Docket No. 07-1284

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.

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

***** ORAL ARGUMENT REQUESTED *****

Submitted by:

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rule 26.1, Plaintiff-Appellant Jon Marcus makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **No**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

April 25, 2008

Michael R. Dezsi

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

COURT RULES

STATEMENT OF RELATED CASES

There are no prior or related appeals in this matter.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant, Mr. Jon Marcus, requests oral argument in the instant appeal. The question presented herein is a question of statutory construction of first impression for this Court. The history and background of the law is sufficiently complex to warrant oral argument which would afford the Court the opportunity to pose any questions it may have concerning the facts or the specifics of the parties' respective positions.

Mr. Marcus's counsel sincerely believes that participation in oral argument will be beneficial, and that the decisional process will be significantly aided by this Court's grant of oral argument.

As one court has noted:

> At its core, the adversary process is oral argument. The presence of live human beings in verbal combat engages the attention of judges and makes them think, question, discuss and reconsider a case as can nothing else, including able briefs and judicial opinions on analogous points. It focuses thought and reflection more than discussion and debate with law clerks in chambers even when the law clerks are better lawyers than the lawyers in the case.
>
> * * *
>
> The oral tradition runs deep in Anglo-American jurisprudence for good reason. It is a safeguard against inattentiveness and unreflection. Oral argument, as Karl Llewellyn observed, is one of the

> 'major steadying factors' which produce 'reckonability' in '[o]ur institution of law-government'.
>
> In oral argument lies counsel's one hedge against misdiagnosis and misperformance in the brief, the one last chance of locating a postern missed in the advance survey. In oral argument lies the opportunity to catch attention and rouse interest among men [and women] who must be got to read – or to reread – this brief not as a routine duty nor under the undiscriminating press of other business, but with the pointed concentration this cause merits. [citing K. Llewellyn, The Common Law Tradition: Deciding Appeals, 18-19 (1960)].

Merritt, Judges on Judging: The Decision Making Process in Federal Courts of Appeals, 51 Ohio St. L.J. 1385, 1386-87 (1991).

JURISDICTIONAL STATEMENT

The district court had original jurisdiction as the case is based on a federal question. 28 U.S.C. §1331. Specifically, Mr. Marcus sought a declaratory judgment under 28 U.S.C. §§ 2201 & 2202 as to the proper interpretation of 2 U.S.C. § 437g. This is an appeal from the final judgment and order of the district court that was entered on March 10, 2008, granting Defendants' motions to dismiss. The district court's order disposed of all parties' claims and is appealable to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. §1291. Plaintiffs filed their timely Notice of Appeal on March 18, 2008.

STATEMENT OF ISSUE PRESENTED

I. The Federal Election Commission has primary and exclusive jurisdiction over the Federal Election Campaign Act. The provisions of the Act set forth a sequence under which the Commission exclusively investigates alleged violations of the Act in the first instance, and the Attorney General may investigate only upon an affirmative and majority vote of the Commission. Did the district court err in dismissing Plaintiff's request for declaratory judgment where the Attorney General violated the Act by initiating an investigation without the statutorily required referral set forth in 2 U.S.C. § 437g(a)(5)(C)?

Appellant Jon Marcus answers: "YES"

Appellees Mukasey and the FEC presumably answer: "NO"

The district court would answer: "NO"

STATEMENT OF THE CASE

This case poses 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 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]

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

[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.

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.

For the following reasons, Appellant Marcus respectfully requests that this Honorable Court reverse the judgment of the district court, and grant his motion for declaratory relief consistent with the congressional mandate contained in the Act.

STATEMENT OF FACTS

Sometime during the summer of 2005, a former disgruntled employee of the Michigan law firm of Fieger, Fieger, Kenney & Johnson, P.C. contacted the Detroit office of the FBI falsely claiming that he had been forced by the firm partners to contribute to the presidential campaign of Senator John Edwards. Instead of referring the matter to the Federal Elections Commission, which under the law has original and exclusive jurisdiction and must investigate campaign finance issues in the first instance, former Attorney General Alberto Gonzales began an invasive and illegal investigation of *every* Fieger Firm employee, their families, and other friends and acquaintances of Geoffrey Fieger, the president of the Fieger law firm. Appellant Jon Marcus, a

resident of Arizona, is an attorney, business associate, and close personal friend of Mr. Fieger.

On November 30, 2005, in a highly publicized media event, federal prosecutors, accompanied by nearly 100 federal agents, led an unprecedented nighttime raid of Fieger's law offices, as well at the homes of *all the employees*. This unprecedented nighttime raid upon a prominent Democrat's law office was specifically authorized by former Attorney General Alberto Gonzales. Since January 2006, many of these employees, family members, and friends of the Fieger firm have been compelled to testify before a federal grand jury. During the grand jury proceedings, the Attorney General's agents have attempted to compel witnesses to disclose for whom they voted in the 2004 election and their entire history of campaign contributions.

