UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WENDY WAGNER, *et al,*

Plaintiffs,

vs. **No. 11-cv-1841(JEB)**

FEDERAL ELECTION COMMISSION,

Defendant.

PLAINTIFFS' MEMORANDUM IN RESPONSE TO MEMORANDUM OF AMICI CAMPAIGN LEGAL CENTER & DEMOCRACY 21

This memorandum is submitted in response to the 32-page memorandum submitted by amici Campaign Legal Center and Democracy 21 on August 22, 2012, as authorized by this Court's Order dated August 23, 2012. It does not respond to the filings by the defendant Federal Election Commission on August 15, 2012. Because many of the arguments made by amici have been previously made in this litigation, this memorandum will make only four points.

1. This is a First Amendment case, not an economic regulation case. Amici pay lip service to that fact, but then proceed to argue as if the case were governed by a rational basis standard, in which the legislature is granted substantial deference. This is most clear when amici respond to plaintiffs' arguments that section 441c cannot be sustained because of the numerous ways in which it is both under- and over-inclusive. According to amici, that is a claim that should be addressed to Congress, not the federal courts. But because this is a First Amendment case, in which Congress has imposed a complete ban on individuals such as plaintiffs from making any political contributions in connection with federal elections, Congress is required to assure that all limitations,

especially bans, are "closely drawn" to achieve the purpose behind the restriction. For all the reasons set forth in plaintiffs' memorandum in support of summary judgment, section 441c does not come close to meeting that test, and amici's suggestion that plaintiffs take their claim to Congress is seriously misplaced.

2. Amici's memorandum contains citations to a wide range of statutes enacted by state and local governments that they contend support section 441c. If offered to show that there is some basis for some kinds of laws that place some limits on the political contributions of some government contractors, plaintiffs would agree with the broad proposition that some regulation of contributions by some government contractors may be warranted to avoid the reality or appearance of pay-to-play. However, amici seek to make more of those other laws than that, and in doing so, they overstate the significance of those laws to this case for several reasons.

First, unless a statute has been upheld in court, it is of no significance beyond the fact that some legislators thought they saw a problem and decided to pass a law directed to it. Second, unless the procurement system on which those laws operate is similar to the federal system as applied to individuals such as plaintiffs, those laws are largely irrelevant. As plaintiffs have previously explained regarding how section 441c applies to them, most if not all of those laws do not apply to persons at the state level who function like employees. We know of no case in which the claims like those of plaintiffs Miller and Brown have been rejected in a First Amendment, let alone an Equal Protection, challenge. Although there are some statutes that do reach persons in plaintiff's Wagner's situations, we know of no case in which a total ban as applied to those persons has been upheld. Moreover, as our prior submissions show, in no case was a contractor law upheld

that did not include an exemption of some kind that allowed every individual to make some contribution to someone in connection with an election. It is the absence of any safe harbor of any kind in section 441c for individuals like plaintiffs that makes it different from every other law that has been upheld in court.

3. On page 25, amici suggest that there are two alternatives for plaintiffs to express their electoral preferences, but neither can save section 441c as applied to plaintiffs. First, amici suggest that plaintiffs can make independent expenditures because section 441c does not mention them. However, the FEC's rules make clear its view that independent expenditures are also prohibited by section 441c. *See* 11 CFR §115.2 (prohibiting contractors from making "either directly *or indirectly*, any contribution or *expenditure* of money or any other thing of value" (emphasis added)); *see also* 11 CFR § 115.6 (including expenditures as well as contributions in the ban, regardless of the source of the funds).

