UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WENDY E. WAGNER, *et al.*,	)	
Plaintiffs,	)	Civ. No. 11-1841 (JEB)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION TO MOTION TO STRIKE
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S STATEMENT OF MATERIAL FACTS

Plaintiffs have asked the Court to grant the extraordinary remedy of striking the entire statement of material facts filed by the Federal Election Commission ("Commission" or "FEC") in support of the FEC's motion for summary judgment (Plaintiffs' Motion to Strike Defendant's Statement of Material Facts (Docket No. 34) ("Mot.")), but the applicable rules do not provide for *any* motion to strike in this context. The Commission's factual submission is a critical part of the district court's decision-making process at summary judgment, and it includes many legislative facts that are material to key issues in this case. More generally, legislative facts often play an important role in this kind of constitutional challenge to the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), the outcome of which could have far-reaching effects on the nation's campaign finance and government contracting systems. (*See* FEC's Statement of Material Facts (Docket No. 32 at pp. 31-86) ("FEC Facts").) Indeed, courts evaluating such complex claims routinely consider lengthy factual submissions and often make extensive factual findings, including findings of legislative facts. Plaintiffs' motion should be denied.

BACKGROUND

On August 15, 2012, the FEC filed its motion for summary judgment, along with a statement of material facts bearing upon the legal issues in this case, pursuant to Local Civil Rule 7(h)(1) and Fed. R. Civ. Proc. 56. Because this is a constitutional challenge to FECA that will turn to a significant extent on issues of coercion and corruption in politics and government, many of the facts the Commission submitted were legislative rather than adjudicative in nature. *See* 1972 Advisory Committee Notes to Federal Rule of Evidence 201(a) ("Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."). Legislative facts are particularly important to the resolution of this case because the Court must give consideration to, among other issues, the likelihood that pay-to-play corruption would exist in federal contracting in the absence of contribution restrictions, the public's perceptions regarding such corruption, the potential for coercion of federal contractors by political appointees, and the similarities and differences between federal contractors and federal employees today.

After the Commission filed its statement of material facts, counsel for plaintiffs contacted FEC counsel by email and stated that he was "very troubled" by the FEC Facts. Counsel for the parties had a telephone conference on August 21, 2012, pursuant to Local Civil Rule 7(m), to attempt to narrow the issues of disagreement. FEC counsel told plaintiffs' counsel that the FEC had no objection to plaintiffs filing a statement of genuine issues specifying plaintiffs' objections to the FEC's facts, as is contemplated (and required) by the local rules, and as the Commission itself did in response to plaintiffs' statement of material facts. (*See* FEC's Statement of Genuine Issues (Docket No. 33, pp. 29-36) ("FEC's Gen. Issues").) In this telephone call, even though

plaintiffs' counsel outlined plaintiffs' general objections to the FEC's facts, he indicated that — rather than filing a statement of genuine issues — plaintiffs would file a motion to strike the FEC's statement of facts in its entirety. Plaintiffs filed their motion later that day.

ARGUMENT

A. There Is No Legal Basis For Striking the Entirety of the Commission's Statement of Material Facts

Neither Fed. R. Civ. P. 56 nor any other part of the Federal Rules of Civil Procedure authorizes the use of a motion to strike in the context of a statement of material facts, and plaintiffs fail to cite any rule or other authority for their motion. Plaintiffs' motion should be denied for this reason alone.

The only provision of the Federal Rules of Civil Procedure that specifically authorizes motions to strike is Rule 12(f), which applies solely to "pleadings," a term that is defined in Rule 7(a) to include only complaints, answers, cross-claims, and counterclaims. However, the FEC Facts is not a "pleading" and it is therefore not subject to this rule.

The other circumstance in which courts generally entertain motions to strike written submissions is for affidavits filed in support of summary judgment. Such affidavits may be struck if they fail to meet the requirements that they "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *U.S. ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 456 F. Supp. 2d 46, 51 (D.D.C. 2006) (quoting Fed. R. Civ. P. 56(e)), *aff'd*, 530 F.3d 980 (D.C. Cir. 2008). But the FEC Facts is not an affidavit either.