On February 1, 2006, counsel to the Fieger Firm sent a letter to FEC Chairman Michael E. Toner demanding that the Commission comply with the provisions of 2 U.S.C. § 437g under which the FEC must first conduct its own investigation before voting to refer the matter to the Attorney General for a criminal investigation. The FEC ignored the letter and took no action; the illegal and extra-jurisdictional investigation by the Attorney General continues to this day.

Around September 2006, the Federal Election Commission began its own investigation into whether the Fieger law firm, including its employees and associates, had violated the Act. Since September 2006, however, the FEC has failed to conduct its statutorily required duties because of the simple fact that the Attorney General has effectively stripped it of its congressionally mandated "exclusive" jurisdiction. Together, the Attorney General and FEC are treating the FEC's "exclusive civil" jurisdiction as dead letter law.

In October 2006, Mr. Marcus was subpoenaed in Arizona to testify and produce documents before a federal grand jury which occurred in November 2006. While appearing before the grand jury, agents of the Justice Department attempted to coerce Mr. Marcus to reveal constitutionally protected activities such as the identity of the presidential candidate for whom he voted in the 2004 election.

On February 21, 2007, Mr. Marcus filed the instant action seeking a declaratory judgment that the acts of the Attorney General are in violation of the Federal Election Campaign Act. Specifically, Marcus avers that the Attorney General, aided by the FEC, have ignored the jurisdictional requirements of the Act such that the Attorney General's investigation is extra-jurisdictional.

District Court Proceedings and Order

The parties filed cross motions for judgment and dismissal and on March 10, 2008, the district court issued its Opinion and Order granting the Attorney General's and FEC's motions to dismiss and denying Mr. Marcus's motion for declaratory judgment (Order dated June 28, 2007, attached as Addendum A).

Specifically, the district court relied on the language of the Act that provides that "[t]he Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions" and that this "'directive' applies to civil enforcement of the Act, not to criminal enforcement of the Act." (R.32, Opinion and Order, pg. 5, Record Excerpts pg. 8).

The district court also found that the 1980 amendments to the Act appeared "to be a procedural change which does not evidence a directive that alters the powers of the Attorney General." (R.32, Opinion and Order, pg. 5, Record Excerpts pg. 8). On March 18, 2008, Mr. Marcus filed a timely Notice of Appeal to this Court.

REVIEWABILITY AND STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision granting Defendants' motions to dismiss for failure to state a claim. *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007).

All of the issues presented in this appeal were raised and briefed at the district court and therefore preserved for appellate review. *See* Ninth Cir. R. 28-2.5.

SUMMARY OF THE ARGUMENT

The Federal Election Commission has primary *and* exclusive jurisdiction over the Federal Election Campaign Act. Only by an affirmative vote of a majority of four members may the Commission refer to the Attorney General knowing and willful violations of the Act. Without a referral by the FEC, the Attorney General has no jurisdiction to investigate or prosecute suspected campaign finance violations.

ARGUMENT

I. The Federal Election Commission Has Primary and Exclusive Jurisdiction Over the Federal Election Campaign Act. Only By An Affirmative Vote of a Majority of Four Members May the Commission Refer to the Attorney General Knowing and Willful Violations of the Act. Without a Referral By the FEC, the Attorney General Has No Jurisdiction to Investigate or Prosecute Suspected Campaign Finance Violations.

Generally, the United States Attorney General's authority to prosecute suspected crimes is plenary except where Congress has provided an expression of its legislative will to restrict the jurisdiction of the Attorney General. *United States v. Morgan*, 222 U.S. 274 (1911).[2] The Federal Election Campaign Act ('FECA', or 'Act') is one example where Congress has clearly

[2] In *Morgan*, the Supreme Court found that the Attorney General shared parallel jurisdiction with the Department of Agriculture based on the Pure Food and Drug Act of 1906 which expressly provided that the Attorney General could initiate proceedings based on a report from *either* the Secretary of Agriculture *or* any health or food or drug officer or agent of any State. *See* Pure Food and Drug Act of June 30, 1906, ch. 3915, sec. 5, 34 Stat. 768, 769 (1906). Given that the statute expressly recognized the Attorney General's ability to prosecute without a referral, the *Morgan* Court refused to limit the Attorney General's prosecutorial powers to cases referred by the Department of Agriculture. Here, unlike the statute considered in *Morgan*, the Federal Election Campaign Act does *not* allow the Attorney General to independently prosecute violations of the Act without a referral from the FEC. In fact, as demonstrated herein, the entire statutory scheme of the FECA would be preempted and rendered nugatory if the Attorney General shared with the FEC primary jurisdiction over the Act.

stripped the Attorney General of his ability to prosecute suspected violations of the Act absent a referral from the Federal Election Commission (FEC).

