

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Christopher Shays and Martin Meehan,

Plaintiffs,

v.

United States Federal Election Commission,

Defendant.

Civil Action No. 02-CV-1984  
(Judge Kollar-Kotelly)

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REPLY IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL MOTION  
REGARDING CONSIDERATION OF EXHIBITS (DKT. NO. 48)

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The Federal Election Commission does not object to Plaintiffs' Exhibits ["PXs"] 30-31, 183-84, 187, and 190-96. The Court should therefore give consideration to these exhibits for the reasons set forth in Plaintiffs' Supplemental Motion Regarding Consideration of Exhibits (Dkt. No. 48).

The Commission restricts its objections to four law review articles that examine various legal and policy issues regarding IRS treatment of Section 501(c)(3) groups that run ads supporting or opposing federal candidates. *See* PXs 185-86 and 188-89; *see also* the discussion of these law review articles at pages 54-56 of Plaintiffs' Memorandum in Opposition to Defendant Federal Election Commission's Motion for Summary Judgment (Dkt. No. 47) [hereinafter "Pls.' Mar. 31 Mem."]. Plaintiffs believe this Court has ample authority, on multiple grounds, to consider the cited analyses in these law review articles. Plaintiffs note two points at the outset. *First*, while objecting to plaintiffs' exhibits, the Commission's own briefing has relied on factual assertions in, among other extra-record materials, the *Washington Post*,

government agency reports, and Internet websites.<sup>1</sup> The Commission has never satisfactorily explained its inconsistent approach; plaintiffs' reliance on matters outside of the record is no more objectionable than the Commission's.

*Second*, the Commission's *per se* exemption of 501(c)(3) groups from the Title II-A regulations must be set aside under *Chevron* step one for numerous reasons having nothing to do with the four challenged law review articles. As plaintiffs have shown, the *per se* exemption violates the plain language of the Commission's statutory exemption authority, flouts clear legislative history instructing that the Commission may not "create any *per se* exemption from the definition of 'electioneering communications' for speech by Section 501(c)(3) charities,"<sup>2</sup> and impermissibly abdicates the Commission's non-delegable duty to "administer [and] seek to obtain compliance with" federal campaign finance laws.<sup>3</sup>

The challenged law review articles become material only if this Court concludes that the Commission has the statutory authority to create a *per se* carve-out of 501(c)(3) groups from Title II-A. In that event, the pertinent questions are (1) whether the electioneering standards and enforcement mechanisms in the Internal Revenue Code are congruent with those in Title II-A of BCRA, so that enforcement of the former will sufficiently serve to enforce the latter; and (2) assuming that the standards and enforcement mechanisms are congruent, whether the IRS will adequately enforce them given competing priorities and resource demands. The challenged law

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<sup>1</sup> See, e.g., Mar. 31, 2004 Federal Election Commission's Resp. in Supp. of Its Mot. and in Opp. to Pls.' Mot. for Summ. J., at ix ("Other Materials" included in Table of Attachments) (Dkt. No. 46); Feb. 27, 2004 Defendant Federal Election Commission's Mem. in Supp. of Its Mot. for Summ. J., at 67 & n.24 (reliance on information from IRS website) (Dkt. No. 27).

<sup>2</sup> 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (PX 100), *quoted in* Pls.' Mar. 31 Mem., at 51 & n.72.

<sup>3</sup> 2 U.S.C. § 437c(b)(1), *quoted in* Pls.' Mar. 31 Mem., at 56; *see generally* Feb. 27, 2004 Mem. in Supp. of Pls.' Mot. for Summ. J., at 73-80 (Dkt. No. 29); Pls.' Mar. 31 Mem., at 50-57.

review articles may fairly be considered on both questions. They contain extensive and thoughtful discussions of *what* the IRS electioneering standards are and *how* federal law provides for their enforcement. Contrary to the FEC's arguments, these are not matters of adjudicative "fact" subject to evidentiary rules of hearsay and judicial notice, but matters of law and policy that the Court may freely consider in comparing the Internal Revenue Code with Title II-A. This is no different than consulting a learned tax treatise in the courthouse library or conducting on-line legal research.<sup>4</sup> As for the adequacy of IRS enforcement, even if that were viewed as an "evidentiary" issue, plaintiffs have shown that it is perfectly appropriate for the Court to look outside the record in determining whether the Commission considered all the relevant factors in adopting its *per se* carve-out of Section 501(c)(3) groups from Title II-A.<sup>5</sup> Such an exercise confirms that, in rejecting staff recommendations and adopting a *per se* exemption, the Commission failed to consider obvious and troubling issues regarding the adequacy of IRS enforcement. The Commission has provided neither a "reasoned analysis" on these issues nor record evidence supporting its analysis.

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<sup>4</sup> See, e.g., *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (allowing consideration of materials that "are judicially cognizable apart from the record as authorities marshaled in support of a legal argument"); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 n.2 (D.C. Cir. 1997) ("We ... appreciate serious discussions of legal doctrine, increasingly rare in the leading law journals."); see generally Mar. 16, 2004 Pls.' Mem. in Opp. to Federal Election Commission's Mot. to Strike Pls.' Exhibits and Reply Mem. in Supp. of Their Mot. Regarding Consideration of Exhibits, at 12-13, 16-22 (Dkt. No. 41) [hereinafter "Pls.' Opp. to Mot. to Strike"].

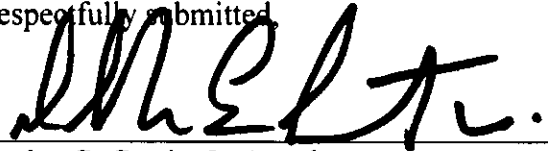
<sup>5</sup> See the D.C. Circuit, D.D.C., and other cases cited in Pls.' Opp. to Mot. to Strike, at 18-19 & n.18; see especially *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1987) ("[T]his Court is free to include in its review the challenged document to ascertain whether the Secretary considered all of the relevant factors she should appropriately have considered in reaching her decision."). The articles also provide appropriate background information and help demonstrate the "appearance of corruption" that the *per se* exemption is helping to perpetuate. See Pls.' Opp. to Mot. to Strike, at 16-17, 19-21.

CONCLUSION

For the reasons set forth above and in plaintiffs' earlier submissions, the Court should consider all of plaintiffs' tendered exhibits, including the four challenged law review articles.

Dated this 14th day of April, 2004.

Respectfully submitted,



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