United States District Court
District of Columbia

Republican National Committee et al., *Plaintiffs* v. **Federal Election Commission**, *Defendant*	**Civil Case No. 14-cv-853 (CRC)** THREE-JUDGE COURT REQUESTED ORAL ARGUMENT REQUESTED

Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment

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Argument

Rule 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Plaintiffs have made that showing and so are entitled to summary judgment.

I. There Is No Genuine Material-Fact Dispute.

There is no genuine material-fact dispute preventing summary judgment. The facts set out in Plaintiffs' Statement of Material Facts (Doc. 25-2) should be deemed admitted because FEC filed no statement of material facts with their memorandum in opposition to summary judgment (Doc. 27). FEC was required to do so: "An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues, setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated . . . ." LCvR 7(h)(1). "[T]he court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." *Id.* So there is no genuine material-fact dispute over those facts, which provide standing and describe the expressive-association activities plaintiffs intend, given judicial relief.

In addition to filing a summary-judgment opposition, FEC filed a Rule 56(d) motion. (Doc. 28.) But in its Rule 56(c) motion, memorandum, and declaration, FEC also identified no genuine material-fact dispute that exists, or might exist given more evidence, concerning any fact in Plaintiff' Statement of Material Facts, so those material facts are undisputed (even if a Rule 56(d) motion could substitute for the statement of facts FEC didn't file).

Moreover, plaintiffs showed in their opposition (Doc. 30) to FEC's Rule 56(d) motion why that motion should be denied. All the arguments set out in plaintiffs' opposition need not be

repeated here, but four key arguments are summarized next. They show there is no genuine material-fact dispute here.

First, FEC failed to meet Rule 56(d)'s requirements of proving necessity with specificity. (*See* Doc. 30.) As set out in Parts I and II of plaintiff's opposition (Doc. 30), Rule 56(d) provides a mechanism for a party to defeat summary judgment *by identifying a triable fact*. A Rule 56(d) motion, memorandum, and declaration must identify the potential facts for which the Rule 56(d) movant seeks to create *triable* facts by getting and providing evidence in one of two ways: (i) submitting "affidavits or declarations" or (ii) "tak[ing] discovery." Fed. R. Civ. P. 56(d)(2). Affidavits/declarations must not be conflated with taking discovery in making a Rule 56(d) showing of necessity with specificity because the two types of activity are different and require a different showing under Rule 56(d). As appropriate for either affidavits/declarations or discovery, the Rule 56(d) movant must show *specific* details, including the potential triable fact for which it seeks evidence, how the evidence sought will prove a genuine material-fact dispute, why such evidence is discoverable, why the movant has been unable to provide the evidence already, and how long it will take the movant to get the evidence. No fishing expeditions are allowed on vague necessity assertions. FEC did not meet the necessity-specificity requirement of Rule 56(d).

Second, in the Joint Scheduling Report, "[t]he parties agree[d] that this case can be resolved by cross-motions for summary judgment ...." (Doc. 26 at 4.) Therefore, they agreed that "there is *no* genuine dispute as to any material fact and [a] movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added). (*See* Doc. 30 at 2.)

Third, there cannot *be* a genuine material-fact dispute here because the key relevant facts involve plaintiffs verifying their intent to engage in expressive-association activities involving (a) independent expenditures, (b) independent-expenditure entities, and (c) party-committees doing

independent-expenditure activity through an independent-expenditure entity (an NCA). FEC doesn't dispute that plaintiffs intend to do these things, given judicial relief. So the *real issue* is whether (a) independent expenditures, (b) independent-expenditure entities, and (c) party-committee independent-expenditure activity *pose cognizable quid-pro-quo corruption or its appearance*. But that is not a *factual* question about which FEC could submit evidence because it is settled, as a *matter of law*, that those activities pose *no* cognizable corruption or its appearance. *See infra* at 4-5 (summarizing case law). Consequently, a party-committee doing independent expenditures through an NCA poses no constitutionally cognizable threat of quid-pro-quo corruption or its appearance, as a matter of law, and there can be no factual dispute over the binding matter-of-law holdings to that effect. (*See* Doc. 30 at 2-3, 27-28, 30-31, 34-35, 39-40.)[1]

Fourth, the evidence FEC seeks is not "relevant to any party's claims or defenses," Fed. R. Civ. P. 26(b)(1), because "defenses" must be read as *permissible*, *cognizable* defenses. If independent expenditures and independent-expenditure activity, including by party-committees and including contributions to independent-expenditure-only entities (such as NCAs), pose neither quid-pro-quo corruption nor its appearance, as a matter of law, then trying to overturn such binding matter-of-law holdings by factual evidence is not a permissible, cognizable defense to which purported evidence of supposed corruption or appearance is relevant.

In sum, absent a genuine material-fact dispute, this case should be decided as a matter of law.

[1] Summary judgment should be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 322-23.

II. Plaintiffs Are Entitled to Judgment as a Matter of Law.

FEC's summary-judgment opposition (Doc. 27) made no effort to dispute plaintiffs' showing that they are entitled to judgment as a matter of law (Doc. 25-1).[2] So plaintiffs are entitled to judgment as a matter of law.

