No. 07-2291

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEOFFREY FIEGER, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES ATTORNEY GENERAL, et al.,

Defendants-Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

# FINAL BRIEF OF THE UNITED STATES ATTORNEY GENERAL

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## STATEMENT REGARDING ORAL ARGUMENT

Counsel for the United States Attorney General stands ready to present oral argument to the extent that the Court believes argument would aid in its consideration of this appeal.

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## STATEMENT OF JURISDICTION

Plaintiffs brought suit in district court seeking declaratory relief pursuant to 28 U.S.C. §§ 2201 & 2202, alleging that a grand jury investigation of their activities violated the Federal Election Campaign Act, 2 U.S.C. § 437g. (R.1 Application for Writ of Mandamus and Complaint, pgs. 2, 4-7, Apx. pgs. 7, 9-12.) Plaintiffs also sought declaratory and mandamus relief against the Federal Election Commission for its alleged failure to investigate plaintiffs' conduct. (R.1 Application for Writ of

Mandamus and Complaint, pgs. 6-7, Apx. pgs. 11-12.) Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 & 1361. (R.1 Application for Writ of Mandamus and Complaint, pg. 2, Apx. pg. 7.)

The district court entered final judgment dismissing plaintiffs' suit on August 15, 2007. (R.34 Judgment, pg. 1, Apx. pg. 39.) Plaintiffs filed a timely notice of appeal on October 10. (R.35 Notice of Appeal, pgs. 1-2, Apx. pgs. 40-41.) This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the district court properly held that the Federal Election Campaign Act does not divest the Attorney General of his traditional authority over criminal investigations and prosecutions.

2. Whether, in any event, declaratory relief is precluded in a civil lawsuit that seeks to collaterally challenge a grand jury investigation and indictment.

## STATEMENT OF THE CASE

Plaintiffs brought suit against the United States Attorney General and the Chairman of the Federal Election Commission, complaining of an alleged grand jury investigation into plaintiffs' violation of federal campaign finance laws. Plaintiffs claimed that the grand jury's investigation was unlawful under the Federal Election Campaign Act, and sought declaratory relief. (R.1 Application for Writ of Mandamus and Complaint, pgs. 2, 4-7, Apx. pgs. 7, 9-12.) Plaintiffs also alleged that the Federal

Election Commission had not fulfilled its statutory duty to investigate plaintiffs, and sought declaratory and mandamus relief on that basis. (R.1 Application for Writ of Mandamus and Complaint, pgs. 6-7, Apx. pgs. 11-12.)

The district court dismissed plaintiffs' suit in August 2007, holding that the Federal Election Campaign Act placed no restrictions upon the investigative or prosecutorial authority of the Attorney General and rejecting plaintiffs' request for relief against the Federal Election Commission. (R.33, Opinion and Order, pgs. 6-19, Apx. pgs. 25-38.) Plaintiffs appealed.

## STATEMENT OF THE FACTS

### I. Statutory Background

1. The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, imposes a variety of requirements on campaign expenditures and contributions in the federal election process. Among other provisions, the Act places dollar limits on individual campaign contributions, 2 U.S.C. § 441a, prohibits certain corporate contributions, 2 U.S.C. § 441b, and forbids contributions made in the name of another, 2 U.S.C. § 441f. Violations of the Act carry both civil and criminal penalties. 2 U.S.C. § 437g(a)(6), (d)(1).

The Act establishes a Federal Election Commission ("FEC") with six voting members, no more than three of whom may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1). The Commission possesses "exclusive jurisdiction with

respect to the civil enforcement" of the Act's provisions, 2 U.S.C. § 437c(b)(1), as well as the authority to issue subpoenas, administer oaths, render advisory opinions regarding compliance with the Act, and litigate civil actions through its general counsel, 2 U.S.C. § 437d(a). The Act provides that, as a general matter, "the power of the Commission to initiate civil actions * * * shall be the exclusive civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. § 437d(e).

In cases where the Commission, by an affirmative vote of at least four members, finds reason to believe that a person has violated or is about to violate the Act, the Commission must notify that person of the factual basis for the alleged violation and make an investigation. 2 U.S.C. § 437g(a)(2). If the Commission subsequently finds probable cause of such violation by an affirmative vote of at least four members, it must typically "attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved." 2 U.S.C. § 437g(a)(4)(A)(i). The Commission may enter into a conciliation agreement only by an affirmative vote of at least four members, and any such agreement, if abided by, provides "a complete bar to any further action by the Commission, including the bringing of a civil proceeding." Id.

If the Commission determines, by an affirmative vote of at least four members, that a knowing and willful violation of the Act's criminal provisions has occurred or

is about to occur, it may refer the violation to the Attorney General without regard to the Act's conciliation provisions. 2 U.S.C. § 437g(a)(5)(C). In such cases, the Attorney General "shall report to the Commission any action taken by the Attorney General regarding the apparent violation" at regular intervals until the matter is concluded. 2 U.S.C. § 437g(c). If a criminal defendant has entered into a conciliation agreement with the Commission that remains in effect, he may introduce the agreement to establish lack of knowledge or intent at trial, as well as to mitigate his penalty at sentencing. 2 U.S.C. § 437g(d)(2)-(3).

