FILED
DEC 11 2012
CLERK U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THE HISPANIC LEADERSHIP FUND, INC.,	)	
Plaintiff,	)	
	)	**Case No. 1:12cv893**
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.		

ORDER

The Hispanic Leadership Fund ("HLF") filed this declaratory judgment action, seeking a declaration that five advertisements were not "electioneering communications" pursuant to 2 U.S.C. § 434(f). An Order and related Memorandum Opinion issued on October 4, 2012, declaring that HLF advertisements one, four, and five were electioneering communications, while advertisements two and three were not electioneering communications. *See Hispanic Leadership Fund, Inc. v. Fed. Elec. Comm'n*, 1:12cv893 (E.D.Va. Oct. 4, 2012) (Mem. Op.). The Federal Election Commission ("FEC") now brings this motion pursuant to Rule 59(e), Fed.R.Civ.P, to amend the judgment as to advertisement two. Accordingly, the question presented here is

> whether the ruling that an audio clip of a candidate's voice, without any other reference to the candidate, is not a reference to a clearly identified candidate for Federal office under 2 U.S.C. § 434(f) is a clear error of law that must be corrected in order to prevent manifest injustice.

For the reasons that follow, this ruling is not a clear error of law that must be corrected to prevent manifest injustice.

I.

The resolution of this motion is informed by a brief review of pertinent facts and legal context. HLF, a Virginia non-profit corporation, makes public communications on both federal and state policy issues. HLF planned to run a series of advertisements during the 60 days leading up to the 2012 presidential election and was concerned that the advertisements might be deemed electioneering communications by the FEC or the Department of Justice. The 60 days preceding a federal election is significant because during that time period, entities may only publish electioneering communications if they comply with the Federal Election Campaign Act's ("FECA")[1] disclosure requirements. *See* 2 U.S.C. § 434(f). Entities that fail to make the required disclosures prior to publishing electioneering communications may be subject to FEC civil enforcement actions, either initiated by the FEC or by a private party complaint to the FEC, and to criminal prosecution by the Department of Justice. *See* 2 U.S.C. § 434g. Given the onerous consequences that may result from an erroneous failure to comply with FECA's disclosure requirements, FECA allows entities to seek and obtain an FEC advisory opinion prior to publication as to whether an advertisement constitutes an electioneering communication. An advisory opinion in the entity's favor provides a safe harbor from FEC enforcement and criminal prosecution. *See* 2 U.S.C. § 437f(c)(2).

HLF did not seek an advisory opinion with respect to the series of five advertisements in issue in this case. Instead, another organization, the American Future Fund ("AFF") had sought an advisory opinion on a series of advertisements, including some that were essentially identical to the advertisements in issue here. HLF was entitled to rely on that opinion because FECA permits other entities to rely on an advisory opinion when they plan to engage in identical

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[1] The Federal Election Campaign Act of 1972, 2 U.S.C. §§ 431 *et seq.*

activity. *See* 2 U.S.C. § 437f(c)(1)(B). With regard to the AFF's advertisements that were virtually identical to HLF's, the FEC deadlocked by a 3:3 vote as to whether the advertisements constituted electioneering communications, and thereafter issued an advisory opinion—by a 6:0 vote—stating that it could not reach a decision with regards to those advertisements.

Advertisement two—the advertisement at issue here—focuses on government policy regarding foreign oil. The advertisement begins with video images of gas prices and gasoline pumps, while an announcer states, "Since 2008 began, gas prices are up 104%. And the U.S. *still* spends over $400 billion a year on foreign oil." The advertisement next shows an image of the Washington Monument, while an announcer states, "The government *says*," followed by an unidentified audio clip of President Barack Obama saying, "We must end our dependence on foreign oil." The video next changes to images of oil rigs and science labs, while an announcer states, "But the government *stopped* American energy exploration[.]" The video changes to stock footage of a "'Denied' Stamp with image of [the] Washington Monument," while an announcer states "and *banned* most American oil and gas production—the government wants *foreign* countries to drill—so we can buy from *them*." The video next changes to an image described only as "Middle East oil" as an announcer states, "*Keeping* us dependent on foreign—and crippling our economy." The advertisement closes by continuing to show the "Middle East oil" image, while an announcer states, "Tell the government it's time for an American energy plan . . . that actually works for *America*."

On these facts, it was declared that this advertisement is not an "electioneering communication" under FECA. The FEC now brings this motion to alter or amend the judgment.

II.

Under Rule 59(e), Fed.R.Civ.P., a party may make "a motion to alter or amend a judgment . . . no later than 28 days after the entry of the judgment." Such motions are considered to be requests for an "extraordinary remedy" reserved only for "extraordinary circumstances" in which: (i) there has been an intervening change in controlling law; (ii) new evidence not available at trial has been discovered; or (iii) a clear error of law must be corrected in order to prevent manifest injustice. *See Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citing *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997)). Here, the FEC does not contend that there has been a change in the controlling law, nor does it contend that there is new evidence; instead, the FEC argues that the ruling as to advertisement two was a clear error of law.

