Docket No. 08-15643

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(On appeal from the United States District Court, District of Arizona, Civil Action No. 07-cv-00398-EHC the Honorable Earl H. Carroll)

JON MARCUS,

Plaintiff-Appellant,

vs.

UNITED STATES ATTORNEY GENERAL ALBERTO R. GONZALES, FEDERAL ELECTION COMMISSION CHAIRMAN MICHAEL E. TONER, In their official capacities,

Defendants-Appellees.

APPELLANT MARCUS'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY AFFIRMANCE AND STAY OF BRIEFING SCHEDULE

On March 18, 2008, Appellant Marcus filed his notice of appeal of the district court's order of dismissal dated March 10, 2008. On April 25, 2008, Mr. Marcus filed his Brief on Appeal and on April 28, 2008, Defendants Mukasey and Federal Election Commission filed motions for summary affirmance and stay of briefing schedule. For the following reasons, Appellant Marcus respectfully requests that this Honorable Court deny Defendants' motions for

summary affirmance, deny defendants' request for a stay of the briefing schedule, and allow this matter to proceed on the merits as currently scheduled.

As a preliminary matter, the Court should consider that Appellant Marcus filed his Brief on Appeal *before* defendants' filed their motions for summary affirmance and for a stay of the briefing schedule. If defendants had wished to seek summary affirmance or to stay the briefing schedule, they should have done so after Mr. Marcus filed his notice of appeal or after this Court issued its briefing schedule on March 25, 2008. Defendants did not file their motions for summary affirmance and to stay the briefing schedule until April 28, 2008, more than a month *after* this Court issued its briefing schedule. In this regard, the Court should consider as untimely Defendants' motions for summary affirmance and to stay these proceedings.

As a consequence, Appellant Marcus already prepared and filed his Brief on Appeal according to the Court's briefing schedule. Defendants last minute request to now stay the briefing schedule and for summary affirmance appears to be calculate solely to delay these proceedings.

I. This Court should deny Defendants' motions for summary affirmance because the question presented herein is based on the 1980 amendments to the relevant provisions of the Act which post-date this Court's decision in *Int'l Union*.

The Court should also reject Defendants' assertion that this appeal is "obviously controlled by precedent" such that summary affirmance is warranted (Motion of Attorney General, pg. 1). The issue presented in this appeal a question of first impression for this Court as to whether the 1980 amendments to the Federal Election Campaign Act ("Act") sets forth a sequence under which the Federal Election Commission ("FEC") investigates alleged campaign finance disputes in the first instance and that the Attorney General can investigate only after receiving a referral from the Commission.

Under the Act, the FEC has *exclusive* civil jurisdiction to investigate campaign finance disputes. This means that the FEC may exercise its jurisdiction to the exclusion of all others. And for more than thirty years, the FEC has resolved, civilly, virtually *all* campaign finance disputes without the intervention or interference of the Attorney General.

The Act also sets forth a referral mechanism by which the FEC may refer certain violations to the Attorney General but only by a bipartisan majority vote of the FEC. By giving the FEC exclusive civil jurisdiction and providing a referral mechanism by which the FEC may refer matters to the Attorney General,

it is clear that Congress set forth a sequence under which the FEC would conduct its civil investigation in the first instance (to the exclusion of all others including the Attorney General), and that the Attorney General would investigate only after receiving a referral from the FEC.

In 1979, this Court rendered its decision in *United States v. Int'l Union of Oper. Engineers, Local 701*, 638 F.2d 1161 (9th Cir. 1979) which addressed the same question but under the then-existing language of the Act. Significantly, the referral provision of the Act, which is squarely at issue in this appeal, was amended in 1980 such that this Court's statutory interpretation of the Act in 1979 is no longer controlling. This Court has never addressed the issue presented herein since the 1980 amendment to the Act.

In *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 307 (1978), the Supreme Court held that a question similar to the question presented here was not predicated on analysis of precedent but rather a review of the statutory scheme. In this case, the referral provision of the statute was amended in 1980 *after* this Court rendered its decision in *Int'l Union*. This Court has never again addressed the issue based on the new language of the statute. Accordingly, Appellant Marcus vehemently challenges Defendants' contention that the issues presented in this appeal are "obviously controlled by precedent."

Under the current statutory scheme, the FEC is given "exclusive civil" jurisdiction which means "to the exclusion of all others." The statutory scheme further provides a mechanism for the FEC to refer a matter to the Attorney General for criminal investigation and/or prosecution *but only after* the FEC has exercised its exclusive jurisdiction.

