UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WENDY E. WAGNER, *et al,*

Plaintiffs,

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

FEDERAL ELECTION COMMISSION,

Defendant.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STRIKE DEFENDANT'S STATEMENT OF MATERIAL FACTS

On August 21, plaintiffs moved to strike the Statement of Material Facts filed by the Federal Election Commission, arguing that the FEC had used the Statement for purposes that are inconsistent with its proper function in summary judgment litigation and that vastly extended the FEC's page limits for legal argument on the pending motions for summary judgment. The FEC's opposition, like its Statement, misses the mark by failing to appreciate the proper role for such statements in motions for summary judgment, especially in this case, which has already been through extensive briefing on plaintiffs' motion for a preliminary injunction. Rather than responding individually to the FEC's many arguments, plaintiffs will limit their reply to the main point.

The FEC's opposition (p. 4) correctly recognizes that a Statement of Material Facts assists the Court to decide summary judgment motions "efficiently and effectively" by requiring counsel "to crystallize for the district court the material facts and the relevant portions of the record." (Citations and internal quotations omitted). The FEC's 53 page, 151 paragraph Statement flunks that functional test, and most of the items in its Statement have no basis in the record in this case. This is not a factually complicated case; there is no

dispute about what the plaintiffs do in their jobs that subjects them to the ban in section 441c, nor are there any other material disputes about any adjudicative facts in the record of this case (as the FEC has articulated that term, *see* Opposition at 2 & 6 n.2). Paragraphs 1-13 of the FEC's Statement are proper as they relate to adjudicative facts, and while plaintiffs might quibble with some parts of some of them (as the FEC did with some of the facts in plaintiffs' Statement), none of those differences are material to the outcome of this case.

The principal problem with the FEC's Statement is that it includes a vast number of what it calls "legislative facts," that do not rely on the record, but on court decisions, statutes, rules, legislative history, newspapers, websites and the like that they cite and from which they quote. Because those "factual" assertions (and arguments) are not based on the record in this case, they are not properly part of a Statement of Material [Adjudicative] Facts. It is not, as the FEC contends, that plaintiffs deny that the FEC can ask the Court to take notice of such legislative facts; plaintiffs have no such objection, as evidenced by their lack of objection to the FEC's citation to such legislative facts in its Memorandum in Opposition to the Motion for a Preliminary Injunction (Docket # 25, *e.g.,* pp. 4-6, 9-12, & 17-18) or in its Summary Judgment Memorandum (Docket # 32, *e.g.,* 8, 12, 17 (incorporating various numbered Statements) & 21). It is the blending of adjudicative facts with legislative facts, and the claim that legislative facts, such as statements in newspaper articles, can count as "undisputed material facts" for purposes of summary judgment, that is the primary basis of plaintiffs' objection.

In addition, by labeling all 151 paragraphs (many including multiple items) as material facts, the FEC's Statement imposes a burden on plaintiffs and the Court to determine whether each assertion is factual and accurate, as well as whether it is material.

But because hardly any of these items satisfy the requirements of Rule 56 that the facts upon which a party relies in seeking summary judgment "be presented in a form that would be admissible in evidence," Fed. R. Civ. P. 56(c)(2), and be supported by "citing to particular parts of materials in the record," Fed. R. Civ. P. 56(c)(1)(A). The FEC's Statement is not consistent with the basic rules for summary judgment adjudication, and it hinders rather than helps the Court decide the legal issues in this case. Accordingly, the motion to strike should be granted.

Nevertheless, in the interest of accommodation and to demonstrate that plaintiffs are not trying to prevent the Court from being provided information that the FEC thinks is helpful to its case, plaintiffs suggest the following possible compromise: the Court should strike the FEC's Statement, but permit it to file two properly-titled and functionally-appropriate documents. The first would consist of paragraphs 1-13 of the previous Statement as its new Statement of Material Facts under Local Civil Rule 7(h)(1). The second, consisting of paragraphs 14-151 of the previous Statement, would be filed as an Addendum to the FEC's Memorandum of Law on the pending summary judgment motions. Although that would result in the FEC having submitted memoranda of law totaling about 60 pages, plaintiffs will not object, nor seek leave to reply.

Finally, if the Court denies the motion to strike entirely, plaintiffs request 14 days to file a Statement of Genuine Issues responding to the FEC's Statement of Material Facts, pursuant to Local Civil Rule 7(h)(1). In it, they will explain why most of the paragraphs after paragraph 13 are not properly supported as required by Rule 56; why most of those items are not material; and for a number of them why they are either not correct or require qualification. There is no issue in this case that should require plaintiffs to engage in that

level of dissection, nor the Court to sift through the back and forth on such peripheral issues. But if all 151 items are asserted to be material facts, plaintiffs would have no choice but to file such a response.

Respectfully submitted,

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September 14, 2012