Furthermore, even if a motion to strike were appropriate here, such motions "are strongly disfavored, and the decision of whether to strike all or part of a pleading or attachment thereto rests within the sound discretion of the court." *U.S. ex rel. K & R Ltd. P'ship*, 456 F. Supp. 2d

at 51. No basis exists for the Court to grant such an extreme remedy here, particularly because the local rules already provide plaintiffs with an opportunity in a statement of genuine issues to contest any or all of the individual facts presented in the FEC Facts. In particular, a statement of issues would be the proper vehicle for plaintiffs to advise the court of any facts they believe are disputed or immaterial, as the Commission did in its own Statement of Genuine Issues. *See* Local Civil Rule 7(h)(1); FEC's Gen. Issues. Plaintiffs' unwillingness to avail themselves of the proper opportunity to respond to the Commission's factual submission is a grossly inadequate basis for striking the Commission's entire statement of facts.

B. The Statements of Material Facts and Genuine Issues Contemplated by the Local Rules Are Part of an Adversarial Process Designed to Assist the Court in Determining Which Material Facts, If Any, Are Genuinely Disputed

The requirement that parties file statements of material facts and statements of genuine issues "assists the district court to maintain docket control and to decide motions for summary judgment efficiently and effectively." *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996) (discussing former Local Rule 108(h), the predecessor to 7(h)(1), which was identical to the current rule). This procedure is intended to place "the burden on the parties and their counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record." *Id.* at 151 (citation omitted). Plaintiffs suggest that the Commission acted improperly in its filing because "the FEC surely knew that plaintiffs would dispute many of these contentions." (Mot. at 4.) But the rule does not require the FEC to guess which facts the plaintiffs are likely to agree with and to limit its submission to only those facts. The rule instead asks for "a statement of material facts as to which the moving party *contends* there is no genuine

issue." Local Civil Rule 7(h) (emphasis added).[1] The purpose of the rule is to subject each fact to "close, adversarial scrutiny." *Gardels v. Cent. Intelligence Agency*, 637 F.2d 770, 774 (D.C. Cir. 1980) (discussing the substantially similar former local rule). Having both parties participate in the process "isolates the facts that the parties assert are material, distinguishes disputed from undisputed facts, and identifies the pertinent parts of the record." *Jackson*, 101 F.3d at 151 (quoting *Gardels,* 637 F.2d at 773). The value of the procedure lies not only in knowing the facts on which the parties agree, but also in revealing any disagreements they may have.

The Court would similarly be deprived of this give-and-take if the Commission were to merely place the facts "in a legal memorandum" as suggested by the plaintiffs. (Mot. at 6.) Although plaintiffs indicate that they "dispute many of these contentions" (Mot. at 4), the motion does not identify a single specific factual assertion that they claim is inaccurate, and it is unclear to the Commission which facts are actually disputed. If plaintiffs believe that any of the facts in the Commission's submission are inaccurate, a blanket argument that the Commission's facts are disputed or immaterial does not aid the Court or suffice to raise a genuine issue. *See Herrion v. Children's Hosp. Nat'l Med. Ctr.*, 786 F. Supp. 2d 359, 362 (D.D.C. 2011) (characterizing all the facts as "irrelevant and immaterial" without explaining further is "patently insufficient to controvert the truth of the matters identified."), *aff'd*, 448 Fed. Appx. 71 (D.C. Cir. 2011).

Plaintiffs indicate that their primary concern is that, on appeal, the Commission "will cite to its statement, claiming it to be admitted by plaintiffs as both factual, material and undisputed."

---

[1] Plaintiffs also suggest that the FEC Facts are flawed because they are titled "Statement of Material Facts" rather than something akin to "Statement of Undisputed Material Facts." (Mot. at 4.) But this argument exalts form over substance. The applicable rule does not require any particular title, and the Commission followed the rule by submitting facts for which it "contends" there is no genuine issue. Local Civil Rule 7(h).

(Mot. at 6.) But again, there is a simple solution to this perceived problem, and that is for plaintiffs to file a statement of genuine issues. In any event, the court of appeals has the discretion to choose whether to accept all the Commission's facts as uncontroverted. *See Arrington v. United States*, 473 F.3d 329, 335 (D.C. Cir. 2006) (Because Rule 7(h) "does not require the district court to enter judgment because of the nonmoving party's default in complying with the local rule, . . . [w]e therefore reject the claim by the United States that the facts as presented by appellees stand uncontroverted." (internal citation and quotation marks omitted)). Regardless of the reason why plaintiffs have chosen not to file a statement of genuine issues, that decision provides no grounds for striking the Commission's statement of facts.

