UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

WISCONSIN FAMILY ACTION,

Plaintiff,

Civil Action No. 1:21-cv-1373

v.

FEDERAL ELECTION COMMISSION,

Defendant.

COMPLAINT

Plaintiff Wisconsin Family Action, by its attorneys, the Institute for Free Speech, files this Complaint against defendant the Federal Election Commission and alleges as follows:

INTRODUCTION

1. The Federal Election Commission ("FEC") has dramatically expanded donor disclosure requirements for non-profits whose primary mission is not political, requiring the disclosure of contributions made for non-political purposes or for general issue advocacy. These requirements exceed Congress's constitutional authority, lie beyond the requirements of the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101, et seq., and violate the First Amendment speech, assembly and associational rights of plaintiff Wisconsin Family Action ("WFA") and its donors. This Court should enjoin the FEC's unlawful disclosure mandates and secure Americans' fundamental First Amendment rights.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this case presents questions of federal law. This Court has authority to issue a declaratory judgment and to order injunctive relief and other necessary and proper relief pursuant to 28 U.S.C. § 2201 and 2202.

3. This Court is the proper venue for this action per 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred and are occurring in the District and Division.

THE PARTIES

4. Plaintiff WFA is a non-profit, non-stock corporation organized under Wis. Stat. § 181 and exempt from federal income taxation under I.R.C. § 501(c)(4). WFA's mission is to advance Judeo-Christian principles and values in Wisconsin by strengthening, preserving, and promoting marriage, family, life, and liberty. WFA's donors include Wisconsin residents from the Green Bay Division of this District.

5. Defendant FEC is an independent agency established by 52 U.S.C. § 30106 with regulatory authority over federal elections and campaigns of candidates for federal office. The FEC's duties include the collection, review and audit of campaign finance disclosures by regulated entities and enforcement of provisions of FECA. The FEC has exclusive jurisdiction with respect to the civil enforcement of FECA.

FACTUAL BACKGROUND

The Regulatory Scheme

6. FECA regulates, *inter alia*, federal campaign activities of entities other than political action committees, including entities like WFA which have major purposes other than political advocacy. The FEC has referred to such entities as "non-political committees," and FECA obligates them to disclose information about some of their contributions.

7. "Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement" that identifies "each . . . person . . . who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of any such contribution." 52 U.S.C. § 30104(b)(3) and (c)(1).

8. "Statements required to be filed by this subsection . . . shall include . . . the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C).

9. FECA defines "contribution" to mean "anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a) (adopting statutory definition).

10. The Supreme Court defined the phrase "for the purpose of influencing" an election to mean, in the independent expenditure context, money spent to expressly advocate specific electoral outcomes. *Buckley v. Valeo*, 424 U.S. 1, 78 (1976) (per curiam). In light of *Buckley*, the FEC and regulated parties understood that the only "contributions" the FEC could regulate were those limited to donations that funded expenditures expressly advocating specific electoral outcomes.

11. Thus, in 1980, the FEC promulgated 11 C.F.R. § 109.10(e)(vi), which required independent expenditure reporting only of contributions from donors of $200 or more (in a calendar year) when "made for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(vi). Section 109.10(e)(vi) served as a "safe harbor" for not-political committees and their donors, giving assurance that disclosure was only required for contributions that were earmarked for a particular independent expenditure.

12. The FEC may seek civil penalties, including the greater of $5,000 or the amount of the contributions or expenditures at issue, for any violation of FECA. 52 U.S.C. § 30109(a)(5)(A). If a violation is knowing or willful, the FEC may seek civil penalties of up to $10,000 or double the amount of the contributions or expenditures at issue. *Id.* § 30109(a)(5)(B).

13. Criminal penalties attach to any knowing and willful violation of FECA that involves the making, receiving, or reporting of any contributions, donations, or expenditures totaling $2,000 or more during a calendar year. *Id.* § 30109(d)(1)(A). An individual or corporation that knowingly commits such a

violation is subject to fines under Title 18 of the United States Code, and imprisonment for up to five years, depending on the amount of the repayment. *Id.* § 30109(d)(1)(A)(ii).

The CREW Decisions and
the FEC's Subsequent Failure to Give Clear Guidance

14. In 2018, the United States District Court for the District of Columbia vacated Section 109.10(e)(1)(vi), stating that it impermissibly narrowed Section 30104(c) by (1) requiring under Subsection (c)(2)(C) that speakers disclose only those donors who earmarked their contributions for a particular communication, rather than all donors who earmarked their contributions to support or oppose a particular candidate, regardless of the specific communication; and (2) failing to treat Subsection (c)(1) as a reporting requirement separate from the particular requirements at Subsection (c)(2)(C). *See Citizens for Responsibility & Ethics in Washington v. FEC*, 316 F. Supp. 3d 349, 388-89, 422-23 (D.D.C. 2018).