In 1971, Congress created the FECA to regulate the financing of political campaigns. Public Law 92-225. At the same time, Congress amended several provisions of the federal penal code contained in Title 18 of the United States Code and placed monetary limits on both individual contributions and expenditures in federal political campaigns. Significantly, Congress left many campaign finance crimes in Title 18 of the U.S.C. where those crimes were exclusively subject to prosecution by the Attorney General.

In 1974, Congress amended the FECA and created the Federal Election Commission. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310, 88 Stat. 1263, 1280-83 (amended 1976, 1979, 2002). By statute, Congress expressly required that "[t]he Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act . . . ." 88 Stat. 1281. The Commission was also given "primary jurisdiction with respect to the civil enforcement of such provisions." *Id.*

In order to carry out its congressional mandate, the Federal Election Commission, as an independent federal agency, was created to conduct investigations, issue subpoenas, initiate civil actions, promulgate rules and

regulations under the Act, and render advisory opinions as to whether "any specific transaction or activity by such [an] individual . . . would constitute a violation of th[e] Act. 88 Stat. 1282-83. The 1974 amendments also provided that:

> The Commission, upon receiving any complaint under paragraph (1)(A), or a referral under paragraph (1)(B), or if it has reason to believe that any person has committed a violation of any such provision, shall notify the person involved of such apparent violation and shall report such violation to the Attorney General;

88 Stat. 1284.

Along with the 1974 amendments to the FECA, Congress also amended certain provisions of the federal criminal code contained in Title 18 of the United States Code. Specifically, Congress amended 18 U.S.C. § 608 relating to limitations on contributions by providing that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000." Pub. L. No. 93-443, § 101, 88 Stat. 1263. Congress also added 18 U.S.C. § 614 which provided that "[n]o person shall make a contribution in the name of another person." 88 Stat. 1268.

In 1976, Congress further amended the Act by shifting to the FECA many of the campaign finance restrictions previously contained in Title 18 of

the federal penal code. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283; 90 Stat. 475. For example, before the 1976 amendments, 18 U.S.C. § 608 provided a limit on individual political contributions. Congress repealed 18 U.S.C. § 608 (along with several other provisions of title 18) and shifted this provision to the Federal Campaign Finance Act, 2 U.S.C. § 441a. 90 Stat. 486-87. Congress also made unlawful contributions or expenditures by national banks, corporations, and labor organizations. 90 Stat. 490 (currently codified at 2 U.S.C. 441b).

In addition to the substantive restrictions on campaign finance, Congress also restructured the makeup of the FEC to be "composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and 6 members appointed by the President of the United States, by and with the advice and consent of the Senate." 90 Stat. 475 (currently codified at 2 U.S.C. 437c). To ensure that the FEC's decisions remained neutral, bipartisan and non-political, Congress further commanded that "[n]o more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party." 90 Stat. 475.

Significantly, Congress also amended the Act to add the word "exclusive" before the word "primary" to describe the jurisdiction of the FEC over the Act. 90 Stat. 476. At the same time, Congress restricted the Attorney General's ability to prosecute alleged violations of the Act without first receiving a referral by the FEC. Specifically, in 1976, Congress commanded that:

> If the Commission determines that there is probable cause to believe that a knowing and willful violation subject to and as defined in section 329 . . . has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States . . .

90 Stat. 484. These 1976 amendments are important because they show that Congress fully intended to depoliticize campaign finance disputes by taking them away from the purview of the Attorney General and placing them in the first instance within the "exclusive primary" jurisdiction of the FEC. Indeed, the very definition of "exclusive jurisdiction" means "to the exclusion of all others." BLACKS LAW DICTIONARY 564 (6th ed. 1990).

Under this statutory scheme, the FEC has exclusive jurisdiction to civilly resolve *any* alleged violations of the Act; failing which it can refer violations to the Attorney General by a bipartisan majority vote. The FEC's exclusive jurisdiction is further buttressed by the fact that, from 1971 until

1976, Congress left certain campaign finance violations in Title 18 (like the current § 441a which limits individual contributions to federal campaigns) where those violations could be independently prosecuted by the Attorney General without regard to the FEC and its jurisdiction.

Because the 1976 amendments *required* a referral from the FEC before the Attorney General could initiate criminal proceedings, the amendments received some opposition from members of Congress. Specifically, Senator Brock opposed passage of the 1976 amendments because of the restriction placed on the Attorney General's ability to prosecute without referral from the FEC. In a Senate debate on the amendments, Brock remarked that:

> Equally bad, the Justice Department is no longer able to prosecute on its own. If an aggressive district attorney finds a clear violation of the law, he cannot take the person into court. He must refer the case to the Federal Election Commission. And what if this agency, which Congress has neatly overtaken, imposes nothing but a simple fine? That is it. The Justice Department can take no further action even if it violently disagrees with the decision.

122 Cong. Rec. S. 12471 (1976). That is the correct interpretation of the statute. Senator Brock correctly recognized that it was the specific intent of Congress, of which he was an elected member, to prevent the Attorney

General from independently prosecuting FECA violations without first receiving a referral from the FEC.