C. The Legislative Facts in the FEC's Statement Are Material to Key Issues in This Case and Properly Included in the Commission's Factual Submission

Plaintiffs do not contest that the Commission's legislative facts, if included in a memorandum of law, would be proper for the Court to consider. (Mot. at 4 ("Those citations are appropriate for inclusion in a legal memorandum … .").)[2] Plaintiffs nevertheless argue that those

[2] The difference "between legislative and adjudicative facts has been widely accepted both within and without this circuit." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1162 n.20 (D.C. Cir. 1979). Adjudicative facts "are the facts that normally go to the jury in a jury case." *Id.* at 1161 (internal quotation marks omitted). They concern the immediate parties to a lawsuit and address who did what, where, when, and how. *Alaska Airlines, Inc. v. CAB*, 545 F.2d 194, 200 n.11 (D.C. Cir. 1976). In contrast, legislative facts are "general facts which help the tribunal decide questions of law and policy." *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992) (internal quotation marks and citation omitted); *accord Ass'n of Nat'l Advertisers*, 627 F.2d at 1161-62. They are "without reference to specific parties" and because they "combine empirical observation with application of [judicial] expertise to reach generalized conclusions, they need not be developed through evidentiary hearings." *Ass'n of Nat'l Advertisers*, 627 F.2d at 1161-63; *accord Friends of the Earth*, 966 F.2d at 694. Legislative facts are frequently based on a variety of materials such as academic studies, research papers, news articles, polling data, and political and social science analyses. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (using opinion polls, views of religious and professional groups, and world opinion to evaluate Eighth Amendment claim); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding law protecting women from workplace health and safety risks, on basis of

facts are immaterial. (Mot. at 5-7.) But in this type of constitutional case, legislative facts can be as important as adjudicative facts, and nothing in the local rules suggests that only adjudicative facts are appropriate for a statement of material facts. Indeed, because the Commission's legislative facts "might affect the outcome of the suit under the governing law . . . ," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), they are material.

Courts often rely upon legislative facts in evaluating the constitutionality of a statute.[3] Because rulings in such cases usually affect many non-litigants, the basis for the judicial reasoning extends well beyond the limited set of adjudicatory facts concerning the parties to the case. *See Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) ("The constitutionality of statutes is typically determined by reference to general considerations, values, intuitions, and other 'legislative facts' . . . rather than to facts presented through testimony and other formal evidence subject to rules of evidence developed largely for control of lay juries."). This is frequently true in campaign finance cases like this one. In the seminal campaign finance case, *Buckley v. Valeo*, the D.C. Circuit relied upon legislative facts such as polling data, a report concerning illegal

---

Louis Brandeis's famous brief presenting over 100 pages of legislative facts, including sociological and economic reports, and committee testimony).

[3] Plaintiffs also argue that the requirement in the rules that statements of fact should include references to the record means that facts can *only* be supported by reference to record evidence. (Mot. at 4 (citing Local Civil Rule 7(h)(1)).) But this part of the rule is not intended to limit the types of facts in a statement of material facts, but simply to prevent litigants from making unsupported statements. *See, e.g., Glass v. Lahood*, 786 F. Supp. 2d 189, 198 (D.D.C. 2011) (disregarding plaintiff's statement of material facts because she "fails to support her response with citations to competent evidence in the record, electing instead to rely upon entirely conclusory and unsupported allegations that her supervisors were somehow guided by an improper motive"), *aff'd*, *Glass v. LaHood*, No. 11-5144, 2011 WL 6759550 (D.C. Cir. Dec. 8, 2011). Because legislative facts are most often supported by the kind of evidence not particular to the record of a single case, plaintiffs' interpretation would severely restrict the ability of litigants to provide the courts with legislative facts. In this case, the Commission provided support for all of the facts in the FEC Facts, either to record evidence or to the kind of external sources typically relied on to support legislative facts. *See infra* pp. 7-8.

contributions by the dairy industry, congressional floor statements, and a Senate committee report. 519 F.2d 821, 837-40 nn.23, 28, 34, 36, 38 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). The Supreme Court then explicitly relied on the D.C. Circuit's discussion of these legislative facts. 424 U.S. at 27 & n.28. Since *Buckley*, the Supreme Court has continued to rely upon legislative facts in evaluating the constitutionality of FECA. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431, 451-52 & nn.12-13 (2001) (relying upon a political scientist's statement, a former Senator's anecdote, a political science book, and FEC disclosure reports); *McConnell*, 540 U.S. at 129-32, 145-52 (relying extensively on legislative facts detailing how national party committees solicited soft money contributions); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 n.6 (2007) (relying on a national survey for the legislative fact that most citizens could not name their congressional candidates); *id*. at 504-09, 515-18 (Souter, J., dissenting) (quoting from newspaper articles, publications by political scientists and lawyers, surveys by pollsters, an *amicus curiae* brief in *McConnell*, congressional hearings, and the conclusions of a state "blue ribbon" commission).

