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Case No. 07-2291

UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

(On Appeal from the United States District Court,
Eastern District of Michigan, Civil Action No. 07-10533
the Honorable Lawrence P. Zatkoff)

GEOFFREY N. FIEGER; NANCY FISHER;
FIEGER, FIEGER, KENNEY AND JOHNSON, P.C.,

Plaintiffs-Appellants,

vs.

U.S. ATTORNEY GENERAL ALBERTO R. GONZALES;
FEDERAL ELECTION COMMISSION CHAIRMAN
MICHAEL E. TONER, in their official capacities,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' REPLY BRIEF ON APPEAL

CERTIFICATE OF SERVICE

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TABLE OF AUTHORITIES

FEDERAL CASES

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

In their briefs, Defendants rely on either irrelevant or outdated law to support their arguments. For instance, Defendants cite *United States v. Int'l Union of Oper. Eng'rs*, 638 F.2d 1161 (9th Cir. 1979), *United States v. Jackson*, 433 F. Supp. 239 (W.D. N.Y. 1977), and *United States v. Tonry*, 433 F. Supp. 620 (E.D. La. 1977), but each of these cases were decided prior to the 1980 amendments which substantially and significantly altered the referral provision of the Act. Given the statutory amendments to the Act in 1980, the decisions and discussions in *Int'l Union*, *Jackson*, and *Tonry* were limited to the pre-1980 amendments and should not be relied on in interpreting the current statutory scheme.

Also misplaced is Defendants' reliance on dicta from *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1368 n.6 (D.C. Cir. 1988). There, the court considered whether the FEC's exclusive jurisdiction displaced *pro tanto* the application of certain fraud proscriptions contained in the United States Postal Service's regulations. In a footnote unrelated to the issue presented in the case, the court noted that criminal enforcement of the FEC may originate either with the FEC or the Department of Justice. 836 F.2d 1362 n.6. In support of this footnote, the court cited the *Int'l Union* case from 1979. Defendants' reliance

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on the *Galliano* decision is hardly a smoking gun. The footnote was pure dicta unrelated to the issues presented therein, and based on the 1979 decision of *Int'l Union* which has been superceded by the 1980 amendments to the statute. In short, since the 1980 amendments to the Act, no circuit court has considered the question presented herein.

Also without merit is Defendants' reliance on *United States v. Hsia*, 24 F. Supp. 2d 33 (Dist. D.C. 1998), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999). There, the defendant challenged her indictment on the grounds that the more specific provisions of the FEC impliedly repealed the more general provisions of the criminal code and thus she could not be charged under both. The court rejected Hsia's argument and stated that the "Attorney General . . . is in no way limited by the FEC." Like the language lifted from *Galliano*, the language cited by Defendants from *Hsia* is dicta and does nothing to shed light on the question before this Court.

Defendants' reliance on *United States v. Palumbo Brothers, Inc.*, 145 F.3d 850 (7th Cir. 1998), is also misplaced. There, the defendants were charged in a multiple count indictment with violating the criminal RICO statutes. Defendants argued that, if at all, their conduct violated the National Labor Relations Act and the Labor Management Act and that those labor statutes

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preempted any criminal prosecution under the criminal RICO statutes. Unlike the instant case, *Palumbo* dealt with two sets of laws, the criminal laws under RICO and civil laws under the NLRA. *Palumbo* is not remotely relevant to the question before this Court.

In short, there are no cases that address the specific issue before this Court because it is a pure question of statutory construction. In *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 307 (1978), the Court held that a question similar to the question presented here was not predicated on analysis of precedent but rather a review of the statutory scheme. In this case, the statutory scheme provides the FEC with "exclusive civil" jurisdiction which means "to the exclusion of all others." The statutory scheme further provides a mechanism for the FEC to refer a matter to the Attorney General for criminal investigation and/or prosecution *but only after* the FEC has exercised its exclusive jurisdiction.

Furthermore, the gust of Defendants' arguments stems from provisions of the Act that existed more than 30 years ago. For example, the Attorney General relies on a conference report from the 1974 amendments to support its argument that the FEC has jurisdiction over civil laws while the Attorney General has jurisdiction over criminal laws. In 1974, Defendants' arguments would have

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made sense because back then the substantive restrictions on campaign finance were contained in the federal penal code (Title 18 U.S.C.). Thus, in 1974, the Attorney General would have been correct to argue that he had jurisdiction over certain campaign finance laws because those laws were criminal laws contained in the federal criminal penal code. But this is no longer the case.

In 1976, congress moved most of the substantive restrictions on campaign finance from the federal penal code and placed them into the Federal Election Campaign Act subject to the exclusive civil jurisdiction of the FEC. Therefore, prior to 1976, there were two sets of laws – one set subject to the jurisdiction of the FEC and another subject to the jurisdiction of the Attorney General. In 1976, congress changed that scheme so that the FEC would have the first opportunity to resolve alleged violations of the Act. At the same time, congress also limited the Attorney General's jurisdiction to independently prosecute violations of the Act without a referral by the FEC. These facts support Plaintiff's argument and further expose the anachronistic nature of the Attorney General's position.

Defendants also assert that Plaintiffs are not entitled to declaratory relief. Plaintiffs disagree. This case presents a substantial question of federal jurisdiction based on statutory interpretation best addressed by an action, like

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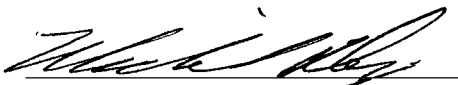
this one, for declaratory relief. Indeed, as this Court has pointed out, "[t]he 'useful purpose' served by the declaratory judgment action is the clarification of legal duties for the *future*, rather than the past harm a coercive tort action is aimed at redressing." *Fieger v. Ferry*, 471 F.3d at 644 n.3 (6th Cir. 2006)(emphasis added)(quoting *AmSouth Bank v. Dale*, 386 F.3d 763, 786 (6th Cir. 2004); *see also Steffel v. Thompson*, 415 U.S. 452 (1974) (finding that plaintiff had standing to seek prospective declaratory relief under § 2201 to prevent future constitutional violations).

In the end, Defendants fail to explain the most obvious problem with their interpretation of the statute. Under their theory, if the FEC votes 5 to 1 *against* referral, the lone disgruntled FEC member can simply walk across the street to the Attorney General and ask the Attorney General to prosecute the matter. Such an interpretation would render meaningless the referral provision of the

Act. This is the crux of the issue before this Court, and Defendants fail to offer any convincing explanation of this problem.

Respectfully submitted,

FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX, P.C.



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Dated: March 4, 2008

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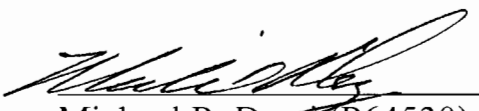
CERTIFICATE OF SERVICE

Michael R. Dezsi hereby certifies that on March 4, 2008, he caused to be served by first-class mail a copy of **Plaintiff-Appellant's Reply Brief on Appeal** upon: Eric Fleisig-Grene, Esq., U.S. Department of Justice, Civil Division, 950 Pennsylvania Avenue, N.W., Suite 7214, Washington, D.C. 20530-0001; and Greg J. Mueller, Esq., Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463-0000.



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