

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|--------------------------------|---|-----------------|
| _____ |) | |
| SPEECHNOW.ORG, <i>et al.</i> , |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Civ. No. 08-248 |
| v. |) | |
| |) | REPLY |
| FEDERAL ELECTION COMMISSION, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

**DEFENDANT FEDERAL ELECTION COMMISSION’S
REPLY IN SUPPORT OF ITS MOTION TO ALTER
OR AMEND THE JUDGMENT**

The Federal Election Commission has moved this Court to alter or amend its judgment to include a declaration that the provisions of the Act upheld by the Court of Appeals are constitutional as applied to plaintiffs, and to reflect that plaintiffs are not entitled to injunctive relief or relief specifically involving the Commission’s regulations. *See* Defendant Federal Election Commission’s Motion to Alter or Amend the Judgment [Doc. #79]. The Court granted Plaintiffs’ Motion for Entry of Judgment two days before the Commission filed a timely partial opposition to the plaintiffs’ motion. The Court erred by issuing an incomplete judgment. In their response to the Commission’s motion, plaintiffs mischaracterize the Commission’s motion and incorrectly argue that the Court of Appeals required this Court to enjoin the Commission from enforcing the provisions of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455 (“Act”), held unconstitutional. *See* Plaintiffs’ Response to Defendant Federal Election Commission’s Motion to Alter or Amend the Judgment (“Resp.”) [Doc. #81].

The Commission has moved to amend the judgment because it is incomplete. The Court failed to enter judgment for the Commission on the organizational, administrative, and reporting provisions of the Act upheld by the Court of Appeals. Plaintiffs claim (Resp. at 6) that the Court properly refused to enter a “redundant” declaration because the Court of Appeals “[a]lready [d]eclared” that those provisions could be constitutionally applied to plaintiffs. Under this flawed reasoning, however, because the Court of Appeals had already declared the provisions limiting contributions to SpeechNow unconstitutional, this Court’s entry of judgment regarding those provisions would be redundant as well. Plaintiffs further suggest (Resp. at 7) that courts need not enter “redundant” judgments in favor of parties defending existing law. Courts routinely, of course, enter judgment in favor of those defending the status quo, whether the defendant has filed a counterclaim or not. *See, e.g., Hi-Tech Pharmacal Co., Inc. v. FDA*, No. 08-01495 (D.D.C. filed Aug. 28, 2008) [Doc. #42]; *Electronic Frontier Foundation v. DOJ*, No. 07-0656 (D.D.C. filed Apr. 10, 2010) [Doc. #50]. This obviously includes cases where a defendant is defending existing law. Indeed, if plaintiffs were correct, no district court would ever have occasion to explicitly hold in a judgment that a party defending the law has prevailed.

Plaintiffs rely (Resp. at 3) on the mandate rule to argue erroneously that the Court had no reason to allow the Commission an opportunity to be heard on the plaintiffs’ motion for entry of judgment. The mandate rule provides that a district court has no “power or authority to deviate” from a circuit court’s mandate. *Role Models Am., Inc. v. Geren*, 514 F.3d 1308 (D.C. Cir. 2008). Contrary to plaintiffs’ argument, however, the mandate rule suggests that this Court was required to enter judgment on behalf of the Commission on the provisions of the Act upheld by the Court of Appeals: The mandate of the Court of Appeals specifically decreed that “there is no

constitutional infirmity in the application of the organizational, administrative, and reporting requirements” against plaintiffs.

The Commission also moved to alter or amend the judgment because the Court erred by granting Plaintiffs’ Motion to Enter Judgment before the Commission had an opportunity to respond. The Commission is not in its pending motion seeking to relitigate the merits of this case, as plaintiffs claim (Resp. at 1). Rather, the Commission seeks to be heard on the question of what relief is appropriate to implement the judgment of the Court of Appeals. As the Commission explained in its Memorandum of Points and Authorities in Partial Opposition to Plaintiffs’ Motion for Entry of Judgment [Doc. #77] (“Partial Opposition”), the Court should have granted plaintiffs’ motion only insofar as it asked for declaratory relief — a remedy adequate to protect plaintiffs from further litigating the issues resolved by the Court of Appeals.