This case depends to a significant extent on legislative facts, as plaintiffs appear to acknowledge in their own summary judgment memorandum. (Plaintiffs' Statement of Points and Authorities in Support of Their Motion for Summary Judgment at 2 (Docket No. 30-1) ("Pls. Br.") ("the Court may not be fully aware of the breadth of application of section 441c, beyond plaintiffs themselves … there are millions of individuals providing a wide range of services for the federal government.").) The facts submitted by the Commission bear upon specific arguments that plaintiffs made in their motion for summary judgment and so those facts clearly "might affect the outcome" of this case. *Liberty Lobby*, 477 U.S. at 248.

For example, in their summary judgment brief plaintiffs assert (without citation) that "the notion that [plaintiffs] or anyone else would conceivably think that their chances of obtaining a contract would be enhanced at all by making a contribution to anyone — let alone to the wide range of entities covered by section 441c — is not believable." (Pls. Br. at 4-5.) In the FEC Facts, the Commission has provided many facts from different jurisdictions that contradict this assertion by showing that "pay-to-play," and the perception of pay-to-play, remains a common problem in various states and municipalities. (FEC Facts ¶¶ 51-90.) The Commission also provided facts from the "soft money" era of campaign finance showing that contributions made to political parties can cause undue influence on officeholders, even if the officeholder herself is not the recipient of the contribution. (FEC Facts ¶¶ 125-136.)

Likewise, plaintiffs argue in their summary judgment brief that "the possibility that either the President, a person appointed by the President, or a Member of Congress might attempt to influence the award of a contract to an individual is so remote that it cannot satisfy the First Amendment." (Pls. Br. at 8.) The FEC Facts, however, provide the Court with evidence that there are approximately 8,000 political appointees in the federal government, spread among various agencies, who might at least have the potential to influence how contracts are awarded. (FEC Facts ¶ 99.) And plaintiffs argue that "[n]o reasonable person would believe that anyone would make a contribution of $200 or less in order to obtain a federal contract" (Pls. Br. at 11), but the FEC provided an example of a state officer who gave out millions of dollars in contracts after accepting only $1,289. (FEC Facts ¶ 53.)[4]

[4] Plaintiffs also claim that some of the Commission's adjudicative facts are immaterial, but that claim also lacks merit. For example, plaintiffs assert that "[n]o reasonable person would believe that anyone would make a contribution of any amount in order to obtain a contract of the size of Wagner's." (Pls. Br. at 10.) What plaintiffs fail to mention, however, is that the contracts of plaintiffs Brown and Miller were each potentially worth more than $800,000, and although

In sum, the evidence in the FEC Facts is not merely of "potential interest to the litigants or the court," as plaintiffs claim. (Mot. at 5.) Instead, that evidence directly addresses potentially dispositive issues in this case.

D. There Is No Page Limit for Statements of Material Facts and Courts Routinely Consider Lengthy Submissions in Cases Like This One

The local rules do not set a page limit for a statement of material facts. But plaintiffs argue that the FEC Facts have caused the FEC to exceed the page limit for briefing because the facts are a legal brief in disguise, claiming that the FEC's factual submission "looks like, reads like, and functions as a legal memorandum … [i]t has a table of contents and ten separate sections, many with argumentative headings." (Mot. at 3.) This argument is way off the mark.

First, the Commission's statement of material facts does not resemble a legal memorandum. It does not argue any legal issues — there is no discussion, for example, of the appropriate standard of review, the First Amendment, or the Equal Protection guarantee of the Fifth Amendment. It is a recitation of facts, with citations, as required by Rule 7(h). Where judicial opinions are cited, they are cited for the facts therein, not for their legal holdings. The facts are divided into sections, and summarized in a table of contents, because that is a better way to "crystallize for the district court the material facts," *Jackson*, 101 F.3d at 151, than simply listing a set of undifferentiated facts in random order. These organizational elements do not cause a factual submission to become a legal brief.