These FEC rules have not been tested in court. But even if the FEC is mistaken in its interpretation of the statute, and individual contractors may spend unlimited amounts of money on independent expenditures supporting candidates, including those who have influence over their government contracts, that would not save the ban in section 441c from this First Amendment challenge. While the D.C. Circuit has recognized that the Supreme Court has held "as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption," *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc), there is no Supreme Court decision, or that of any other court of which plaintiffs are aware, that has upheld a law allowing an individual voter to make unlimited independent expenditures, but not allowing that individual to

make a contribution of any amount to any candidate or political committee. Sustaining such a law here would be particularly bizarre where the asserted purpose of section 441c is to prevent the appearance of pay-to-play. Under the "closely drawn" First Amendment standard applicable here, the notion that a $10 contribution by an individual federal contractor to a candidate for Congress would present the appearance of paying to play, while the purchase of $10,000 or even $10 million in television ads by the same contractor to support that same candidate would not present such an appearance, defies all logic. And the fact that the ban on contributions applies even to contributions to political committees that make only independent expenditures underscores just how over-inclusive section 441c is.

Second, amici also suggest that plaintiffs could host fund-raisers for candidates for Congress or the President as an alternative to making a contribution. Leaving aside the issue of whether it is reasonable in terms of the burden on the plaintiffs to compare writing a check (or clicking on a website and inserting credit card information), with making all the arrangements and taking the time to host such an event, amici overlook that section 431(8)(B) excludes the value provided by hosting an event, but only within limits. Thus, subparagraph (ii) excludes out of pocket costs only "to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year." This exception is relevant to this challenge for two reasons: (A) If the object of section 441c is to prevent the appearance of pay-to-play, it would appear to most observers that having a fund-raiser at one's home would be at least as inappropriate

for a federal contractor as making a modest contribution, especially if the other guests end up being major contributors. Stated another way, what is the rationale of permitting the greater, while banning the lesser? (B) If it is reasonable to allow fund-raisers, but with a limit on the costs that contractors and others can spend on them, it suggests that banning all contributions, and not just placing some limits on them – even limits lower than those generally applicable to others – is inconsistent with the "closely drawn" requirement applicable here. How is it even rational to allow these plaintiffs to spend $1,000 to host a fundraiser for a favored politician's campaign – at which the politician may appear and thank the host for his efforts – but send them to jail for contributing $25 to the same politician's campaign?

4. Although amici state that their memorandum does not separately analyze plaintiffs' Equal Protection claim (p.1), it contains a number of references to the impact of section 441c on corporations, which is relevant mainly to that claim. For example, amici contend that plaintiffs have effectively conceded that, because both individuals and corporations that are government contractors are forbidden from making contributions, they are treated equally (p. 23). However, contractor corporations can establish and pay for separate segregated funds (PACs) that must use the name of the contractor-sponsor when making contributions. And those contributions can be made to any candidate, even one that might be in a position to influence the award of the contract, which creates the same appearance of pay-to-play as if the sponsor itself made the contribution. The fact that the entities are legally separate and that the Supreme Court has ruled that a corporation has a right to make independent expenditures, even if it has a PAC, is

irrelevant in the context of pay-to-play, where the justification for the ban is to avoid the *appearance*, as well as the reality, of pay-to-play.

Moreover, individuals such as plaintiffs cannot set up PACs because the exception does extend to individuals. Perhaps equality could be achieved in an analogous way if individuals were allowed to use funds from sources other than their government contracts, such as plaintiff Wagner's earnings as a law professor, the pensions of plaintiffs Brown and Miller, or money that any of them had from savings, gifts, or inheritances. But section 441c bans all contributions, regardless of the source of the funds. *See* 11 CFR § 115.6 (ban extends to contractor "contributions or expenditures from their personal assets"). To many, allowing an individual to set up a separate fund to avoid section 441c might seem quite artificial, but it is no more artificial than is allowing a corporate PAC to make otherwise prohibited contributions, or using an LLC as the official contractor, but having all the income go to the sole shareholder, officer, and director who is the contributor and who has performed all of the services under the government contract. Whether considered as an Equal Protection violation, or as an example of the under-inclusiveness of section 441c as applied to corporations and their PACs in a First Amendment analysis, the ban on contributions by plaintiffs cannot stand.

For all of these reasons, as well as those set forth in plaintiffs' prior submissions, section 441c falls far short of being "closely drawn" to support its stated objective or to sustain the distinction between the total ban on contributions in federal elections that is applicable to plaintiffs and what it allows others who are similarly situated to do.

Respectfully submitted,

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