IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

The Hispanic Leadership Fund, Inc., Plaintiff, v. Federal Election Commission, Defendant.	Civil Case No. 4:12-cv-00339-JAJ-TJS RESPONSE TO DEFENDANT'S RESISTANCE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCITON

PLAINTIFF'S RESPONSE TO DEFENDANT'S RESISTANCE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. The FEC's Arbitrary Selection of a "Controlling Group" Is Contrary To Law

The Federal Election Commission's Resistance To Plaintiff's Motion For Preliminary Injunction (FEC's Resistance") defends the positions taken by three of six FEC Commissioners in Advisory Opinion 2012-19 as "controlling," and suggests that the views expressed in Draft B preserve the "status quo." The FEC's alleged litigation position is contrary to law, as the agency's authorizing statute specifically declares that "All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission." 2 U.S.C. § 437c(c). *See also* 11 C.F.R. § 112.4(a) ("Within 60 calendar days after receiving an advisory opinion request that qualifies under 11 CFR 112.1, the Commission shall issue to the requesting person a written advisory opinion or shall issue a written response stating that the Commission was unable to approve an

advisory opinion by the required affirmative vote of 4 members."). In the context of an Advisory Opinion Request in which the Commission divides 3-3 on a question of law, there is, by definition, no "controlling group" because the Commission has not made any substantive decision. The FEC also erroneously claims that it may designate one side of a 3-3 deadlock as "entitled to great deference." Again, because no substantive decision was made, this position is contrary to law.

At footnote 2 of its "Resistance To Plaintiff's Motion For Preliminary Injunction," the FEC writes:

> The Commission defends in this lawsuit the position of the "controlling group" of three Commissioners who declined to provided [sic] AFF with the response it sought to its request. *Cf. FEC* v. *Nat'l Republican Senatorial Comm*., 966 F.2d 1471, 14765 (D.C. Cir. 1992) (explaining that when suit challenges action on which Commission deadlocked, subject of judicial review is position of controlling group of Commissioners.).

FEC Resistance To Plaintiff's Motion For Preliminary Injunction ("FEC Resistance") at 2.

We fail to see how the FEC may *legitimately* designate a "controlling group" of Commissioners in this matter, as the Commissioners split 3-3 on those questions when they were presented in Advisory Opinion 2012-19. The precedent cited by the FEC in "*cf*" fashion does not support the assertion that a "controlling group" exists. The theory advanced by the FEC derives from *Democratic Congressional Campaign Committee* v. *FEC,* 831 F.2d 1131 (D.C. Cir. 1987). As the D.C. Circuit explained in a subsequent matter:

> In *Democratic Congressional Campaign Committee v. Federal Election Commission,* 831 F.2d 1131 (D.C. Cir. 1987) (*DCCC*), we held that when the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under § 437g(a)(8). 831 F.2d at 1133. We further held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss

> must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did. *Id.* at 1134-35.

FEC v. *National Republican Senatorial Committee*, 966 F.2d 1471 (D.C. Cir. 1992). *See also* *Stark* v. *FEC*, 683 F.Supp. 836, 841 (D.D.C. 1988) ("this Court reads DCCC to require that the same deference be accorded the reasoning of 'dissenting' Commissioners who prevent Commission action by voting to deadlock as is given the reasoning of the Commission when it acts affirmatively as a body to dismiss a complaint."). Arguably, this decision may be read as creating an exception to the statutory requirement that the FEC's position must be represented by a four-vote majority in order "to make judicial review a meaningful exercise." Whether read that way or not, the rule only makes sense in its particular context.

Democratic Congressional Campaign Committee involved a 3-3 deadlock vote on a motion to adopt the General Counsel's recommendation to proceed with an investigation into alleged wrongdoing. The result of the 3-3 vote was dismissal of the matter, as the Commission lacked the statutorily-required four affirmative votes to proceed. The court in *Democratic Congressional Campaign Committee* required the three Commissioners who voted against the General Counsel's recommendation – i.e., the three Commissioners who actually voted to dismiss – to explain their reasoning. This group of three Commissioners was deemed "controlling" in that particular situation because their votes clearly caused the ultimate result – dismissal of the enforcement matter – and it was their reasoning that, accordingly, served as the basis for judicial review. *See also* Former FEC Chairman Brad Smith, "What does it mean when the Federal Election Commission "Deadlocks," Center For Competitive Politics (April 14, 2009) ("the FEC needs 4 votes to find a violation. If the FEC votes 3-3 not to find a violation, that means the FEC has determined that the conduct does not violate the law. For purposes of

judicial review, the controlling opinion is that of the Commissioners who voted not to find a violation, and it is that reasoning that is subject to review") *available at* http://www.campaignfreedom.org/2009/04/14/what-does-it-mean-when-the-federal-election-commission-deadlocks/.