Under the clear error prong, "mere disagreement does not support a Rule 59(e) motion." *Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993). Indeed, "[t]he Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, *Fed. Prac. and Proc.* § 2810.1 (3d ed. 2012). Here, the FEC contends that the October 4, 2012 Order and Memorandum Opinion misunderstand the FEC argument as to why advertisement two is an electioneering communication. Specifically, the FEC argues that it did not and does not argue that President Obama's voice is widely recognized;[2] instead, the FEC argues that advertisement two is an electioneering communication because an audio clip, like a photograph, is inherently a reference to a clearly identified candidate. In other words, the FEC

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[2] The FEC did argue that "President Obama's voice is widely recognized . . . ." See Def.'s Mem. in Op. to Pl.'s Mot. for Prelim. Inj. at 18 (doc. 18).

contends that the proper standard to apply to an audio clip is the standard applicable to photographs. This is plainly wrong.

To begin with, it is far from clear that the alleged misapplication of the proper legal standard is clear error under Rule 59(e). *Compare Vuyyuru v. Jadhav*, No. 3:10cv173, 2011 WL 3841823, at *1 (E.D.Va. Aug. 30, 2011) ("Disagreement with the manner in which a court applies a legal standard to the facts of a given case does not constitute clear legal error remediable by Rule 59(e).") *with Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) ("The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, . . . or has made an error not of reasoning but of apprehension."). In any event, for the reasons that follow, this motion fails on the merits.

FECA makes clear that a reference to a "clearly identified" candidate may arise in three ways, (i) "the name of the candidate involved appears;" (ii) "a photograph or drawing of the candidate appears;" or, (iii) "the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18). It is the third way that is at issue here. The plain and unambiguous meaning of the phrase "the identity of the candidate is apparent by unambiguous reference," is that the identity of the federal candidate would be apparent, *i.e.* clear, to a reasonable, objective person viewing the advertisement in the context of the reference. *The Hispanic Leadership Fund, Inc. v. Fed. Elec. Comm'n*, No. 1:12cv 893 (E.D. Va. Oct. 4, 2012) (Mem. Op.).

Given this plain meaning of the statute, advertisement two is not an electioneering communication because the identity of the candidate is not apparent by unambiguous reference. The advertisement only contains an unidentified audio clip of eight words and there is no contextual basis for concluding that the audio clip is of President Obama. Accordingly, whether a reasonable, objective person would identify the voice on the clip as that of President Obama

depends on the ability of the listener to identify the voice. Absent evidence that President Obama's voice is widely recognized, there is no reasonable basis for presuming that the reasonable, objective person would conclude that the eight word voice clip on advertisement two refers to President Obama.

The FEC raises several arguments in support of its position, none of which is persuasive. First, the FEC argues that an audio clip of a candidate's voice is analogous to a photograph or drawing of the candidate. This argument fails as there is clearly a sharp distinction between a photograph of a candidate and an audio clip of the candidate's voice, a distinction that finds firm support in the statute. Congress provided specifically that photographs are clearly identified references, but is silent as to whether voice clips, of eight words or any length, are clearly identified references. *See* 2 U.S.C. 431(18)(B). Accordingly, if the image of a candidate appears, then the inquiry ends because that advertisement is deemed an electioneering communication by the statute's explicit language. Yet, because there is no analogous provision for audio clips of the candidate, an unidentified audio clip of a candidate must be evaluated under § 431(18)(C). This means that the identity of the candidate must be clear to a reasonable, objective person viewing—or hearing—the advertisement. Unless the candidate's voice is well-known, and there is some evidentiary basis for reaching such a conclusion, an unidentified audio clip is not a reference to a clearly identified candidate.

Second, the FEC argues that under the result reached here, whether an audio clip is a reference to a clearly identified candidate becomes a function of the popularity of the candidate. Perhaps so, but this not an argument for reading into the statute provisions that are not there. Distilled to its essence, the FEC's argument is that an audio is a per se reference to a clearly identified candidate. The statute does not so provide, and if an audio clip is to be a per se

reference to a clearly identified candidate, then it is for Congress, not the courts, to re-write the statute in this regard. *See Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); *see also Schafer v. Astrue*, 641 F.3d 49, 61 (4th Cir. 2011) ("[i]t is our duty to interpret and enforce statutes, not to update and revise them").

III.

In sum, an unidentified audio clip of a candidate for federal office is not a reference to a clearly identified candidate for federal office unless there is an evidentiary showing that the candidate's voice is well-recognized. The FEC has made no such showing with regard to HLF's proposed advertisement number two.

Accordingly, for these reasons and for good cause,

It is hereby **ORDERED** that the FEC's motion to alter or amend the final judgment (doc. 46) pursuant to Rule 59(e), Fed.R.Civ.P., is **DENIED**.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, VA
December 11, 2012

/s/
T. S. Ellis, III
United States District Judge