2. Since 1977, shortly after the Federal Election Campaign Act was amended to grant exclusive civil jurisdiction over violations of the Act to the FEC, the division of authority between the Commission and the Department of Justice has been governed by a memorandum of understanding between the two agencies. The memorandum, which was originally published in the Federal Register shortly after its adoption, see 43 Fed. Reg. 5441 (Feb. 8, 1978), sets forth the roles of each agency in enforcing the civil and criminal provisions of the Act. The memorandum "recognizes the Federal Election Commission's exclusive jurisdiction in civil matters" under the Act, and describes the circumstances in which the Commission will refer willful and knowing violations to the Department of Justice. Id. The memorandum further provides:

> Where information comes to the attention of the Department indicating a probable violation of Title 2, the Department will apprise the Commission of such information at the earliest opportunity.
>
> Where the Department determines that evidence of a probable violation of Title 2 amounts to a significant and substantial knowing and wilful violation, the Department will continue its investigation to prosecution when appropriate and necessary to its prosecutorial duties and functions, and will endeavor to make available to the Commission evidence developed during the course of its investigation subject to restricting law. * * * *
>
> Where the Department determines that evidence of a probable violation of title 2 does not amount to a significant and substantial knowing and wilful violation * * * the Department will refer the matter to the Commission as promptly as possible for its consideration of the wide range of appropriate remedies available to the Commission.

Id.[1]

## II. Factual Background and Prior Proceedings

1. In February 2007, Geoffrey Fieger, along with his law firm and the firm's office manager, brought suit against the Attorney General and the Chairman of the Federal Election Commission. (R.33 Opinion and Order, pg. 2, Apx. pg. 21.) Plaintiffs claimed that they were the target of an ongoing federal grand jury

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[1]Congress' expansion of the campaign finance laws in 2002 has prompted the Department and the FEC to begin negotiations for an updated memorandum of understanding. See Public Integrity Section, U.S. Dep't of Justice, Federal Prosecution of Election Offenses 205 (7th ed. Aug. 2007). These developments do not address the Attorney General's underlying authority to investigate and prosecute criminal violations of the campaign finance laws independent of referral from the FEC. See id. at 177.

investigation for violations of campaign finance laws, and that the FEC had failed to conduct a civil investigation into those violations. (R.1 Application for Writ of Mandamus and Complaint, pgs. 3-4, 6, Apx. pgs. 8-9, 11.) Plaintiffs alleged that because the Federal Election Commission had not completed a civil investigation and referred the matter to the Attorney General, the grand jury's criminal investigation was contrary to "the jurisdictional requirements" of the Federal Election Campaign Act, 2 U.S.C. § 437g. (R.1 Application for Writ of Mandamus and Complaint, pg. 5, Apx. pg. 10.) Plaintiffs sought declaratory relief from grand jury investigation and prosecution, and declaratory and mandamus relief against the FEC. (R.1 Application for Writ of Mandamus and Complaint, pgs. 5, 7, Apx. pgs. 10, 12.)

2. In August 2007, on cross-motions by the parties, the district court dismissed plaintiffs' suit. The court rejected plaintiffs' argument that the Attorney General lacked authority to conduct a grand jury investigation or prosecution without a referral from the Federal Election Commission, noting that while "the Act specifically provides that the Commission has 'exclusive jurisdiction with respect to the civil enforcement of [campaign finance] provisions,'" it contains no restriction or provision governing the Attorney General's criminal jurisdiction. (R.33 Opinion and Order, pgs. 8-9, Apx. pgs. 27-28 (quoting 2 U.S.C. § 437c(b)(1)).)

Moreover, because plaintiffs' interpretation of the Act would limit the Attorney General's plenary criminal authority, the court held that such a construction required

"a 'clear and unambiguous' directive from Congress." (R.33 Opinion and Order, pg. 9, Apx. pg. 28 (quoting United States v. Morgan, 222 U.S. 274, 282 (1911)).) The court found no clear and unambiguous intent in the Federal Election Campaign Act to so restrict the Attorney General's authority. To the contrary, the court noted that the statutory provision granting the FEC exclusive jurisdiction "applies only to civil enforcement of the Act." (R.33 Opinion and Order, pg. 9, Apx. pg. 28 (citing 2 U.S.C. § 437c(b)(1)).) The FEC's civil enforcement was governed by a detailed set of administrative procedures and requirements, but "none of those requirements mentions the Attorney General, let alone the timing of when the Attorney General may engage in criminal enforcement actions." (R.33 Opinion and Order, pg. 10 n.2, Apx. pg. 29 n.2.) And although the Act granted the FEC authority to refer knowing and willful violations to the Attorney General, "nothing in that (or any other) provision of the Act addresses, much less restricts, the authority of the Attorney General (or a grand jury) to investigate activities that might constitute criminal violations of the Act." (R.33 Opinion and Order, pg. 10, Apx. pg. 29.)