In 1979, the Ninth Circuit considered for the first and only time whether the Attorney General could independently prosecute violations of the Act without referral from the FEC under the 1976 law. *United States v. Int'l Union of Oper. Engineers, Local 701*, 638 F.2d 1161 (9th Cir. 1979). There, the court concluded, based upon the *then existing language* of the 1976 law, that the Attorney General *could* prosecute alleged violations of the Act without first receiving a referral from the FEC. Significantly, however, the Ninth Circuit's opinion has now been superceded by subsequent amendment to the Act in 1980.

In 1980, Congress enacted amendments to the Act which made clear it's intent to require a referral by the FEC *before* the Attorney General could prosecute. The 1980 amendments were intended to codify the intent of Congress to *require* a referral by the FEC before the Attorney General could prosecute.

The 1980 amendments require that the FEC may refer a matter to the Attorney General for criminal prosecution *only by an affirmative vote of 4 of its members*. 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 [or chapter 95 or chapter 96 of the Internal Revenue Code of 1954] has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

2 U.S.C. § 437g(a)(5)(C)(emphasis added). 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 (or prosecution) under the Act. This congressionally mandated sequence allows the FEC to exclusively exercise its subpoena power in the first instance to determine compliance or conciliation ***before*** ever referring a matter to the Attorney General.

Upon referral to the Attorney General, the Act now requires that "the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation." 2 U.S.C. § 437g(c). This new provision requiring the Attorney General to file reports *after* a referral from the FEC dispels any argument by the Attorney General that the Act only applies to the FEC and does not impose any restrictions or duties on the office of the Attorney

General.[3] By this statutory scheme, Congress mandates that *all* alleged violations of the Act ***first*** be considered by the FEC which possesses the *sole* discretion to later allow the Attorney General to investigate.

In a direct repudiation of the Ninth Circuit's opinion in *Int'l Union of Oper. Engineers*, Congress's amendment to the Act in 1980 solidified the exclusive jurisdiction of the FEC and outlined the necessary steps required to be taken by the FEC before it may vote to refer the matter to the Attorney General. Under the 1980 version of the Act, the FEC can investigate only with an affirmative vote of 4 of its members "upon receiving a complaint" or "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities." Pub. L. No. 96-187; 93 Stat. 1360; 2 U.S.C. § 437g(a)(2).

Upon receiving allegations of a campaign finance violation, the Commission "shall . . . notify the person of the alleged violation" and "shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section." *Id.*

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[3] Under the Attorney General's misguided argument, he can undermine and circumvent his reporting obligations under the Act by simply initiating all investigations of campaign finance violations himself, thereby avoiding the Act's requirement to issue periodic reports to the FEC.

These steps are *mandatory* and must be followed *before* the FEC can make a criminal referral to the Attorney General.

If, after conducting its field investigation or audit, the FEC determines, *by an affirmative vote of 4 of its members*, that there is probable cause to believe that there has been a violation of the Act, the Commission "shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved." 2 U.S.C. § 437g(a)(4)(A)(i). Significantly, in 1980, Congress also amended the Act to allow an individual who may be subsequently charged criminally (after a referral by the FEC) to "introduce as evidence a conciliation agreement" to demonstrate his lack of knowledge or intent to commit the alleged violation. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187; 93 Stat. 1361-62 (effective January 1980). This amendment clearly demonstrates Congress's intent to establish a sequence of events under which the FEC *first* attempts to resolve alleged violations *prior* to a referral to the Attorney General.

Consistent with the statutory scheme to provide exclusive jurisdiction to the FEC, Congress provided the FEC with powerful tools to exercise its

exclusive jurisdiction to enforce the Act. For example, in addition to its subpoena power, the FEC is authorized "to render advisory opinions" as to whether certain conduct or transactions are permissible under the Act. 2 U.S.C. § 437d. The FEC's power to issue advisory opinions would be rendered meaningless and would be preempted if the Attorney General could independently investigate and charge criminally without first allowing the FEC to examine a case through the issuance of advisory opinions as set forth in 2 U.S.C. § 437d(a)(7). Such a practice by the Attorney General would lead to inevitable conflicts where the FEC and the Attorney General reach entirely inconsistent and diametrically opposed positions as to interpretation, implementation, and enforcement of the Act. This anomalous result is clearly prevented by the Act's orderly scheme providing original jurisdiction to the FEC.

Additionally, § 437d(a)(8) delegates to the FEC the sole power to "develop such prescribed forms and to make, amend and repeal such rules . . . as are necessary to carry out the provisions of this Act." Thus, the Act means exactly what it says; that is, that Congress delegated the exclusive authority to the FEC to carry out its mandate as contained in the Act. Congress's mandate would be meaningless, and rendered nugatory, if the Attorney General were

free to develop his own guidelines for interpreting and prosecuting the provisions of the Act *before* [or without] the FEC's involvement, or before the FEC even had the opportunity to exercise its exclusive jurisdiction over enforcement.