Plaintiffs have shown that, under a straightforward application of controlling matter-of-law holdings, plaintiffs should win as a matter of law because the only cognizable governmental interest that might support categorically prohibiting party-committees from setting up an NCA (or doing the other similar activities plaintiffs verify their desire to do) is quid-pro-quo corruption or its appearance. But as a matter of law, the government lacks any such interest regarding independent expenditures, independent-expenditure entities, or party-committee independent-expenditure activity, so it lacks any interest in categorically banning a party-committee from setting up an NCA (or doing the other similar activities plaintiffs verify their desire to do). (*See* Doc. 25-1.)

In short, the matter-of-law holdings supporting plaintiffs may be briefly stated as follows. As a *matter of law*,

- "independent expenditures . . . do not give rise to corruption or the appearance of corruption," *Citizens United v. FEC*, 558 U.S. 310, 357 (2010);
- "because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption [or its appearance] interest in limiting contributions to independent expenditure-only organizations" such as NCAs, *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010); *see also*

[2] FEC should be provided no further briefing, though its summary-judgment opposition is identical to its Rule 56(d) memorandum. That identical filing should be deemed an acknowledgment that FEC has no legal arguments against plaintiffs' summary-judgment arguments. FEC relied entirely on the notion that Rule 56(d) allows it to do discovery to which FEC is not entitled. That reliance was misplaced, but FEC should not be granted further briefing because of its misplaced reliance on its misinterpretation of how the rules apply to what FEC wants to do.

EMILY's List v. FEC, 581 F.3d 1, 12 (D.C. Cir. 2009) (recognizing right to have separate accounts for independent expenditures and contributions); *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011) (recognizing that *EMILY's List* authorizes NCAs)[3];

- party-committee independent-independent activity similarly poses no cognizable risk of corruption or its appearance, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"); and
- the fact that party-committees and candidates are "inextricably intertwined," *McConnell v. FEC*, 540 U.S. 93, 155 (2003), does not pose a constitutionally cognizable risk of quid-pro-quo corruption or its appearance *regarding party-committee independent-expenditure activity* because *McConnell* held that party-committees could not be forced to choose between coordinated expenditures and independent expenditures, *id.* at 213-19, meaning that political parties are factually capable of doing independent expenditures, as a matter of law, even if they also do coordinated expenditures, and so have a constitutional right to do independent expenditures under prevailing laws, regulations, and FEC guidelines.
- To these matter-of-law holdings, should be added FEC's recognition that, if entities can do independent expenditures *separately*, they must be allowed to pool their resources for effective advocacy by doing them *together*, *see* FEC, Advisory Opinion ("AO") 2010-11 (Commonsense Ten) at 3, which should be treated in the nature of a concession here.

Applying these matter-of-law holdings and FEC's concession to the issue of whether government may categorically ban party-committees from setting up an NCA (or do the other similar activities plaintiffs verify their desire to do) yields a straightforward analysis.

[3] *See also* FEC, *FEC Statement on Carey v. FEC: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account* (Oct. 5, 2011) (recognizing that some political committees may have a non-contribution account to receive unlimited contributions for making independent expenditures) (*see* www.fec.gov/press/press2011/20111006postcarey.shtml).

First, the government lacks the requisite interest (the only cognizable one) in preventing quid-pro-quo corruption or its appearance. Independent expenditures pose neither quid-pro-quo corruption nor its appearance (*Citizens United*). The same is true of independent expenditures by party-committees (*Colorado-I* and *McConnell*). *Because* independent expenditures pose no quid-pro-quo corruption or its appearance, contributions to NCAs may not be limited (*SpeechNow*). Therefore (applying the same analysis), *because* party-committee independent expenditures *also* pose no risk of quid-pro-quo corruption or its appearance, contributions to party-committee NCAs *also* may not be limited.[4] Moreover, because would-be contributors to a party-committee NCA may do unlimited independent expenditures and since party-committees can do unlimited independent expenditures—all without posing any quid-pro-quo corruption or its appearance—then there is no quid-pro-quo corruption or its appearance if the would-be contributors and party-committee pool their resources for making non-corrupting independent expenditures together through a party-committee NCA. Categorically banning the party committee from setting up such an NCA violates their expressive-association rights under the First Amendment because there is no cognizable interest justifying the ban.

Second, under any scrutiny level, there is a substantial mismatch between the alleged interest in preventing quid-pro-quo corruption (and its appearance) and a categorical ban on a party-committee setting up an NCA because the independent-expenditure activity involved poses no risk of quid-pro-quo corruption (or its appearance).

In sum, categorically prohibiting a party-committee from setting up an NCA (or doing the other independent activities plaintiffs seek to do) is unconstitutional under First Amendment free-speech and free-association rights. So plaintiffs are entitled to judgment as a matter of law.

[4] Party-committee status does not justify different treatment. *See* Doc. 25-1 at Part III.C.

Conclusion

For the reasons shown, this Court should grant summary judgment to plaintiffs.

Respectfully submitted,

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Certificate of Service

I certify that today I electronically filed the foregoing with the clerk of court using the CM/ECF system, which will notify:

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