This conclusion, the court held, was reinforced by the legislative history of the statute, as well as the Ninth Circuit's decision in United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979), which had interpreted the Act in an identical manner. (R.33 Opinion and Order, pgs. 11-14, Apx. pgs. 30-33.) Subsequent amendments to the Act, which plaintiffs claimed had repudiated the Ninth

Circuit's ruling, had no bearing on the Attorney General's criminal authority. (R.33 Opinion and Order, pgs. 13-14, Apx. pgs. 32-33.) Finding no compelling suggestion to the contrary in the statute's text or history, the court held that any alleged grand jury investigation of plaintiffs was consistent with the Federal Election Campaign Act, and dismissed plaintiffs' claim against the Attorney General.

The court held plaintiffs' claims against the FEC to be similarly without merit. By plaintiffs' own account, the Commission had initiated an investigation into their conduct. (R.33 Opinion and Order, pgs. 16-17, Apx. pgs. 35-36.) Plaintiffs' allegation that the investigation was not proceeding with sufficient speed did not establish that the agency had "'failed to take a discrete agency action that it is required to take,'" as needed to make out a claim under the Administrative Procedure Act or mandamus. (R.33 Opinion and Order, pg. 15, Apx. pg. 34 (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004)).) To the contrary, the court noted that "an agency authorized to conduct investigations has broad authority to control the conduct and timing of its investigation." (R.33 Opinion and Order, pg. 16, Apx. pg. 35.) Moreover, the court held that the Federal Election Campaign Act precluded judicial review over the Commission's handling of administrative complaints except in limited circumstances not satisfied by plaintiffs, further supporting dismissal of the claims against the FEC. (R.33 Opinion and Order, pgs. 17-18, Apx. pgs. 36-37.)

## III. Related Proceedings

At nearly the same time that plaintiffs brought this suit against the FEC Chairman and the Attorney General, three other sets of plaintiffs affiliated with (and represented by) Fieger's law firm filed actions in the district courts of Colorado, Illinois, and Arizona, raising claims virtually identical to those presented here. The Colorado suit was dismissed on grounds closely resembling those adopted by the district court in this case, and is now on appeal to the Tenth Circuit. Bialek v. Gonzales, Civ. No. 07-00321, 2007 WL 1879989, at *2-5 (D. Colo. June 28, 2007), appeal docketed, No. 07-1284 (10th Cir. July 13, 2007). Motions to dismiss are currently pending in the remaining suits. Beam v. Gonzales, Civ. No. 07-1227 (N.D. Ill., suit filed Mar. 2, 2007); Marcus v. Gonzales, Civ. No. 07-398 (D. Ariz., suit filed Feb. 21, 2007).

In August 2007, a federal grand jury in the Eastern District of Michigan handed down a ten-count indictment against Fieger for violations of the Federal Election Campaign Act and related offenses. That prosecution is currently pending. United States v. Fieger, Crim. No. 07-20414 (E.D. Mich., indictment unsealed Aug. 24, 2007).

## SUMMARY OF THE ARGUMENT

The district court properly dismissed plaintiffs' challenge to the Attorney General's grand jury investigation. As plaintiffs acknowledge, authority over federal

criminal investigations and prosecutions is vested exclusively in the Attorney General absent an express contrary command from Congress. Nothing in the Federal Election Campaign Act disturbs that traditional allocation of power. The Act's grant of exclusive civil jurisdiction to the Federal Election Commission is just that--a grant of civil jurisdiction. The statute says nothing about the Attorney General's criminal enforcement under the Act, and plaintiffs' attempts to draw contrary inferences from statutory limits on the Federal Election Commission are without merit. That conclusion is further buttressed by the legislative history of the Act, and by the Ninth Circuit's decision in United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979), which rejected precisely the claims plaintiffs raise here.

Plaintiffs' claim against the Attorney General also fails because individuals may not obtain declaratory relief from criminal investigation or prosecution through civil litigation. Longstanding principles of equity jurisprudence prohibit parties from interfering with federal criminal investigations or indictments through the guise of a civil lawsuit. That rule is founded both on separation-of-powers principles and on the traditional precept that equitable relief will not lie when an adequate alternative remedy is available. Geoffrey Fieger has been indicted and is currently facing trial. He was entitled to challenge the validity of his indictment on the basis of the Federal Election Campaign Act in his criminal proceedings, but elected not to do so. He

cannot now seek to halt those proceedings through a collateral civil challenge. "Prospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." Deaver v. Seymour, 822 F.2d 66, 71 (D.C. Cir. 1987). That is precisely the effect of plaintiffs' suit, and the district court's dismissal of plaintiffs' claim against the Attorney General is equally justified on this alternative ground.

## STANDARD OF REVIEW

This Court reviews a dismissal for failure to state a claim de novo. Robert N. Clemens Trust v. Morgan Stanley DW, Inc., 485 F.3d 840, 845 (6th Cir. 2007). The Court may affirm on any ground supported by the record. Id.; see Hutcherson v. Lauderdale County, 326 F.3d 747, 756 (6th Cir. 2003).

## ARGUMENT

### I. THE FEDERAL ELECTION CAMPAIGN ACT DOES NOT ALTER THE ATTORNEY GENERAL'S TRADITIONAL AUTHORITY OVER CRIMINAL INVESTIGATIONS.