A. The 1980 Amendments to the Federal Campaign Finance Act Contain a Congressionally Mandated Sequence That the Attorney General May Investigate Alleged Violations of the Act Only Upon a Referral By an Affirmative Vote of 4 Members of the FEC. Without an FEC Referral, the Attorney General Has No Congressional Authority to Conduct an Investigation of Federal Campaign Finance Violations.

If there were any doubt remaining after the 1976 amendments as to the question of whether Congress intended to give the FEC exclusive jurisdiction, Congress again amended the Act in 1980 to eliminate any confusion that might have been caused by this Court's opinion in *Operating Engineers*. In 1980, Congress added two significant provisions mandating the FEC's exclusive jurisdiction. First, Congress mandated that an alleged knowing and willful violation of the Act could be referred to the Attorney General *only* "***by an affirmative vote of 4 of its members***". 2 U.S.C. § 437g(a)(5)(c). This is significant because it shows that Congress wanted to avoid political prosecutions of an out-of-power party by the controlling party. Because the Commission consists of 6 members, no more than 3 of whom can be from the

same party, Congress expressly required bipartisan support from a majority of the Commission *before* referring a case for criminal prosecution.

Indeed, it would defy common sense to believe that Congress would statutorily confer broad power upon the FEC only to have it usurped unilaterally by an Attorney General's investigation or prosecution prior to a referral by the FEC.

In determining the effect to be given the provision requiring an affirmative vote of 4, it is not only appropriate for this court to examine the nature and objectives of the FEC as a whole but "a significant consideration . . . is a comparison between the results to which each such construction would lead." *Holbrook v. United States*, 284 F.2d 747, 752 (9th Cir. 1960). The very purpose and essence of requiring "an affirmative vote of 4" members in order to refer a matter for criminal prosecution would be rendered meaningless if the Attorney General could just simply step in and say "oh well, since they don't have the bipartisan support of a majority vote of the Commission we'll issue an indictment ourselves." Congress clearly contemplated this exact politically charged scenario and guarded against it by *requiring* the bipartisan support of 4 members of the Commission ***before*** the FEC could refer a case to the Attorney General for criminal prosecution.

If the Attorney General's assertion of concurrent jurisdiction was true, the purpose of a 4 member bipartisan vote for referral would be superfluous. *Arkansas Best Corp. v. Comm'r Internal Revenue Serv.*, 485 U.S. 212, 218 (1988) (an interpretation of statutory provision that renders another superfluous cannot be correct). Under the Attorney General's theory, if the FEC was considering a criminal referral to the Attorney General, but the Commission voted 5 to 1 ***against*** such a referral, then the lone member in support of referral could simply walk across the street to a politically allied Attorney General and say, "prosecute this case, the Commission has refused to refer for prosecution so I'm bringing it to you myself." Obviously, Congress did not intend such a result. In fact, it protected against such a politically corrupt act. Such a result would undermine the entire statutory scheme of the Act, and render superfluous Congress's 1980 amendment to the statute. Surely, no one can argue in good faith that Congress intended that it be easier for a disgruntled member of the FEC to bring a matter to the Attorney General than it is for the whole Commission (who can only refer upon a majority vote).

A second provision of the 1980 amendments further mandates that the Attorney General may investigate and prosecute violations of the Act *only after* referral from the FEC. Under 2 U.S.C. § 437g(d)(2), a defendant in a

criminal action "may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement *entered* into between the defendant and the Commission . . ."(emphasis added). By using the word "entered" in the past tense, it is clear that Congress intended the FEC to have the first opportunity to examine and administratively resolve alleged violations of the Act before referring the matter to the Attorney General. This provision would be nullified if the Attorney General could first prosecute an alleged violation of the Act since no one would ever cooperate with the FEC in the first instance if the Attorney General could proceed irrespective of a referral.

Naturally, the Attorney General would have no interest in a defendant using a conciliation agreement as exculpatory evidence in a criminal proceeding. Thus, if a referral were not required, the Attorney General could circumvent the law by simply initiating a criminal charge *before* the FEC ever reaches a conciliation agreement. Such duplicity would be an end-run around the statute. By enacting § 437g(d)(2), Congress required that the FEC investigate alleged violations of the Act *in the first instance*, and the Attorney General may investigate or charge *only after* a referral by a bipartisan majority vote of the Commission.

The history of the Act from its inception unequivocally supports this conclusion. At the time the Act was originally passed, most of the substantive restrictions on campaign finance were contained in the federal penal code. In 1974, Congress created the FEC and left the substantive restrictions on Campaign finance *in the penal code*. This fact demonstrates that in 1974 Congress fully intended to allow the Attorney General to continue investigating and prosecuting suspected campaign finance violations even after it created the FEC.

In 1976, Congress *removed* the issues related to campaign finance from the penal code and shifted them to the Campaign Finance Act making them subject to the FEC's oversight, interpretation, and enforcement. Since 1974, virtually all campaign finance cases have been resolved by the FEC. In the history of the United States, no case resembling the facts here has ever been criminally charged or tried to a verdict before a jury.

