IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Abdul Karim Hassan, Petitioner, v. Federal Election Commission, Respondent.	**REPLY** No. 11-1354

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PETITION FOR LACK OF JURISDICTION

Judicial review of the advisory opinions issued by the Federal Election Commission ("Commission" or "FEC") must begin in the district courts. Accordingly, the Commission has moved this Court to dismiss Hassan's petition for review.

Hassan wrongly contends that this Court has original jurisdiction to review the advisory opinion he received because the Commission either was acting under the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 ("Matching Payment Act"), or should be deemed to have been acting under it. The Commission issued its advisory opinion pursuant to its authority under 2 U.S.C. § 437f , a provision of the Federal Election Campaign Act, 2 U.S.C. §§ 431-57

("FECA") — not under the Matching Payment Act. And such advisory opinions are reviewable in the first instance, if at all, in the district courts under 28 U.S.C. § 1331. *See also* FEC's Mot. to Dismiss and Opp'n to Mot. to Certify and Expedite ("Mot."), Nov. 7, 2011, at 5-9 (Matching Payment Act does not give Commission authority to issue advisory opinions).[1] Hassan provides no good reason for the Court to depart from the "'normal default rule' . . . that 'persons seeking review of agency action go first to district court.'" *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007) (quoting *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994)).

When interpreting jurisdictional provisions, this Court has explained that "[i]nitial review occurs at the appellate level only when a direct-review statute *specifically* gives the court of appeals subject-matter jurisdiction." *Watts*, 482 F.3d at 505 (citing cases) (emphasis added). The Court "'simply is not at liberty to displace, or improve upon, the jurisdictional choices of Congress'" and thus is careful not to expand beyond what "the plain terms of the statute dictate." *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d. 1279, 1287

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[1] Hassan has filed a combined Reply to Respondent's Response/Opposition to Petitioner's Motion to Certify and/or to Expedite and Response to the Respondent's Motion to Dismiss for Lack of Jurisdiction on November 17, 2011 ("Resp."). This reply brief addresses only Hassan's Response to the Commission's Motion to Dismiss. *See* Fed. R. App. P. 27(a)(4). The Commission has already addressed Hassan's motion to have questions certified to the United States Supreme Court and to have this case expedited. *See* Mot. at 9-19.

(D.C. Cir. 2007) (quoting *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1988)). "It is axiomatic that 'Congress, acting within its constitutional powers, may freely choose the court in which judicial review [of agency decisions] may occur.'" *Five Flags Pipe Line*, 854 F.2d at 1439 (quoting *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir.1979) (alterations in original)). Hassan claims that an advisory opinion should be reviewed directly in this Court pursuant to 26 U.S.C. § 9041(a) in the same way as the Commission's adjudicatory decisions under the Matching Payment Act. Resp. at 1-5. But section 9041(a) provides for original appellate jurisdiction only for agency actions made under Title 26, which are certifications regarding eligibility for matching funds and determinations that matching funds must be repaid. *See* 26 U.S.C. §§ 9036, 9038. Title 26 neither provides for advisory opinions nor specifies how advisory opinions issued under 2 U.S.C. § 437f can be reviewed by the courts. None of the points Hassan raises in his opposition call into question the plain meaning of the relevant statutory language.

First, Hassan argues that the Commission's advisory opinion authority (2 U.S.C. § 437f) is merely an "authorizing provision which . . . empowers the FEC to act under the [Matching Payment Act]" and that the Commission was acting under the Matching Payment Act when it issued the underlying advisory opinion. Resp. at 1-2. The authority to interpret the Matching Payment Act,

however, is distinct from the authority to issue an advisory opinion. Only FECA provides the Commission authority to issue advisory opinions. Those powers are established in 2 U.S.C. § 437d(a)(7) ("The Commission has the power . . . to render advisory opinions under section 437f of this title . . . .") and 2 U.S.C. § 437f. Likewise, only FECA — and not the Matching Payment Act — provides a defense for any person acting in accordance with "such advisory opinion . . . [and precludes] any sanction provided by this Act or by chapter 95 or chapter 96 of title 26." 2 U.S.C. § 437f(c).[2]

This Court's decision in *Five Flags Pipeline* is instructive. In that case, the Court distinguished the Department of Transportation's "*power*" to establish a fee schedule under one statute with *interpretations* it made of another statute that were relevant to its fee schedule determinations. 854 F.2d at 1441. Because the statute establishing the agency's fee schedule power did not provide for direct appellate review, the Court declined to exercise original jurisdiction — even though the other relevant statute did provide such jurisdiction. "To be sure, questions about the meaning of certain provisions of the [latter statute] may arise in the course of judicial review of the fee schedules, but that is no reason for concluding that the user fee notices are regulations *issued under* [that] Act." *Id.* (emphasis added;

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[2] Congress also provided the Commission with general authority to "formulate policy with respect to" FECA and the Matching Payment Act, 2 U.S.C. § 437c(b)(1), but that authorization is separate from the statutory provisions regarding advisory opinions.

internal quotation marks omitted). Likewise, here, there is no reason to conclude that the Commission's advisory opinion rendered pursuant to 2 U.S.C. § 437f was "issued under" the Matching Payment Act, even though the opinion interpreted that Act.

Hassan argues that the Commission has not cited any cases specifically holding that actions for review of Commission advisory opinions must be brought in the district court. Resp. at 1-2. That is not surprising — we are not aware of any other attempt besides Hassan's to seek review of an advisory opinion before this Court in the first instance. To the extent advisory opinions have been reviewed at all, review was brought in the first instance in the district court. Mot. at 7 (citing *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010)); *see also U.S. Defense Comm. v. FEC*, 861 F.2d 765, 771 (2d. Cir. 1988) (vacating on ripeness grounds lower court decision reviewing advisory opinion).