**1.** "Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government." United States v. Nixon, 418 U.S. 683, 694 (1974) (citing 28 U.S.C. § 516). Accordingly, "criminal prosecution is 'an executive function within the exclusive prerogative of the Attorney General.'" United States v. Palumbo Bros., Inc., 145 F.3d 850, 865 (7th Cir. 1998) (quoting

United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1366 (9th Cir. 1987)). See also In re Persico, 522 F.2d 41, 54 (2d Cir. 1975) (same) (citing United States v. Cox, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., specially concurring)). Congress may entrust these investigatory and prosecutorial powers to another Executive officer, but it has long been established that "[t]o graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will." United States v. Morgan, 222 U.S. 274, 282 (1911).

The Federal Election Campaign Act contains no such clear and unambiguous direction. The Act does not restrict or even mention the Attorney General's authority over criminal violations, nor does it vest criminal jurisdiction in any other agency or Executive official. To the contrary, the Act provides that the Federal Election Commission "shall have exclusive jurisdiction with respect to the civil enforcement" of the Act, 2 U.S.C. § 437c(b)(1), but does not work any similar change in criminal enforcement. Congress' silence with regard to criminal matters is reason enough to conclude that it did not intend to disturb the traditional responsibilities of the Attorney General. Congress' decision to confer exclusive civil jurisdiction to the Commission, while including no such provision as to criminal jurisdiction, makes that conclusion even more inescapable.

The authority by which the Commission may refer cases to the Attorney General for criminal investigation, 2 U.S.C. § 437g(a)(5)(C), is wholly consistent

with this reading. Plaintiffs contend (Br. 17) that the subsection "require[s] a referral from the FEC before the Attorney General [can] initiate criminal proceedings." But that is not what the statute says. To the contrary, the statute provides only that, if the Commission votes to find probable cause of certain knowing and willful violations of the Act, "it may refer such apparent violation[s] to the Attorney General."

As the district court properly concluded, nothing in the referral provision "addresses, much less restricts, the authority of the Attorney General (or a grand jury) to investigate activities that might constitute criminal violations of the Act." (R.33 Opinion and Order, pg. 10, Apx. pg. 29.) The subsection by its terms addresses the Commission's authority. A referral to the Attorney General bears the imprimatur of the Commission, and requires regular reports from the Attorney General on any action taken regarding the matter. See 2 U.S.C. § 437g(c). The Act's provisions ensure that such a step is not undertaken by the Commission lightly. The statute contains no language, however, to suggest that the Attorney General may not act on the basis of other information or referrals, and plaintiffs offer no reason why the statute's silence should be read to express such a limitation. As the district court held, "there is no * * * language in the Act which could constitute a prohibition or restriction on the authority of the Attorney General to investigate or charge a criminal violation of federal election law," let alone a clear and unambiguous instruction to that effect.

(R.33 Opinion and Order, pg. 10, Apx. pg. 29.) Plaintiffs' claim against the Attorney General accordingly fails.

**2.** The legislative history of the Federal Election Campaign Act further underscores that its provisions have no bearing on the Attorney General's criminal authority. When Congress created the Federal Election Commission in 1974, it considered and rejected language that would have conditioned the prosecutorial acts of the Attorney General on the Commission's approval. The original Senate bill provided that "[n]otwithstanding any other provision of law, the Commission shall be the primary civil and criminal enforcement agency for violations of the provisions of this Act * * * . Any violation of any such provision shall be prosecuted by the Attorney General or Department of Justice personnel only after consultation with, and with the consent of, the Commission." S. 3044, 93d Cong., § 207, sec. 309(d), at 49 (2d Sess. 1974), reprinted in Fed. Election Comm'n, Legislative History of Federal Election Campaign Act Amendments of 1974, at 51 (1977) [hereinafter 1974 Legislative History]. Congress discarded that provision in conference, replacing it with the House's language that afforded the Commission only "primary jurisdiction with respect to the civil enforcement of such provisions." H.R. Rep. No. 93-1438, at 22 (2d Sess. 1974) (Conf. Rep.), reprinted in 1974 Legislative History at 966. In so doing, the Conference Report explicitly disclaimed the Senate's proposal: "The primary jurisdiction of the Commission to enforce the provisions of the Act is not

intended to interfere in any way with the activities of the Attorney General or Department of Justice personnel in performing their duties under the laws of the United States." Id. at 94, reprinted in 1974 Legislative History at 1038.

Congressional statements reinforce this understanding. Senator Cannon, one of the key supporters of the Act, explained when introducing the Conference Bill that "the Department of Justice would not be deprived of any of its power to initiate civil or criminal actions in response to referrals by the commission or complaints from other sources." 93 Cong. Rec. S18525 (daily ed. Oct. 8, 1974) (statement of Sen. Cannon), reprinted in 1974 Legislative History at 1079. Similar sentiments were echoed by the Act's supporters in the House. See, e.g., 93 Cong. Rec. H10327 (daily ed. Oct. 10, 1974) (statement of Rep. Hays) ("We allow [the Commission] to go to court independently on civil matters * * * but all criminal matters must still be handled by the Justice Department."), reprinted in 1974 Legislative History at 1105; 93 Cong. Rec. H10331 (daily ed. Oct. 10, 1974) (statement of Rep. Frenzel) ("Criminal enforcement remains with the Justice Department, but the Attorney General is held accountable to the Commission for reporting on the disposition of violations referred to him."), reprinted in 1974 Legislative History at 1109. The Conference language was enacted into law without alteration. Pub. L. No. 93-433, § 208, sec. 310(b), 88 Stat. 1263, 1281 (Oct. 15, 1974), reprinted in 1974 Legislative History at 1153.

