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.

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION TO CERTIFY FACTS

This action challenges the constitutionality of 2 U.S.C. § 441c ("section 441c") as applied to individuals such as the three plaintiffs in this action who have contracts with agencies of the federal government under which they provide services to the government. The defendant Federal Election Commission ("FEC") is the primary agency responsible for the enforcement of the Federal Election Campaign Act generally and section 441c in particular.

Section 441c is an absolute bar to all contributions by any person who has a contract with a federal agency. As government contractors, these plaintiffs are forbidden from making contributions to a candidate for any federal office or to a political party or a political committee for use in connection with a federal election, including the election for President to be held in 2012, in which they are all eligible to vote. They desire to make contributions in connection with federal elections in 2012, subject to the same limits as every other individual. However, if they were to make such contributions, they would be guilty of a crime. Because they are unwilling to subject themselves to

prosecution and potentially up to five years in prison, they ask this Court to declare section 441c unconstitutional as applied to them.

Plaintiffs make two separate claims of unconstitutionality. First, they rely on the Equal Protection Clause of the Constitution because they are forbidden from making contributions that three other categories of similarly situated persons are permitted to make. One such category is federal employees to whom the ban does not apply, even though plaintiffs work with, and in some cases literally along side of, those employees. In all relevant respects, the situations of employees with respect to making political contributions in federal elections are identical with those of plaintiffs and other individuals who have similar federal government contracts.

The second group is composed of corporations that, like plaintiffs, have contracts with federal agencies. Those corporations are also barred from making contributions directly, but are expressly authorized by subsections (b) and (c) of section 441c to establish and utilize separate segregated funds to make contributions in connection with federal elections, whereas individuals such as plaintiffs do not have that option.

The third group consists of directors, officers, employees, and shareholders of corporations that have contracts with federal agencies to whom the ban is also inapplicable. This group includes individuals who form corporations such as Limited Liability Companies ("LLCs"), which can have one individual as the sole shareholder, director, officer, and employee. However, that person is permitted to make contributions otherwise permitted by law, even though plaintiffs, who are identically situated from an economic perspective, may not make any contributions in connection with elections for federal office. This third group also includes the officers, directors, employees, and

shareholders of large corporations with enormous government contracts, such as Halliburton, Boeing or Lockheed, even when those individuals are directly involved in contract negotiations and implementation and stand to benefit economically from their company's government contracts.

Plaintiffs' second claim is based on section 441c's complete denial of their ability to make contributions in connection with federal elections, a right that is protected by the First Amendment. Because section 441c is a ban on a form of speech, it is subject to strict or at least heightened scrutiny, and under either standard it cannot stand. There is, however, no connection between the contribution ban and plaintiffs' status as individual contractors because the only offices that are elected in the federal government – and for which contributions might be made – are President and Vice President, Members of the United States House of Representatives, and United States Senators, and none of those individuals has any role in the awarding or implementing of plaintiffs' contracts with federal agencies. Even if a law banning contributions to candidates who might have a role in awarding a person a government contract were constitutional, this law is far too broad and not nearly narrowly enough tailored to satisfy the First Amendment.

THE MOTION TO CERTIFY SHOULD BE GRANTED.

Congress enacted the predecessor of section 441c in 1940, and it was codified in 1972 (with minor modifications) as 2 U.S.C. § 611 of the Federal Election Campaign Act ("FECA"). It was subsequently amended in 1976 by the addition of subsections (b) and (c), at which time the three subsections were re-designated as section 441c by section 322 of Public Law 94-283 (1976). It was not further amended by the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 ("BCRA"). It is also not listed in subsection

403(a) of BCRA, set forth in the note to 2 U.S.C.A. § 431, and therefore the three judge court jurisdictional provisions of section 403 of BCRA do not apply to this challenge. Because section 441c is part of FECA, and because each of the plaintiffs is eligible to vote for President of the United States, this challenge to the constitutionality of section 441c must be determined under 2 U.S.C. § 437h.