In this case, the Attorney General began what is believed to be the largest campaign finance investigation in the history of America targeting dozens of individuals, including Mr. Marcus, who contributed to the John Edwards 2004 presidential campaign. The Attorney General began this investigation without ever having received the statutorily required referral from the FEC. About a year later, the FEC began its own investigation but has since sat out on the sidelines because the Attorney General has stripped the FEC of its "exclusive" civil jurisdiction. In short, the Attorney General, with the tacit approval of the FEC, have circumvented the jurisdictional requirements of the Act and reversed the congressional sequence of the Act.

The Attorney General and FEC contend, however, that they have acted properly because the FEC has "civil" jurisdiction while the Attorney General has "criminal" jurisdiction, but this is not the specific issue before the Court. Appellant Marcus does not dispute that the FEC has civil jurisdiction or that the

Attorney General has criminal jurisdiction. The issue presented is an issue of sequence, that is, who exercises jurisdiction in the first instance. Congress clearly and expressly answered this question by granting the FEC *exclusive* civil jurisdiction and providing a mechanism by which the FEC could refer certain matters to the Attorney General *after* it exercised its exclusive jurisdiction. Indeed, the very definition of 'exclusive' jurisdiction means "to the exclusion of all others." Blacks Law Dictionary 564 (6th ed. 1990).

The Attorney General and FEC are proposing that the Court interpret the Act so as to provide the FEC with exclusive civil jurisdiction *but only* to the extent that the Attorney General has not begun its own investigation. In other words, the government seeks to re-write the statute so that the Attorney General and FEC have *concurrent* jurisdiction, but such an interpretation is contrary to the plain language of the statute.[1]

[1] The government suggests that Mr. Marcus's arguments represent a "radical" change in the law. Respectfully, Mr. Marcus disagrees. For more than

30 years, the FEC has resolved, civilly, about 99.9% of campaign finance disputes without the interference or intervention of the Attorney General. In fact, there have only been a handful of criminal campaign finance cases brought by the Attorney General, and even less have ever actually been tried before a jury. So in reality, the only "radical" change proposed here is by the Attorney General. The fact that there have been so few criminal campaign finance cases in 30 years explains why the jurisdictional requirements of the Act, raised herein, have gone unaddressed.

The referral provision of the statute further supports Marcus's assertion that the Act sets forth a sequence under which the FEC exercises its jurisdiction first, and the Attorney General only after receiving a referral. Congress incorporated such a specific referral mechanism to prevent politically motivated or uneven application and enforcement of the Act. Specifically, Congress mandated that the six member Commission consist of 3 members from each party, and required a bipartisan majority vote of 4 members in order to refer a matter to the Attorney General for criminal investigation, but only *after* the FEC has conducted its own investigation. Specifically, the Act provides that

> If the Commission ***by an affirmative vote of 4 of its members***, determines that there is probable cause to believe that a knowing and willful violation of this Act . . . has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States . . . .

2 U.S.C. § 437g(a)(5)(C)(emphasis added). Thus, it is only *after* the FEC opens this jurisdictional door (i.e., *by an affirmative vote of 4 of its members*) that the Attorney General may proceed with an investigation under the Act.

The Attorney General and FEC contend that the referral mechanism is merely a limitation on the FEC and does not restrict the authority of the Attorney General. However, such an interpretation of the statute produces an absurd result. An example that best illustrates the obvious flaw in the Attorney

General's and FEC's argument is as follows: If the FEC votes 5 to 1 *against* referral, the lone disgruntled FEC member can simply walk across the street and say to the Attorney General, "the FEC won't vote to refer this matter to you, so I'm bringing it to you myself. This way, you can still prosecute the case." Such an interpretation of the Act renders meaningless the bipartisan referral mechanism enacted by Congress.

CONCLUSION AND RELIEF REQUESTED

For the reasons contained herein, and because this Court has never examined the amended referral provision and statutory scheme of the Act, Appellant Marcus respectfully requests that this Honorable Court deny Defendants' motions for summary affirmance, deny Defendants' request to stay the briefing schedule, and proceed on the merits of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Michael R. Dezsi hereby certifies that on the 6th day of May, 2008 he caused to be served a copy of ***Appellant Marcus's Response in Opposition to Defendants' Motion for Summary Affirmance and Stay on Briefing Schedule*** upon the following individuals by placing same in the U.S. Mail, postage fully prepaid:

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