Congress clearly understood that their members were the very persons who could be targeted by a politically motivated Justice Department. Thus, Congress devised a statutory formula to place all campaign finance matters *first* within the administrative aegis of the FEC. Also significant is the fact that in 1976 Congress created a mechanism by which "the Commission" *could*

refer to the Attorney General knowing and willful violations of the Act. This provision demonstrates congressional intent to administratively funnel *all* alleged violations of the Act first through the FEC, without interference from the Attorney General. It was exactly for this reason that Senator Brock opposed the 1976 amendments. As Senator Brock correctly recognized, under the 1976 amendments, "the Justice Department is no longer able to prosecute on its own. [Instead, the Attorney General] . . . must refer the case to the Federal Election Commission." 122 Cong. Rec. S. 12471 (1976). That is the law, and is has been violated here.

B. The Attorney General's Assertion That He May Proceed Simultaneously With an Investigation without Referral While the FEC Exercises its Own Congressionally Mandated Subpoena Power Creates the Unconstitutional Conundrum of Compelling Individuals to Invoke the Fifth Amendment and Thus Thwart the Ability of the FEC to Exercise its Exclusive Jurisdiction.

The Attorney General's proposed interpretation of the Act impermissibly allows vital Fifth Amendment protections to be used as a mechanism to thwart the entire purpose of the FEC. Under the Attorney General's theory, he may proceed with a criminal investigation irrespective of a referral by the FEC. Under such a scheme, every time the FEC provides its statutorily required notice to an individual of possible noncompliance with the

Act, an individual would, *without fail*, assert her Fifth Amendment right against self-incrimination for fear that any statements made to the FEC would be used against her by the Attorney General in a criminal prosecution.

The FEC could never, *ever* carry out its congressionally mandated functions and duties if the Attorney General could, irrespective of a referral, issue an indictment during the pendency of an ongoing FEC investigation. No individual would rationally respond to, or even settle an investigative request by the FEC without first securing a promise from the FEC that it would not refer the case for criminal prosecution. Each time the FEC sought to settle a case civilly, an individual would be forced to file a motion to quash the FEC subpoena, or move for a protective order, asserting a Fifth Amendment privilege against self-incrimination for fear that the Attorney General would unilaterally prosecute irrespective of a referral by the FEC. Moreover, the FEC would be powerless to proceed because an individual's fear of prosecution would be well founded. Certainly a court could not enforce an FEC subpoena during a simultaneous civil investigation (by the FEC) and a criminal investigation (by the Attorney General) without compelling a violation of a respondent's Fifth Amendment privilege. Thus, allowing

simultaneous investigations would prevent the FEC from ever carrying out its statutory duties.

In *Hoffman v. United States*, 341 U.S. 479, 488 (1951), the Supreme Court emphasized that "[t]he privilege afforded [under the Fifth Amendment] not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a *link in the chain of evidence* needed to prosecute the claimant for a federal crime." *Id.* at 486 (citing *Blau v. United States*, 340 U.S. 159 (1950)). By utterly disregarding the congressionally mandated sequence that the FEC proceed first [and that the Attorney General proceed only after a referral] the Attorney General is effectively making the Fifth Amendment an absolute impediment to the FEC's ability to carry out its investigative and resolution functions.

There is no doubt that if the Attorney General were permitted to conduct a concurrent [or prior] criminal investigation, while at the same time the FEC, during its statutorily required investigation, issues compulsory process to testify, a respondent would have a well founded fear of answering *any* question posed by the FEC. Indeed, a respondent's answers "[c]ould furnish a link in the chain of evidence needed [by the Attorney General] to prosecute the

claimant for a federal crime." *Hoffman*, 341 U.S. at 486. Thus, the FEC could never civilly resolve a dispute if the Attorney General could independently prosecute without a referral by a majority vote of the Commission.

In *United States v. Grable*, 98 F.3d 251 (6th Cir. 1996), the Sixth Circuit refused to uphold a civil contempt order against a taxpayer who asserted his Fifth Amendment privilege in response to an IRS summons. In *Grable*, the IRS issued a compulsory summons for failure to file federal income tax returns. At a contempt hearing, the taxpayer asserted his Fifth Amendment privilege against compulsory self-incrimination. The district court refused to recognize the taxpayer's Fifth Amendment right in response to the IRS summons and held him in contempt of court. The Sixth Circuit reversed and held that the taxpayer's failure to file a tax return constituted a crime and thus "the prospect of a criminal prosecution and punishment appears to have been real and substantial, not 'merely trifling or imaginary.'" *Id.* at 255 (citing *Marchetti v. United States*, 390 U.S. 39 (1968)). So it is here.