When Congress amended the Act in 1976 to grant the Commission exclusive civil jurisdiction, it again made clear that the change did not affect the Attorney General's criminal powers, but was limited to civil enforcement. The House bill that would ultimately become law "follow[ed] the pattern set in the 1974 Amendments" by excluding from the FEC's jurisdiction "complaints directed to the Attorney General and seeking the institution of a criminal proceeding." H.R. Rep. No. 94-917, at 4 (2d Sess. 1976), reprinted in Fed. Election Comm'n, Legislative History of Federal Election Campaign Act Amendments of 1976, at 804 (1977) [hereinafter 1976 Legislative History]; see S. Rep. No. 94-677, at 7 (2d Sess. 1976) (noting that "[t]he proposed changes would give the Commission exclusive civil enforcement authority," but suggesting no change to the Attorney General's authority over criminal violations), reprinted in 1976 Legislative History at 283; H.R. Rep. No. 94-1057, at 43 (2d Sess. 1976) (Conf. Rep.) ("The Conference substitute is the same as the House amendment and the Senate bill."), reprinted in 1976 Legislative History at 1037. That sentiment was again echoed by Senator Cannon, who explained that "[t]he bill would grant the exclusive civil enforcement of the act to the Commission to avoid confusion and overlapping with the Department of Justice, but at the same time, retain the jurisdiction of the Department of Justice for the criminal prosecution of any violations of this act." 94 Cong. Rec. S3860-61 (daily ed. Mar. 22, 1976) (statement of Sen. Cannon), reprinted in 1976 Legislative History at 470-71.

Plaintiffs' sole response to this history is an isolated floor statement by a staunch opponent of the Federal Election Campaign Act, Senator Brock. See Br. 17-18, 26 (quoting 122 Cong. Rec. S12471 (1976)); 94 Cong. Rec. S6479 (daily ed., May 4, 1976) (statement of Sen. Brock) (labeling the Act "a deceit, a sham, and a fraud on the American public"), reprinted in 1976 Legislative History at 1109. As the district court properly recognized, a single paragraph from an opponent of the Act is entitled to little weight in determining Congressional intent. (R.33 Opinion and Order, pgs. 11-12, Apx. pgs. 30-31.) See Bryan v. United States, 524 U.S. 184, 196 (1998) ("[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation. In their zeal to defeat a bill, they understandably tend to overstate its reach." (quotation marks and citations omitted)). Plaintiffs' suggestion that the definitive statement of Congress' intent lies not in the language of its statute, its Conference Reports, or the statements of legislative sponsors, but rather in the lone views of a dissenting Senator, stretches an argument for "clear and unambiguous intent" well beyond its breaking point.

**3.** The Ninth Circuit has also rejected precisely the argument that plaintiffs now press before this Court. In United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979), appellees had sought dismissal of their indictments for violations of the Federal Election Campaign Act, claiming that the Attorney General was required "to exhaust the administrative remedy before the

Federal Election Commission (FEC), available under section 437g of the Act, before seeking an indictment." Id. at 1162. Like the district court in this case, the Ninth Circuit began its analysis from the proposition that any infringement on the Attorney General's prosecutorial authority "'would require a clear and unambiguous expression of the legislative will.'" Id. (quoting Morgan, 222 U.S. at 282). After assessing the civil enforcement scheme provided by the Act, the Court determined that "[n]othing in these provisions suggests, much less clearly and [un]ambiguously states, that action by the Department of Justice to prosecute a violation of the Act is conditioned upon prior consideration of the alleged violation by the FEC. Indeed, it would strain the language to imply such a condition." Id. at 1163.

In particular, the Ninth Circuit explained, "[t]he fact that the FEC may refer certain complaints to the Department of Justice for prosecution, after administrative processing, does not in itself imply that administrative processing and referral are prerequisite to the initiation of litigation by the Attorney General." 638 F.2d at 1163 (citation omitted). The court likewise held that the statute's procedural requirements for enforcement actions and conciliation agreements did not confine the Attorney General's prosecutorial discretion, but rather established limits on the Commission's ability to investigate and pursue remedies for civil infractions. Id. at 1164. In short, those provisions "detail duties of the FEC and rights of persons complained against,

not limitations upon the statutory power of the Attorney General to initiate prosecution on behalf of the United States." Id. at 1163.

The court found additional support for its interpretation in the Act's extensive legislative history. 638 F.2d at 1165-68. It further noted that the FEC and the Justice Department, through their 1977 memorandum of understanding, had contemporaneously interpreted the Act to permit criminal investigations by the Attorney General without first exhausting the Commission's civil remedies. That interpretation, the court held, was also entitled to "[s]ubstantial deference." Id. at 1166. The court concluded:

> In sum, neither the language nor the legislative history of the Act provides the kind of "clear and unambiguous expression of legislative will" necessary to support a holding that Congress sought to alter the traditionally broad scope of the Attorney General's prosecutorial discretion by requiring initial administrative screening of alleged violations of the Act. On the contrary, the language and legislative history indicates that while centralizing and strengthening the authority of the FEC to enforce the Act administratively and by civil proceedings, Congress intended to leave undisturbed the Justice Department's authority to prosecute criminally a narrow range of aggravated offenses.