Second, plaintiffs' suggestion that the Commission has attempted to circumvent the page limits is belied by the fact that the FEC readily agreed, in light of the prior submissions at the preliminary injunction stage, to file only one summary judgment memorandum and ultimately

---

plaintiffs now argue that that fact is immaterial, it clearly provides information that addresses their claims and could affect the outcome of the case. (*See* Mot. at 5 (citing FEC Facts at ¶ 4 (Plaintiff Brown's contract); *see also* FEC Facts at ¶ 5 (Plaintiff Miller's contract).)

filed one that was only 21 pages long. In an ordinary case with cross-motions for summary judgment, the Commission could have filed a total of 115 pages: 45 pages in support of its motion, another 45 pages in opposition to plaintiffs' motion, and an additional 25 pages in reply. Local Civil Rule 7(e). Here, the Commission submitted a total of 74 pages of material (a 21-page brief and a 53-page statement of facts). If the Commission had wanted additional pages to make its legal arguments, it could have used more than 21 of the 45 pages to which it was entitled in an opening brief or sought permission for additional pages.

The Commission has routinely filed lengthy submissions of legislative facts that have assisted courts in their resolution of important constitutional cases. For example, in *McConnell v. FEC*, the judges on the district court panel made hundreds of specific findings of fact — most of which were legislative facts — spanning more than two hundred pages, after voluminous submissions from the parties. *McConnell v. FEC*, 251 F. Supp. 2d 176, 220-233, 296-356, 438-522, 813-918 (D.D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003); *see also id.* at 813-14 (Leon, J.) (praising the parties for the "herculean effort" of compiling the extensive facts and noting that "the job of reviewing and evaluating this record would have been substantially more difficult, and less reliable, in my judgment, if they had not assembled these factual materials with such extraordinary care.")[5] What plaintiffs describe as "flagrantly flaunt[ing] the rules" (Mot. at

[5] The Commission has frequently filed similarly lengthy "proposed findings of fact" pursuant to the somewhat different, but directly comparable procedure used in constitutional cases challenging FECA under 2 U.S.C. § 437h. For example, in *Mariani v. United States*, 80 F. Supp. 2d 352 (M.D. Pa. 1999), the district court made 407 specific findings of fact, many of which were legislative facts, after receiving hundreds of separate facts submitted by the Commission and the plaintiff. *Mariani*, 80 Supp. 2d at 355, 419. In *Cao v. FEC*, 688 F. Supp. 2d 498 (E.D. La. 2010), the district court made 156 specific factual findings, many of them legislative facts, following a similarly lengthy submission by the FEC. *Cao*, 688 F. Supp. 2d at 533. A district court deciding a constitutional case on summary judgment should have access to the same kind of comprehensive facts available to a court proceeding under section 437h, and plaintiffs do not suggest otherwise.

6-7) is nothing more than a routine submission by the FEC in a constitutional case, one that is consistent with what many courts have relied on in crafting their opinions.

Even if this Court were to conclude that the Commission's statement of material facts exceeded a page limit, striking the submission in its entirety would be a completely inappropriate remedy. Courts have the discretion to accept even non-conforming documents. *See Menkes v. Dep't of Homeland Sec.*, 662 F. Supp. 2d 62, 68 n.4 (D.D.C. 2009) ("given the *de minimis* nature of the violation and the drastic nature of striking [plaintiff's] motion, this Court exercises its discretion and accepts [plaintiff's 47-page] memorandum in its entirety."), *aff'd*, 637 F.3d 319 (D.C. Cir. 2011). The Court thus has the discretion to grant the Commission an extension of any applicable page limit or to require the Commission to resubmit the document in a different form; such alternatives would avoid prejudice to the Commission and would allow the Court to rely on the Commission's statement of facts. Plaintiffs present no colorable basis for the draconian remedy they seek.

CONCLUSION

Plaintiffs have filed a constitutional challenge to a law that Congress passed more than 70 years ago that has helped protect the integrity of federal elections and the federal contracting process. The outcome of the case could affect not only this federal regime, but also the constitutionality of dozens of similar state laws and municipal ordinances. Such a case merits thorough legal briefing and comprehensive fact-finding, as the applicable rules envision. Plaintiffs present no justification for striking the Commission's entire statement of material facts merely because plaintiffs have chosen not to pose specific objections to the individual facts in that submission. Plaintiffs' motion should be denied.

Respectfully submitted,

Anthony Herman
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

Lisa J. Stevenson (D.C. Bar No. 457628)
Special Counsel to the General Counsel

Harry J. Summers
Assistant General Counsel

Holly J. Baker
Attorney

/s/ Seth Nesin
Seth Nesin
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

September 7, 2012