15. The district court stayed its vacatur of Section 109.10(e)(1)(vi) for 45 days to allow the FEC to issue interim regulations that "comport with the statutory requirement of 52 U.S.C. § 30104(c). *Id.* at 423. However, the FEC did not issue interim regulations in that 45-day period, nor has it done so since.

16. On or about August 27, 2018, the Institute for Free Speech (which is also counsel for WFA in this action) petitioned the FEC to conduct a rulemaking to amend the regulatory definition of "Contribution" at Section 100.52 in light of the district court's decision (the "August 2018 Petition"). The August 2018 Petition indicated that the district court's decision had "adopted a broad reading of the

contributions that must be reported pursuant to 52 U.S.C. 30101(c)," and that the requested rulemaking was needed "to clarify which donations are 'contributions' as a general matter." Thus, the August 2018 Petition stated that "in revising its definition of 'Contribution,' the [FEC] should determine that only donations *affirmatively* given for purposes of express advocacy are contributions for purposes of non-political committee reporting." (Emphasis original.) A true and correct copy of the August 2018 Petition is attached hereto as Exhibit A.

17. The FEC has not acted on the August 2018 Petition.

18. On October 4, 2018, the FEC issued a press release entitled "Federal Election Commission, Guidance following U.S. District Court decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018)" (the "October 2018 Guidance Document"). The October 2018 Guidance Document stated that Section 30104(c)(1) "require[d] disclosure of donors of over $200 annually making contributions 'earmarked for political purposes,'" while Section 30104(c)(2) required disclosure of "donors of over $200 who contribute 'for the purpose of furthering *an* independent expenditure.'" (Emphasis original.) A true and correct copy of the October 2018 Guidance Document is attached hereto as Exhibit B.

19. On appeal, the United States Court of Appeals for the District of Columbia Circuit agreed with the district court's decision that 11 C.F.R. § 109.10(e)(vi) conflicted with "the plain terms of the statute's broader disclosure requirements." *Citizens for Responsibility & Ethics in Washington v. FEC*, 971 F.3d 340, 343 (D.C. Cir. 2020). The appellate court held that "FECA (c)(1)

unambiguously requires an entity making over $250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total $200." *Id.* at 354. Further, it held that the contributions that must be disclosed under Section 30104(c)(2)(C) were a subset of those covered by Subsection (c)(1); that is, Subsection (c)(2)(C) required disclosure of whether a contribution "was intended to support IEs," while Subsection (c)(1) covered contributions for all of the recipient's election-related communications and activities. *Id.* at 356.

20. In an August 21, 2020 press release, Citizens for Responsibility & Ethics in Washington, the organization which had brought the case, described the appellate decision as expansively requiring that "groups that make a key type of political ad known as independent expenditures must report every contributor who gave at least $200 in the past year, as well as those who give to finance independent expenditures generally. It will be much harder for donors to anonymously contribute to groups that advertise in elections." A true and correct copy of the press release is attached hereto as Exhibit C.

21. The FEC's current instruction on how to make quarterly reports (the "Reporting Instruction") states that non-political committees must disclose "[e]ach contributor who makes a contribution during the reporting period aggregating in excess of $200 during the calendar year. . ., including their identification information, contribution date and amount." In addition, according to the FEC, the report must state whether "the contribution was given for the purpose of furthering

independent expenditures." A true and correct copy of the Reporting Instruction is attached hereto as Exhibit D.

22. The FEC's post-*CREW* interpretation of Section 30104(c), as reflected in the October 2018 Guidance Document and the Reporting Instruction, requires disclosure of general donations given for no political purpose or for purposes of issue advocacy.

The FEC's Chilling of Wisconsin Family Action's Speech and Associational Rights

23. In addition to its issue advocacy, WFA intends to make independent expenditures in support of candidates for federal office, including in the Sixth, and Seventh Congressional Districts, but has to date refrained from doing so on account of Section 30104(c) and the FEC's interpretation of that provision.

24. Like virtually all groups that advocate positions on controversial social issues, and their supporters, WFA and its supporters prize their First Amendment freedom of private association. Their freedom to associate with each other in fulfilling their social, political and ideological goals would be significantly damaged if they could not maintain the privacy of their relationships, as WFA's supporters would risk all manner of retribution from some who reject WFA's mission.

25. Given the elimination of Section 109.10(e)(vi)'s safe harbor provision and the FEC's failure to promulgate a replacement regulation, WFA and its donors lack adequate assurance as to which donations must be reported under Section 30104(c).