Second, Hassan suggests that "[t]he whole purpose of 26 U.S.C. § 9041(a) [is] to have the Court of Appeals review actions concerning the *subject matter* of the [Matching Payment Act]." Resp. at 2 (emphasis added). However, the text of the statute does not support Hassan's expansive claims. Section 9041(a) provides the review mechanism for "agency action by the Commission" made under the provisions of the Matching Payment Act, not to all actions related to the much broader "subject matter" as Hassan claims. This Court has consistently refused to

find direct review jurisdiction by implication. *See, e.g.*, *Public Citizen*, 489 F.3d at 1287-88 (finding court of appeals lacked jurisdiction over agency decision to refuse to initiate a rulemaking, despite having authority to review promulgated rules); *Watts*, 482 F.3d at 505-06 (holding that even though agency orders involving final dispositions were subject to direct review in the court of appeals, agency decision whether to comply with subpoena in ongoing litigation was not).

Third, Hassan argues that "the relevant portions of 2 U.S.C. § 437f" dealing with the Matching Payment Act are "very much part of the MPA." Resp. at 2. This argument is baseless. The Commission's advisory opinion authority is firmly planted in FECA, whereas section 9041(a) is in the Matching Payment Act. In support of his flawed view, Hassan argues that under the Commission's theory a party facing an enforcement action "would not be able to invoke the defense in 2 U.S.C.§ 437f" unless it were part of the Matching Payment Act. Resp. at 2. However, the statute explicitly addresses the circumstance Hassan describes; its plain language makes clear that the defense provision applies to both "this Act" (FECA) and "chapter 96 of Title 26," *i.e.*, the Matching Payment Act. 2 U.S.C. § 437f(c)(2). In contrast, the jurisdictional provision Hassan relies upon, 26 U.S.C. § 9041, has no similar language incorporating into the Matching Payment Act the power to issue and rely upon advisory opinions established in FECA.

Fourth, Hassan asserts that "the FEC has the implied power to issue opinions and rulings under the [Matching Payment Act] with or without 2 U.S.C. § 437f." Resp. at 2. Regardless of whether the implied power Hassan describes exists — he cites no support for this implied authority — it is clear that the Commission was in fact exercising its explicit authority under 2 U.S.C. § 437f. The Commission said so in the advisory opinion itself. FEC Advisory Op. 2011-15 ("AO") at 6, http://saos.nictusa.com/saos/searchao?AONUMBER=2011-15.

Fifth, Hassan argues that since the main purpose of review is to correct actions that are unauthorized or contrary to law, "it has to be that review [is] in this Court of Appeals pursuant to 26 U.S.C. § 9041(a)" (Resp. at 3). But just because judicial review is available to correct agency errors does not mean this Court has jurisdiction in the first instance. Instead, this Court can exercise its traditional appellate power in the normal course following district court review. "The 'federal question' jurisdiction of the court of appeals . . . may be invoked only after a district court has issued an appealable order." *Five Flags Pipe Line,* 854 F.2d at 1439-1440 (citations omitted). This Court has rejected policy arguments, like those advanced by Hassan, that argue for jurisdiction untethered from specific

statutory authority, "no matter how compelling the policy reasons for doing so." *Id.* at 1441.[3]

Finally, Hassan questions the congressional judgment that only the Commission's quasi-judicial decision-making under the Matching Payment Act, which involves extensive fact development, is appropriate for direct appellate review. Resp. at 3-4. His argument extrapolates from the circumstances of his own particular case, which may not be representative of issues raised in other advisory opinions.[4] In any event, the circumstances of this case have nothing to do with the general congressional judgment as to where judicial review should lie in the first instance. Congress's decision to limit direct appellate review to quasi-adjudicatory repayment and certification decisions makes sense given the record

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[3] Hassan inaccurately contends (at 4) that the Commission argued that issues in the *Bluman v. FEC* case should have been divided between a three-judge district court and this Court sitting en banc. In fact, the dispute in that case was whether the case would be heard by a single-judge or three-judge district court, and the Commission contended that the *entire* case should be heard by a single-judge court. *See* FEC's Opp. to Pls'. App. For Three-Judge Ct., *Bluman v. FEC*, No. 10-1766, Docket No. 10, (D.D.C. Nov. 5, 2010), http://www.fec.gov/law/litigation/bluman_FEC_opp_to_app_for_3_judge_ct.pdf. The court divided the case, finding that part of it should be heard by a three-judge court. *See* Mem. Op. Granting in Part and Denying in Part the Pls'. App. for a Three-Judge Ct., *Bluman v. FEC*, No. 10-1766, Docket No. 18 (D.D.C. Jan. 7, 2011), http://www.fec.gov/law/litigation/bluman_dc_memo_opinion.pdf.

[4] Indeed, even in this case fact development regarding standing could be necessary because of the threshold requirements under the Matching Payment Act to qualify for matching funds (*e.g.*, a showing that Hassan has raised $5,000 raised in 20 states). *See* Mot. at 12-13 n.4. The district courts are better situated to oversee any such record development.

development that occurs in those administrative proceedings, and the plain language of 2 U.S.C. § 437f and 26 U.S.C. § 9041 makes clear that Hassan cannot bring this case to this Court for initial review.

Accordingly, this Court should grant the Commission's Motion to Dismiss the Petition for Lack of Jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 1st day of December 2011, I caused to be filed electronically using this Court's ECF system and sent via the ECF electronic notification system a true copy of the Federal Election Commission's Reply in Support of its Motion to Dismiss Petition for Lack of Jurisdiction on the following counsel:

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