The FEC seeks to import this theory to the current context, but the theory is entirely inapplicable. A 3-3 vote in the enforcement context is entirely different than a 3-3 vote in the advisory opinion context. For enforcement purposes, four votes are required to find a violation of the law. Thus, the absence of four votes to find a violation in an enforcement case *is* a substantive legal determination that no violation occurred. In the advisory opinion context, four votes are required to issue an opinion, but in the absence of four votes, no opinion issues and no substantive legal determination is made.

In the instant matter, the Office of General Counsel did not recommend any particular course of action – it merely circulated two opposing drafts that were prepared by the Commissioners themselves. At issue was an Advisory Opinion Request that sought responses to several questions of law. The ultimate resolution of the Advisory Opinion Request was to provide no answer to the Requestor on the questions that are now before this Court, leaving those who engage in materially indistinguishable conduct "liable for a possible enforcement action." *See Carey* v. *FEC*, Memorandum Opinion on Motion For Preliminary Injunction, No. 11-259 (D.D.C. June 14, 2011), slip op. at 6. No Commissioner voted to "dismiss" or not proceed with an enforcement matter; the divided vote has no legal significance. There are no "dissenters" among the Commissioners and neither group of three Commissioners was any more or less responsible for the final outcome. Draft B does not explain why "no action" was taken here any better than Draft A, and vice versa. In other words, Draft B cannot reasonably or legitimately be

regarded as representing the legal position of the FEC, unless the FEC's Commissioners have changed their views since June.

The FEC then attempts to claim that the views of three FEC Commissioners in a "no decision" Advisory Opinion are entitled to deference under *Chevron*. *See* FEC Resistance at 10. According to the FEC, "[t]he Commission declined to find that the advertisements are not electioneering communications, and because that determination was a reasonable interpretation of FECA, it must be upheld by under [sic] the Supreme Court's decision in Chevron. See Nat'l Republican Senatorial Comm., 966 F.2d at 1476-77 (deferring to interpretation of controlling group of Commissioners when the Commission is deadlocked)." First, the FEC's position misrepresents the legal significance of an advisory opinion response that does not garner the statutorily required four votes. Without four votes, no substantive decision is made and the advisory opinion response is simply a "no response" with no legal implications whatsoever. *See* 11 C.F.R. § 112.4(a). Thus, the Commission absolutely did not "decline[] to find that the advertisements are not electioneering communications." As the FEC's Commissioners explained in their written response, "The Commission could not approve a response by the required four affirmative votes about the remaining proposed advertisements." *See* Advisory Opinion 2012-19 (AFF) at 1. In rendering Advisory Opinion 2012-19, on the questions now presented to this court, the FEC made no "interpretation of the statute," reasonable or otherwise. *Chevron* is not implicated here. The FEC's counsel therefore cannot claim, under any applicable law, that a "no decision" on an advisory opinion request is a substantive decision on the merits that is entitled to *Chevron* deference.

The FEC's Resistance then proceeds, with an obvious eye to *Chevron*, to explain why the views held by the three Commissioners who supported Draft B are "reasonable." The obvious implication is that there is something deficient about the views of the three Commissioners who

supported Draft A. Plaintiff disagrees and objects to the FEC's arbitrary designation of Draft B as "controlling" over, and in any way preferable to, Draft A.[1] Both drafts, along with the views of all six Commissioners, are entitled to precisely the same respect and deference in this litigation.

While the FEC is certainly entitled to present whatever position it wishes in litigation, assuming it acts consistent with its authorizing statute, we simply wish to note that the FEC's cited precedent does not support its decision to deem the views of three Commissioners "controlling." Nor do the positions articulated in Draft B preserve the legal status quo, as the FEC claims – there is no status quo in this case. In any event, Draft B does not purport to preserve the status quo as it cites no judicial precedent or relevant legislative history, and fails to acknowledge the FEC's own prior representations made in court.

In conclusion, the FEC's claims of representing a "controlling group" of Commissioners does not survive scrutiny. The views of three Commissioners in an evenly divided advisory opinion are no more controlling than the views of the other three Commissioners, and the views of one group are most certainly not entitled to deference under *Chevron*. Accordingly, the designation of the views of three Commissioners as "controlling" over the views of three other Commissioners is arbitrary. If Plaintiff is subsequently in a position to seek attorneys fees in this matter, Plaintiff will almost certainly ask the court to consider the FEC's unsupported adoption of a novel "controlling group" theory as further evidence of its refusal to apply the law correctly.