An Attorney General's 'concurrent' investigation of the same facts and circumstances that serve as a basis for an FEC investigation would act as an illegal whipsaw under which the Attorney General simply sits back while the FEC uses its congressionally authorized subpoena power to compel a

respondent into self-incrimination. Such a shameless result is totally repugnant to the most basic principles of constitutional jurisprudence. *See Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964). As Justice Frank Murphy aptly stated:

> The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution.

United States v. White, 322 U.S. 694 (1944).

Here, the Attorney General [with the tacit approval of the FEC] is attempting to gut those provisions of the Act designed specifically to thwart the intolerable situation now created. The Act is carefully designed to allow the FEC to administratively resolve alleged violations of the Act by way of civil settlements and conciliations. As part of a conciliation, the FEC can agree that it will not refer the matter to the Attorney General so as to conclusively resolve the matter.

The Attorney General's position undermines any such efforts by the FEC to conciliate alleged violations. If the Attorney General could independently prosecute alleged violations of the Act without a referral, no

one could ever resolve a campaign finance dispute with the FEC, and the various provisions of the Act allowing the FEC to resolve disputes would be rendered meaningless.

Moreover, the Supreme Court has refused to allow simultaneous criminal and civil investigations by the Attorney General and administrative agencies like the FEC. In *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978), the Court considered whether the Internal Revenue Service could exercise its subpoena power under 28 U.S.C. § 7602 when it "was conducting [an] investigation solely for the purpose of unearthing evidence of criminal conduct." *Id.* at 299. The Court concluded that under § 7602 Congress specifically authorized the IRS to conduct civil investigations that carried the potential of criminal liability; however, the Court also emphasized that the IRS's subpoena power must cease at the point at which the agency refers a matter to the Attorney General for criminal prosecution.

The *LaSalle* Court recognized the inherent conflict created by allowing simultaneous investigations by the Attorney General and an administrative agency. As the *LaSalle* Court noted, "[o]nly at th[e] point [of referrral] do the criminal and civil aspects of a tax fraud case begin to diverge." *LaSalle*, 437

U.S. at 311 (citing *United States v. Hodge & Zweig*, 548 F.2d 1347, 1351 (9th Cir. 1977); *United States v. Billingsley*, 469 F.2d 1208, 1210 (10th Cir. 1972).

The Court noted the impossible situation created if it allowed both the IRS and the Department of Justice to proceed simultaneously and *after* the IRS had referred the matter to the Attorney General. In fact, the Court highlighted the futility of the Attorney General's case if the IRS were allowed to continue its investigation by use of its subpoena power. Such activity by the IRS would greatly jeopardize the Attorney General's' use of a grand jury. "We cannot deny that the potential for expanding the criminal discovery rights of the Justice Department or for usurping the role of the grand jury exists at the point of the recommendation by the special agent." *Id.* at 313.

After the *LaSalle* case was decided, Congress amended the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) to ensure that the Attorney General and IRS could not conduct simultaneous investigations. Specifically, Congress delineated where the IRS's subpoena power under § 7602 ended, that is at the point where an investigation has been referred to the Justice Department for prosecution. Pub. L. No. 97-248, 96 Stat. 324 (1982). This case involves a similar practical problem as that presented in *LaSalle*.

In short, the Attorney General's assertion that he may proceed independently with a criminal investigation, without a referral from the FEC, while the FEC conducts its own investigation, runs afoul of the statutory scheme requiring the FEC to resolve cases civilly in the first instance. Recognizing this obvious problem, Congress set up a statutory scheme under which *all* alleged violations of the Act must *first* be considered by the FEC *and then only* by the Attorney General upon referral by the FEC.

Accordingly, the Attorney General's proposed statutory construction of the Act to include shared or concurrent jurisdiction must be rejected by this Court as an impermissible infringement upon the statutory framework providing the FEC with primary and exclusive jurisdiction.

C. A Congressional Grant of Primary and Exclusive Jurisdiction to the FEC Effectively and Entirely Forecloses the Attorney General's Contention of Shared or Concurrent Jurisdiction. Exclusive and Concurrent Jurisdiction Do Not Go Hand in Hand.

The FEC's ability to exercise its primary and exclusive jurisdiction over the law is gutted when the Attorney General intervenes uninvited by the FEC. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court described the FEC's enforcement power as "both direct and wide ranging." *Buckley*, 424 U.S. at 112. The Court also emphasized that the FEC has exclusive

jurisdiction to decide how to proceed under the Act. Specifically, the Court stated that "[i]n no respect do the foregoing civil actions require the concurrence of *or participation by the Attorney General*; *conversely, the decision not to seek judicial relief in the above respects would appear to rest solely with the Commission.*" *Id.* (italics added).

By ignoring the FECA statutory scheme, the Attorney General has usurped the primary and exclusive jurisdiction of the FEC and taken it for himself. The FEC is thus forced to sit by while the Attorney General disingenuously claims that he and the FEC share exclusive jurisdiction. In short, both the Attorney General and the FEC are treating the FEC's exclusive civil jurisdiction as dead letter law. In an effort to circumvent this problem, the Attorney General suggests in the alternative that he has jurisdiction over criminal matters while the FEC has jurisdiction only over civil matters. These arguments completely miss the mark.