26. WFA fears that under Section 30104(c), as interpreted by the FEC, it will be forced to disclose all donors of more than $200 in a calendar year should it make a single independent expenditure of more than $250 in the same time period.

27. Section 30104(c), as interpreted by the FEC, also threatens WFA's fundraising prospects because privacy-conscious donors might decline to contribute to the organization knowing that it may be required to disclose their identities publicly. *See Buckley,* 424 U.S. at 64 ("[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.")

28. WFA also fears that Section 30104(c), as interpreted by the FEC, will expose it to third-party claims for alleged violations of Section 30104(c), like the administrative complaint that initiated *CREW*, should it follow through with its intent to participate in upcoming elections.

29. Accordingly, Section 30104(c), as interpreted by the FEC, chills WFA's political speech. Owing to the risk posed by Section 30104(c), as interpreted by the FEC, WFA refrains from making independent expenditures it would otherwise make in support of candidates for federal office in Wisconsin, in the upcoming 2022 federal elections and in future federal elections.

COUNT ONE
RIGHTS OF ASSOCIATION AND FREE SPEECH, U.S. CONST. AMEND. I

30. WFA re-alleges and incorporates by reference paragraphs 1 through 29 of the Complaint as though fully set forth below.

31. Section 30104(c), as interpreted by the FEC, violates WFA and its supporters' First Amendment rights of speech, association, and assembly by forcing them to select between these rights.

32. Section 30104(c), as interpreted by the FEC, does not survive any form of heightened First Amendment scrutiny. It does not further the governmental interest in preventing corruption or the appearance of corruption, nor is its disclosure requirement narrowly tailored, nor does it have a substantial relation to any sufficiently important governmental interest.

33. Section 30104(c), as interpreted by the FEC and applied to contributions other than those earmarked for particular independent expenditures, is unconstitutional under the First Amendment. WFA is entitled to declaratory and injunctive relief against Section 30104(c)'s enforcement.

COUNT TWO
ULTRA VIRES ENACTMENT, U.S. CONST., ART. I

34. WFA re-alleges and incorporates by reference paragraphs 1 through 33 of this Complaint as though fully set forth below.

35. The federal government is one of enumerated powers. Congress cannot legislate with respect to any subject absent specific constitutional authority to do so.

36. Since passage of the Tillman Act in 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907), Congress has enacted legislation to regulate campaigns for election to federal office, including FECA.

37. Constitutional authority for Congress to enact such legislation purports to be based in Article I, Section 4 of the United States Constitution. *See,*

e.g., Buckley, 424 U.S. at 62, 67-68; *Burroughs v. United States,* 290 U.S. 534, 545-47 (1934).

38. However, Article I, Section 4 provides only that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to Places of chusing Senators."

39. As shown by its text, history, and structure, Article I, Section 4 authorizes Congress to regulate only the "time, place and manner" of elections, and applies only to regulating such actual election mechanics as the system of election, maintenance of voters lists, and the method of casting and counting ballots. The provision does not authorize Congress to regulate political debate that precedes elections.

40. Congress lacks power under Article I, Section 4 (or otherwise) to abridge political speech. Accordingly, Section 52 U.S.C. § 30104(c), and its various enforcement mechanisms, are *ultra vires* and unconstitutional.

41. WFA and their supporters have been and are likely to continue to be, irreparably harmed by the FEC's enforcement of Section 30104(c), which forces WFA to disclose its private associations and file reports with the FEC, absent constitutionally authorized power to do so. WFA is therefore entitled to declaratory and injunctive relief against enforcement of this *ultra vires* and unconstitutional enactment.

WHEREFORE, WFA prays for judgment as follows:

a. On Count I,

i. A declaration that WFA is required under Section 30104(c) only to disclose contributions as defined by Section 30101(8)(A)(i) and earmarked for activities or communications that expressly advocate the election or defeat of a clearly identified candidate; and

ii. Consistent with such declaration, preliminary and permanent injunctive relief barring the FEC from enforcing Section 30104(c) against WFA;

b. On Count II,

iii. A declaration that Section 30104(c) and its enforcement mechanisms are ultra vires and unconstitutional; and

iv. Consistent with such declaration, permanent injunctive relief barring the FEC from enforcing Section 30104(c) against WFA;

c. That WFA be awarded its costs and attorneys fees pursuant to applicable statute or authority; and

d. That WFA be awarded such other and further relief that this Court may deem just and proper.

Dated this 2nd day of December, 2021

Respectfully submitted,

By: *//s Donald A. Daugherty, Jr.*

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