Id. at 1168.

Plaintiffs attempt to escape the force of the Ninth Circuit's decision in International Union by contending that it "has now been superceded by subsequent amendment to the Act in 1980." Br. 18. In particular, plaintiffs point to the Act's requirement that the Commission refer violations to the Attorney General only "by

an affirmative vote of 4 of its members." Br. 19 (quoting 2 U.S.C. § 437g(a)(5)(C)); see Br. 22-24 (same).

That claim is without merit. The provision to which plaintiffs cite is not substantively different from any other version of the Act since the Commission's formation. As far back as 1974, when the Commission was first created as a six-member body, it was required that "[a]ll decisions of the Commission with respect to its duties and powers under the provisions of this title shall be made by a majority vote of the members of the Commission." Pub. L. No. 93-433, § 208, sec. 310(c), 88 Stat. at 1282, reprinted in 1974 Legislative History at 1154. As Congress recognized, this amounted to "the requirement of four votes for affirmative action" well before the 1979 amendments cited by plaintiffs. H.R. Rep. No. 94-917, at 4, reprinted in 1976 Legislative History at 804. Consistent with that understanding, Congress described the 1979 language as merely "incorporat[ing] the language * * * of the current Act regarding referral of knowing and willful violations to the Attorney General." H.R. Rep. No. 96-422, at 22 (1979), reprinted in Fed. Election Comm'n, Legislative History of Federal Election Campaign Act Amendments of 1979, at 206 (1983) [hereinafter 1979 Legislative History].

Plaintiffs' assertion that the amendment was enacted "to eliminate any confusion that might have been caused by the erroneous 1979 Ninth Circuit opinion" (Br. 22) is incorrect. Plaintiffs cite no legislative history to support that claim. It is

contradicted by the Congressional Reports preceding and accompanying the 1979 amendments. And as the district court recognized, it is further belied by the fact that the language in question was first reported on September 7, 1979, three weeks before the Ninth Circuit's decision in International Union. (R.33, Opinion and Order, pg. 13, Apx. pg. 32 (citing H.R. 5010, 96th Cong. § 108, sec. 309(a)(5)(C), at 130 (1979), reprinted in 1979 Legislative History at 412).) Well after the 1979 amendments, the D.C. Circuit cited approvingly to the Ninth Circuit's holding in International Union, noting that it was "settled that criminal enforcement of FECA provisions may originate either with the FEC or the Department of Justice." Galliano v. U.S. Postal Serv., 836 F.2d 1362, 1368 n.6 (D.C. Cir. 1988) (citation omitted). That conclusion holds equally in this case.

**4.** Plaintiffs' remaining arguments offer no compelling reason to disregard the clear language and legislative history of the statute, as well as the settled law of two other Circuits.

Plaintiffs suggest that the Attorney General's prosecutorial discretion would interfere with the Commission's ability to provide advisory opinions and rules or enter into conciliation agreements. Br. 20-22. Those contentions rest on misunderstandings of the Commission's civil enforcement powers. The Commission's advisory opinions bear only on prospective conduct, 11 C.F.R. § 112.1(b), and afford immunity from sanction only for individuals who subsequently

rely upon them. See 2 U.S.C. § 437f(c). Such opinions are therefore of no import to previously completed conduct that might be the subject of a criminal investigation. In any event, the Commission's advisory opinions and rules are not "rendered meaningless" (Br. 21) by a criminal investigation or prosecution: to the contrary, the interpretations of the Commission are entitled to as great weight in criminal prosecutions as in civil enforcement suits. In re Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000).

The Commission's ability to enter into conciliation agreements is likewise consistent with the Attorney General's criminal authority. The Commission need not pursue the conciliation process at all in cases where it refers potential violations to the Attorney General. 2 U.S.C. § 437g(a)(5)(C). Moreover, nothing prevents the Commission from entering into such agreements during the pendency of a criminal prosecution. Conciliation agreements have force both as evidence to establish lack of knowledge or intent at trial, and as mitigating evidence at sentencing. 2 U.S.C. § 437g(d)(2)-(3). Rather than suggest a conflict between the Attorney General and the Commission, conciliation agreements--like advisory opinions--help to ensure consistency between the two agencies. These powers are a substantial reason why plaintiffs' specter of "inevitable conflicts" (Br. 21) between the Attorney General and the Commission has not materialized despite the concurrent exercise of their responsibilities over the past three decades.

Plaintiffs assert that independent prosecutions by the Attorney General would jeopardize the Commission's investigations due to witnesses invoking their Fifth Amendment rights. Br. 27-30. That argument misunderstands the contours of the Fifth Amendment, which does not turn on whether an individual is the subject of a criminal investigation, but rather "privileges him not to answer official questions put to him in any * * * proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). Because the Fifth Amendment's privilege turns on the potential for incrimination, and not on whether an individual is subject to investigation, witnesses in Commission proceedings would have the same Fifth Amendment privilege whether or not the Attorney General could independently pursue investigation or prosecution at the same time.