Plaintiffs claim that receiving declaratory relief by itself will render their judgment a nullity by leaving the Commission free to “harangue and pursue its contributors” (Resp. at 5-7). That contention lacks merit. The Commission has explicitly conceded that it cannot enforce the provisions of the Act held unconstitutional against the individual plaintiffs or SpeechNow (Partial Opposition at 4-8), and similarly may not enforce those provisions against those who wish to contribute to SpeechNow. Attempting to do so would be tantamount to enforcing the limits against SpeechNow itself, which is barred by collateral estoppel. *See id.; cf. Utility Workers Union of America, Local 369 v. FEC*, 691 F. Supp. 2d 101, 106 (D.D.C. 2010) (“Employee contributions to the PAC and PAC acceptance of those contributions are two sides of the same coin.”); 2 U.S.C. § 441a(f) (prohibiting political committees from knowingly accepting contributions in excess of the Act’s contribution limits). The Court’s declaration that the contribution limits cannot be enforced against SpeechNow of course means that the

Commission also cannot enforce the limits at issue against any of SpeechNow's individual contributors.* Given that the likelihood of an enforcement action against plaintiffs or SpeechNow's other contributors is entirely unsupported, plaintiffs fail to present the proof of a threatened injury that is a prerequisite to an injunction. (Partial Opposition at 3-4, 8.)

Due process requires the Court to at least consider the Commission's views, as set forth in its Partial Opposition, regarding what type of relief the Court should grant. Plaintiffs counter (Resp. at 2-4) that due process does not require the Commission to have such an opportunity to respond to Plaintiffs' Motion for Entry of Judgment [Doc. #76] because entering judgment is a "purely ministerial act." Plaintiffs' only support for this proposition is, as discussed above, the mandate rule. The mandate issued by the Court of Appeals in this case, however, makes no mention of the exact form of relief the Court must provide — whether declaratory, injunctive, or both. Although the mandate vacates the Court's July 2008 order denying preliminary injunctive relief, it provides no indication regarding whether a permanent injunction is appropriate. As the Commission explained in its Partial Opposition (at 8 n.8), the appellate court's vacatur of a denial of preliminary relief is not dispositive as to whether plaintiffs now merit a permanent injunction, particularly where "a district court can ... protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary," *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

* Plaintiffs appear to argue (Resp. at 6 n.4) that enjoining the Commission from enforcing its regulations that implement the provisions of the Act found unconstitutional is necessary because the Commission has not foresworn enforcing those statutory provisions against its non-plaintiff donors. But since the Commission will not enforce the statute against non-plaintiff donors, it obviously follows that the Commission similarly will not enforce implementing regulations against the same donors. In any event, as the Commission explained (Partial Opposition at 10 n.10), its regulations were not technically before the D.C. Circuit under 2 U.S.C. § 437h, which empowers courts only to entertain actions "constru[ing] the constitutionality of any provision of this Act."

In its Partial Opposition, the Commission explained that declaratory relief will adequately protect plaintiffs' rights because of collateral estoppel, as well as the presumption that the government will obey a declaratory judgment. Plaintiffs mischaracterize (Resp. at 4 n.3) the Commission's latter argument by claiming that the Commission contends that the government can *always* be presumed to comply with a declaratory judgment. But the Commission did not make this argument. Rather, the Commission explained that Supreme Court and D.C. Circuit precedent hold that *in the absence of evidence* that the government would not "acquiesce in the decision," *Poe v. Gerstein*, 417 U.S. 281 (1974), the government can be presumed to comply. Plaintiffs counter (*id.*) by citing cases where courts entered injunctions against the government. But in none of those cases did the courts address the issue raised by the Commission here regarding unnecessary injunctions, and it does not appear that in any of them did the government resist injunctive relief by pointing to the authority that declaratory relief against the government is typically sufficient. Because there is no evidence in the instant case that the government will not acquiesce in the Circuit Court's judgment granting relief to the plaintiffs, the proper course is to deny their request for injunctive relief. (Partial Opposition at 8-10.)

For the foregoing reasons, as well as those in the Commission's Motion to Alter or Amend, the Court should grant the relief therein requested by the Commission.

Respectfully submitted,

Thomaseia P. Duncan
General Counsel
tduncan@fec.gov

David Kolker
Associate General Counsel
dkolker@fec.gov

Kevin Deeley
Assistant General Counsel
kdeeley@fec.gov

/s/ Steve N. Hajjar
Steve N. Hajjar
Attorney
shajjar@fec.gov

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

July 2, 2010