When the Attorney General steps in, *without a referral,* he has stripped the FEC of ***any and all jurisdiction*** to do anything, including civil enforcement of the Act. In short, the Attorney General does violence to the congressional command that the Commission shall have "exclusive jurisdiction of civil enforcement." 2 U.S.C. § 437c(b). "Exclusive" means

exactly what it says: that the FEC has jurisdiction to the exclusion of all others including the Attorney General! Indeed, the Attorney General's proposition of "shared exclusive jurisdiction" is an oxymoron. The statute requires that the FEC exhaust its administrative functions *before* making a referral to the Attorney General.

The Attorney General's position is also at odds with the abstention doctrine of primary jurisdiction. The absurd concept of 'shared primary jurisdiction' is entirely unworkable under the Federal Campaign Finance Act.

Primary jurisdiction is used by the federal courts to abstain from hearing certain matters until after the agency has had an opportunity to interpret unanswered technical factual issues. *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 567 (1946); *United States v. Haun*, 124 F.3d 745 (6th Cir. 1997)("The doctrine of primary jurisdiction arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency."). The doctrine of primary jurisdiction is designed to promote comity between courts and administrative agencies and applies with equal force to both civil proceedings and criminal prosecutions. *See United States v. Pacific & Arctic Co.*, 228 U.S. 87, 106-08 (1913); *United*

States v. Alaska Steamship Co., 110 F. Supp. 104, 111 (Dist. D.C. 1952). In *Haun*, the Sixth Circuit emphasized that:

> 'Primary jurisdiction,' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Haun, 124 F.3d at 749 (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956)). Here, Congress expressly delegated to the FEC the sole statutory responsibility to issue advisory opinions as to whether certain conduct or transactions fell within the scope of the Act, and promulgate rules "necessary to carry out the provisions of th[e] Act" and to "encourage voluntary compliance . . ." 2 U.S.C. § 437d.

If the Attorney General were permitted, in the first instance, to investigate and prosecute without a referral from the FEC, the value of the Commission's practices and rules designed to promote voluntary compliance and avoid the rigors of litigation would be gutted. *Arkansas Best Corp. v. Comm'r of Internal Revenue Serv.*, 485 U.S. 212 (1988)(an interpretation of a statutory provision that renders another superfluous cannot be correct).

The following example best illustrates this point: the Attorney General issues an indictment while at the same time the FEC is drafting an advisory opinion as to whether the conduct forming the basis of the indictment is proscribed by the Act. In these circumstances, the courts must ordinarily defer to the rule making authority of the FEC under the doctrine of primary jurisdiction. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963)(primary jurisdiction "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme").

If the Attorney General could proceed unfettered without referral from the FEC, the Attorney General's prosecutions would constantly be at odds with courts who must defer jurisdiction of the matter to the FEC as the administrative agency exclusively possessed with the exclusive implementation and enforcement of the Act. Congress intended to avoid this quagmire completely by plainly writing a statute which mandates that the FEC has the first opportunity to consider the conduct or transaction and decide whether to refer the matter to the Attorney General. The plain wording of the Act conclusively establishes that Congress intended the FEC to exercise

"exclusive" jurisdiction over the investigation of *all* alleged violations of the Act *before* the Attorney General can ever initiate a criminal investigation.

CONCLUSION AND RELIEF SOUGHT

The Federal Election Commission has primary *and* exclusive jurisdiction over the Federal Election Campaign Act. Only by an affirmative vote of a majority of four members may the Commission refer to the Attorney General knowing and willful violations of the Act. Without a referral by the FEC, the Attorney General has no jurisdiction to investigate or prosecute suspected campaign finance violations.

It is important to stress that the activity of the Attorney General as documented here is unlike ever before. For nearly 30 years, virtually all campaign finance cases have been resolved by the FEC – not the Justice Department. The FEC is willfully failing to comply with the requirements of the Federal Campaign Finance Act in order to assist the Attorney General to engage in politically motivated investigations like the one now before this Court.

Accordingly, Appellant Mr. Marcus respectfully requests that this Honorable Court reverse the judgment of the district court, grant his motion for declaratory judgment, and conclude that the Attorney General's conduct is

unlawful, unconstitutional, and contrary to the requirements of the Federal Election Campaign Act.

Respectfully submitted,

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Docket No. 07-1284

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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.

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation provided in Fed.R.App.P. 32(a)(7)(B). The foregoing brief is proportionally spaced Times New Roman (Point 14), and contains 8,349 words. I relied on my WordPerfect software to obtain the word count.

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CERTIFICATE OF SERVICE

Michael R. Dezsi hereby certifies that on the 25th day of April, 2008 he caused to be served a copy of Plaintiff-Appellant's Opening Brief on Appeal and Appendix upon the following individuals by placing same in the U.S. Mail, postage fully prepaid:

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