Indeed, as the district court recognized, "[t]he civil and regulatory laws of the United States frequently overlap with the criminal laws * * * thereby creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous." (R.33 Opinion and Order, pg. 14, Apx. pg. 33.) The Commission's civil powers are no different from those of myriad other agencies that may act concurrently with a criminal investigation or prosecution by the Attorney General. The FEC retains its broad powers to investigate and remedy civil infractions, without regard to whether criminal proceedings are pending at the same time. See

2 U.S.C. § 437d. Compare United States v. LaSalle Nat'l Bank, 437 U.S. 298, 312 (1978) (citing statutory limits on Internal Revenue Service fraud investigations after referral to the Justice Department). Absent Congress' clear intent to the contrary, criminal authority remains "reserved to the Department of Justice," with "the grand jury as a principal tool of criminal accusation." Id.

Equally misguided is plaintiffs' allegation (Br. 19-20, 23-24) that the referral and reporting provisions of the Act are rendered meaningless if the Attorney General can independently conduct investigations. As Congress made clear when it initially enacted those provisions in 1974,[2] the requirements do not prevent the Attorney General from investigating violations independently. See supra pages 15-17. Although the Attorney General retains the discretion whether to prosecute particular cases, it was Congress' hope that the reporting requirements and gravity of the Commission's referrals would bring additional violations to the Justice Department's attention--not prevent it from pursuing cases on its own. See, e.g., 93 Cong. Rec. H10331 (daily ed. Oct. 10, 1974) (statement of Rep. Frenzel) ("Criminal enforcement remains with the Justice Department, but the Attorney General is held accountable to

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[2]Plaintiffs' characterization of the reporting requirement as a "new provision," Br. 20, is incorrect. The requirement has existed since the Commission's creation. Pub. L. No. 93-443, § 208, sec. 314(b), 88 Stat. at 1285, reprinted in 1974 Legislative History at 1157.

the Commission for reporting on the disposition of violations referred to him."), reprinted in 1974 Legislative History at 1109.

Plaintiffs assert, without support, that "[s]ince 1974, virtually all campaign finance cases have been resolved by the FEC"; that "[i]n the history of the United States, no case resembling the facts here has ever been criminally charged or tried to a verdict before a jury"; and that "the FEC has resolved, civilly, about 99.9% of campaign finance disputes without the interference or intervention of the Attorney General." Br. 5 n.1, 25-26. See also Br. 44. Even if those claims were not squarely contradicted by the prosecutions cited by the Commission, FEC Br. 9-10, they would have no bearing on the question before this Court. The position of the Justice Department and the Commission, as memorialized in the agencies' thirty-year-old memorandum of understanding, is that the Attorney General possesses independent authority to investigate potential criminal violations of the campaign finance laws. That conclusion is compelled by the statute's text and legislative history. The Attorney General's criminal enforcement power is not altered by plaintiffs' bare assertion that he has not prosecuted enough cases.

Finally, plaintiffs claim that the Attorney General is foreclosed from conducting a grand jury investigation by the doctrine of primary jurisdiction. Br. 31-34. But that doctrine applies only "in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the

scheme." United States v. Phila. Nat'l Bank, 374 U.S. 321, 353 (1963). Plaintiffs' argument for primary jurisdiction amounts to no more than a repetition of their other attempts to create a "clear and unambiguous" restriction on the Attorney General's authority. See Gen. Dynamics Corp., 828 F.2d at 1366 & n.18 ("For all practical purposes, there is no difference between requiring exhaustion of and requiring deferral to an administrative remedy. In either case there can be no litigation before the agency has acted."). For the reasons discussed above, those attempts are without merit, and the district court's judgment should accordingly be affirmed.

## II. PLAINTIFFS ARE NOT ENTITLED TO OBTAIN RELIEF FROM CRIMINAL INVESTIGATION OR PROSECUTION THROUGH A CIVIL LAWSUIT.

Even if plaintiffs' interpretation of the Federal Election Campaign Act had merit, traditional equitable principles preclude the relief they seek. Geoffrey Fieger is currently standing trial for violations of the federal campaign finance laws, see supra page 10, and his fellow plaintiffs allege that they have been the subjects of a similar grand jury investigation. Plaintiffs' requested relief--that the court declare such actions "unlawful"--would effectively enjoin Fieger's criminal trial, as well as any future criminal investigation of plaintiffs. That result finds no support in law. Parties may not seek equitable relief to halt a grand jury investigation, let alone a pending prosecution, through civil litigation.

"The traditional rule, dating back to the English division between courts of law and equity, was that the latter had 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' and therefore could not enjoin criminal proceedings." Deaver v. Seymour, 822 F.2d 66, 68 (D.C. Cir. 1987) (quoting In re Sawyer, 124 U.S. 200, 210 (1888)). This prohibition on interference with criminal proceedings derives from the basic doctrine that courts of equity will not act when a party possesses an adequate remedy at law. Because "the adversary system 'afford[s] defendants, after indictment, a federal forum in which to assert their defenses,'" individuals cannot challenge a federal criminal investigation or prosecution through a suit in equity. Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 185 (3d Cir.) (quoting Deaver, 822 F.2d at 69), cert. denied, 127 S. Ct. 494 (2006).