Under section 437h, this Court has a very limited role: it must "immediately" certify the relevant facts to the Court of Appeals for this Circuit, which is directed to determine the constitutionality of the challenged provisions en banc. *See Buckley v. Valeo*, 424 U.S. 1, 8-9 & n.4 (1976) (describing this procedure). Plaintiffs have submitted with this motion their Proposed Certified Facts, together with the declarations of each of the plaintiffs, as well as three additional individuals with relevant knowledge of the manner in which contracts between individuals and federal agencies are carried out. For each of the facts, there are citations to the relevant supporting paragraphs in the declarations. In order to make the Proposed Certified Facts easier to follow, they include certain statements of law that plaintiffs believe are not in dispute. Plaintiffs reserve the right to refer in their briefing in the Court of Appeals and the Supreme Court to other facts supported by their declarations or other proper evidence and agree that defendant has a similar right with respect to facts on which it wishes to rely that are similarly supported.

Plaintiffs recognize that if the claims set forth in a complaint challenging a provision of FECA were frivolous or plainly foreclosed by prior decisions of the Supreme Court, this Court would not be required to certify the case to the Court of Appeals. There is no case of which we are aware involving a challenge to the

constitutionality of section 441c, and the facts surrounding the Equal Protection and First Amendment claims set forth above show that the claims are plainly not frivolous.

In informal conversations with counsel for the plaintiffs, counsel for the FEC stated that the FEC has in the past moved to deny certification under what may be a more lenient standard than the one set forth in the prior paragraph. Regardless of what the standard is, plaintiffs submit that there is no basis for such a motion in this case. There is no Supreme Court or D.C. Circuit decision upholding any law that completely forbids persons who are eligible to vote for President of the United States from making any contributions in connection with any federal election. That alone is a basis on which any claim that this case does not raise significant constitutional questions should be rejected.

In the case most factually similar to this one, involving a ban on contributions in federal elections by individuals under the age of 18, the Supreme Court – in a rare moment of unanimity in this area, which is often beset by 5-4 rulings – found the statute violated the First Amendment. *McConnell v. Federal Election Commission,* 540 U.S. 93, 231-32 (2003) (striking down 2 U.S.C. § 441k). There are no First Amendment cases challenging section 441c, or any other comparable provision of federal law, let alone any that reject a challenge like this brought by individuals with contracts providing quite modest payments, under which they provide services to federal agencies, whose heads are not elected federal officials.

In our view, the *McConnell* Court could also have decided the challenge to section 441k on Equal Protection grounds, on the theory, similar plaintiffs' claim here, that there are no relevant distinctions between individuals over the age of 18, and those under age 18, for purposes of making contributions in federal elections. The line between

an Equal Protection claim and a claim based on a specific protection in the Constitution is not always clear. For example, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court struck down a law requiring the payment of a filing fee of $50 to obtain a divorce by persons unable to afford the fee, relying on both Due Process and Equal Protection. In other cases where both sets of claims are made, some members of the Court have relied on Equal Protection as a more narrow ground for decision. *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 579-85 (2003) (O'Connor, J., concurring on Equal Protection grounds to majority decision on Due Process basis). Therefore, under either of plaintiffs' legal theories, section 441c raises serious constitutional questions.

CONCLUSION

For the foregoing reasons, this Court should grant plaintiffs' motion, certify their proposed facts, and immediately certify this case to the Court of Appeals for this Circuit for it to decide the constitutional questions presented.

Respectfully submitted,

/s/ Alan B. Morrison
Alan B. Morrison
D. C. Bar No. 073114
George Washington Law School
2000 H Street NW
Washington D.C. 20052
(202) 994 7120
(202) 994 5157 (fax)
abmorrison@law.gwu.edu.

/s/ Arthur B. Spitzer
Arthur B. Spitzer
D.C. Bar No. 235960
American Civil Liberties Union of
the Nation's Capital
1400 20th Street, N.W., Suite 119
Washington, D.C. 20036
(202) 457 0800
(202) 452-1868 (fax)
artspitzer@gmail.com

November 17, 2011