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[1] Plaintiff also objects to the inclusion at page 24 of the FEC's Resistance of language from Justice Scalia's concurring opinion in *Doe* v. *Reed* that was previously used by one Commissioner to mock the requestor during the Commission's public consideration of Advisory Opinion Reqest 2012-19. *See* FEC Transcript, Exhibit 6 to HLF's Complaint, at 6-20 (statement of Comm'r Weintraub) ("The notion that you could actually use somebody's own voice, their own voice, and claim that you're allowed to criticize them using their own voice, and you don't have to identify who you are, you want to hide behind some shield, some ambiguous name like American Future Fund, and not identify who you are when you're criticizing the White House, when you're criticizing the President using his own voice, that certainly is not demonstrating civic courage.").

II. FEC Incorrectly Characterizes This Matter As One That Concerns "Mere Disclosure"

The FEC incorrectly contends that Plaintiff "seeks only to avoid disclosing its donors." FEC Resistance at 2, and that "[t]he application of law HLF challenges does not prevent it from speaking but instead implicates only a requirement to disclose information to the public." As previously explained, what Plaintiff seeks is an *actual answer* to the questions presented to the FEC in Advisory Opinion 2012-19. Whether the end result is "only a requirement to disclose information to the public" or something else, the government is not relieved of its obligation to clearly state the rules, restrictions, and contours of law and regulations that burden speech. Plaintiff acknowledges that "disclosure" is especially fashionable in some quarters now, and that the Supreme Court has upheld disclosure as a general matter. That does not mean that disclosure has ceased to be any burden at all on First Amendments rights, or that the government may now loosely define when disclosure is required.

The FEC argues that "[t]he Supreme Court has recognized that harm can arise from disclosure only when there is a 'reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed.'" The FEC speaks here of "harm" that the Supreme Court has said would qualify an organization from an outright exemption from otherwise applicable disclosure requirements. This is, of course, not the only "harm" that may arise from disclosure – it is simply the threshold for constitutionally-cognizable harm. Plaintiff does not seek a constitutionally-mandated exemption from the FEC's disclosure requirements, nor does Plaintiff contend that the harassment, nuisances, intrusions and inconveniences referenced in its Preliminary Injunction Brief rise to the level described by the Supreme Court as requiring some remedy. *See* Plaintiff's Preliminary Injunction Brief at footnote 9. The examples provided in Plaintiff's Preliminary Injunction Brief are all examples of "harm," albeit admittedly

not all constitute "harms" with which the Supreme Court is constitutionally concerned. Plaintiff's point was, and remains, that Plaintiff is entitled to know what the law is when its First Amendment rights, and the First Amendment rights of its supporters, are at issue so that Plaintiff may accurately weigh the potential costs ("harms") of speaking against its benefits.

Plaintiff has repeatedly stated that it does not challenge the constitutionality of the disclosure requirements that attach to electioneering communications. Plaintiff simply asks if the proposed advertisements are electioneering communications so that it may know the consequences of its speech before it speaks. As explained previously, electioneering communications must carry both spoken and written disclaimers *and* must be reported to the FEC on prescribed forms within a certain period of time. The FEC's position is that Plaintiff is free to distribute its advertisements at any time – but in order to do so without risking an enforcement action, Plaintiff must include the aforementioned disclaimers and file reports with the FEC. Yet, the same FEC is unable to tell Plaintiff if these disclaimers and reports are actually required.[2] The government may not compel speech without adequate reason. *See, e.g.*, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."). Thus, the FEC's position is that while this litigation is pending, Plaintiff is free to speak and should voluntarily

[2] The practical, real world consequences are significant, at least to Plaintiff. For example, if the proposed advertisements *are not* electioneering communications, then approximately four seconds of each thirty-second advertisement may be filled with Plaintiff's own speech rather than by government-mandated disclaimers. On the other hand, if the proposed advertisements *are* electioneering communications, these various disclaimers must be inserted at the end of the advertisement, which may need to be shortened as a result. Thus, Plaintiff cannot actually complete the final production of any proposed advertisement unless some legal authority, be it the FEC or this Court, is able to decide if certain speech qualifies as an electioneering communication or not.

burden its First Amendment rights because doing so "implicates only a requirement to disclosure information to the public." While there may be debate about the precise meaning of the First Amendment in certain circumstances, there can be no debate that the First Amendment does not permit what the FEC insists is reasonable here.

III. Conclusion

For the reasons set forth herein and in Plaintiff's prior submissions, the Court should grant Plaintiff's motion for preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, copies of the foregoing Response Defendant's Resistance To Plaintiff's Motion For Preliminary Injunction were served by electronic mail on the following parties:

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And

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