"Courts exercise this restraint because, as Justice Frankfurter explained, '[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.'" In re Sealed Case, 829 F.2d 50, 62 n.60 (D.C. Cir. 1987) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)). The same is true of grand jury investigations. United States v. Dionisio, 410 U.S. 1, 10 (1973) (quoting Blair v. United States, 250 U.S. 273, 281 (1919)). Individuals may decline to testify before the grand jury pursuant to certain constitutional safeguards, but "witnesses are not entitled to take exception to the

jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation." Blair, 250 U.S. at 282; see United States v. Calandra, 414 U.S. 338, 345 (1974).[3]

These equitable limits are further reinforced by the Executive's "exclusive authority and absolute discretion to decide whether to prosecute a case." Nixon, 418 U.S. at 693. "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." United States v. Cox, 342 F.2d 167, 171 & n.8 (5th Cir. 1965) (en banc) (citing cases). See also Stolt-Nielsen, 442 F.3d at 187.

The impropriety of allowing a collateral civil challenge to criminal proceedings is further underscored by the contrast between the broad rules of civil discovery and grand jury secrecy. The practical implications of that difference are manifest in this case. Plaintiffs sought civil discovery into a variety of criminal documents including subpoenas, search warrants, and similar items regarding a broad range of individuals. (R.12 Plaintiffs' Motion To Conduct Limited Discovery, pg. 2, Apx. pg. 57.) Allowing potential defendants access to such documents, simply by dint of having

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[3]The obligation to cooperate in a grand jury investigation "is no different for a person who may himself be the subject of the grand jury inquiry." Dionisio, 410 U.S. at 10 n.8.

filed a collateral suit challenging an investigation or prosecution, would have the potential to greatly disrupt the grand jury as well as any subsequent criminal trial. The "general rule barring judicial interference with the conduct of a grand jury proceeding" is at its strongest in such cases: "courts do not, except in very limited circumstances not alleged here, entertain the claim of a person subject to a criminal investigation that the investigation is unlawful and must therefore be enjoined." In re Sealed Case, 829 F.2d at 62 n.60.[4]

"[S]ubjects of federal investigation have never gained injunctive relief against federal prosecutors." Deaver, 822 F.2d at 69-70. Principles of equity preclude such extraordinary relief in this case as well. If plaintiffs wish to challenge the propriety of the Attorney General's actions, they may follow the approach taken by the appellees in International Union and file a motion to dismiss any indictments that may be returned against them. See 638 F.2d at 1162; Fed. R. Crim. P. 12(b)(3). Fieger had this opportunity, and elected not to challenge his indictment on the basis of the Federal Election Campaign Act.[5] "Prospective defendants cannot, by bringing

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[4]Limited exceptions may apply for plaintiffs seeking to resist a subpoena or assert particular First Amendment rights. United States v. Ryan, 402 U.S. 530, 532 (1971); Deaver, 822 F.2d at 69, 70 n.8. Plaintiffs' suit falls into neither category.

[5]Pursuant to court order, Fieger's motion to dismiss his indictment under Rule 12(b)(3) was due on or before October 9, 2007. Dkt. #50, United States v. Fieger, Crim. No. 07-20414 (E.D. Mich.). Fieger's motion did not challenge the indictment (continued...)

ancillary equitable proceedings, circumvent federal criminal procedure." Deaver, 822 F.2d at 71. Plaintiffs' suit seeks precisely that result, and the district court's dismissal should be affirmed on this ground as well. See Clemens Trust, 485 F.3d at 845 (affirmance permitted on any supported ground); Hutcherson, 326 F.3d at 756 (same).

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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MARCH 2008

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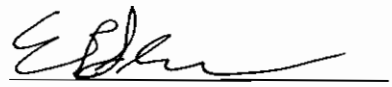
[5](...continued)
on the basis of 2 U.S.C. § 437g, and is currently pending before the district court. Dkt. #21, United States v. Fieger, Crim. No. 07-20414 (E.D. Mich.).

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief contains 7150 words from its Statement of Jurisdiction to its Conclusion, and is presented in proportionally spaced 14-point Times New Roman typeface. The brief was prepared using WordPerfect 12 for Windows XP.



Eric Fleisig-Greene

## CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2008, I filed and served the foregoing Brief by causing an original and six copies to be sent to the Court by Federal Express overnight, and two copies to be sent by Federal Express to:

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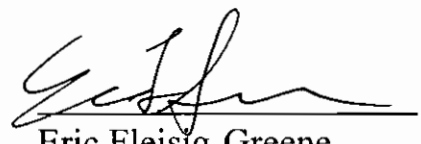

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## DESIGNATION OF JOINT APPENDIX CONTENTS

Pursuant to Sixth Circuit Rules 28(d) and 30(b), the United States Attorney General hereby designates the following portions of the district court record for inclusion in the Joint Appendix, in addition to those contents that appear in plaintiffs-appellants' designation:

| Description of Entry | Date | Record Entry No. |
|---|---|---|
| Plaintiffs' Motion To Conduct Limited Discovery | 3/28/07 | 12 |