UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INGA L. PARSONS, *et al.,*

Plaintiffs,

v. No. 14-cv-1265 (JEB)

FEDERAL ELECTION COMMISSION,

Defendant.

REPLY IN SUPPORT OF
MOTION FOR CERTIFICATION ORDER
PURSUANT TO 2 U.S.C. § 437h.

Rule 1 of the Federal Rules of Civil Procedure provides that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." For nearly three years, the *Wagner* plaintiffs and their counsel have been attempting to obtain a determination of the constitutionality of 2 U.S.C. § 441c as applied to individual contractors. Their case was scheduled to be heard by the court of appeals en banc on September 30, 2013, but it was removed from the calendar pending the final determination by the Supreme Court of *McCutcheon v. FEC,* 134 S. Ct. 1434, which was decided on April 2, 2014. *Wagner* has been re-set for en banc oral argument on September 30, 2014.

As plaintiffs' motion explained, they and their counsel became concerned that, although *Wagner* was not moot, it might become moot at some future date, and hence require the D. C. Circuit, and perhaps the Supreme Court, to hear what counsel believe are the same legal issues again. Therefore, in effort to comply with the spirit, as well as the letter of Rule 1, counsel located additional individuals who have contracts with the United States Government and who are adversely affected by section 441c. On July 11, 2014, after the two plaintiffs in this action

had agreed to become parties to the litigation, counsel for the *Wagner* plaintiffs spoke by telephone with counsel for the FEC and advised the FEC of the intention to add parties, either by way of motion in the Court of Appeals in *Wagner*, or by filing a new complaint and seeking to expedite it in order to have the two cases heard on September 30th. The FEC was asked to consent to one means or another of achieving that goal. Counsel for Parsons and Leckar promised to provide draft declarations and to obtain other information that the FEC thought was necessary, and those drafts were provided on July 21, 2014. Three days later, the FEC advised that it was unwilling to consent to any procedures that would enable Parsons and Leckar to have their claims joined with those in *Wagner*, in order to have them heard together. On July 24, 2014, the complaint and the motion to certify in this action were both filed, and the FEC filed its Opposition on August 8, 2014.

After sweeping away all the legalese, the FEC's position is that it needs more facts. We put aside the question of whether any of the facts that it seeks are necessary or even relevant, because there is a more basic response to their Opposition: what exactly do you need to know and how can we (the plaintiffs' counsel) help you get that information? That is essentially the offer counsel made on July 11th, and given the cooperation shown by counsel for the plaintiffs regarding discovery in *Wagner*, there was no reason to think that the very limited factual information that the FEC claims to need could not have been supplied very quickly. But that was not the path that the FEC chose to follow. Instead, it prefers "Opposition." If the FEC has its way, it will take a full 60 days to answer, after which it will be impossible to have this case and *Wagner* heard together. Perhaps the FEC's lawyers have nothing better to do than to go through an entire re-briefing of these constitutional questions, but plaintiffs' lawyers do – and so do the eleven judges of the D. C. Circuit.

Plaintiffs cannot let pass one other aspect of the FEC's plea for more information. Request for Admission # 4 served by plaintiffs in *Wagner*, which is attached as an addendum to this reply, asked the FEC to admit that a variety of other individuals performing various specific services paid for by the United States were subject to section 441c. The services included those performed for the judicial branch (as is true for the plaintiffs in this case) and those performed as attorneys, mainly for federal officers or employees, but not expressly including CJA attorneys like plaintiffs. The FEC admitted that those individuals would be covered provided that the individual "is a party to a contract with the United States or any department or agency thereof". Does the FEC really believe that plaintiffs here have no "contract" when they are being paid by the United States to perform work that the United States wants performed? It may be that, unlike the plaintiffs in *Wagner*, there is no paper with the heading "contract" or "agreement" signed by the lawyer and an agent for the United States, but the essentials of a contract are present: the lawyer agrees to perform certain designated work and the United States agrees to pay him or her for that work at an agreed rate.

The FEC suggests that Parsons and Leckar may not be contractors because certain physicians or lawyers have been deemed not to be contractors in FEC Advisory Opinions. But the FEC does not suggest that the facts involved in those Advisory Opinions are analogous to the facts here, and it is clear that they are not.

In Advisory Opinion 1987-33, the FEC determined that a lawyer who served on the Council on Employee Welfare and Pension Benefit Plans was not a contractor — for the simple reason that he was a part-time government employee: "[T]he Department of Labor views persons appointed to the Council as part-time Federal employees. This characterization is supported by the definition of 'employee' in Federal personnel statutes and also by the statutory provisions

under which members of the Council are appointed and paid." Advisory Opinion 1987-33 at 2. CJA attorneys are not federal employees.

Likewise, in Advisory Opinion 2012-13, the FEC determined that certain physicians who provided services to Medicare and Medicaid participants were not federal contractors. But to the extent that there were any contracts involving those physicians, they were either between the physicians and their patients, who assigned to the physicians their right to receive reimbursements (Advisory Opinion 2012-13 at 3), or between the physicians and the States, who operate the Medicaid program: "Under Medicaid, doctors . . . have specific contractual agreements . . . with State agencies and not with the Federal Government.'" *Id*. (internal quotation and citation omitted; alterations in original). In either case, as the FEC recognized, the ban on contributions "does not apply when a person [the physician] contracts with an entity other than the United States or a department or agency of the United States, even if the entity is funded in whole or in part from funds appropriated by the Congress. The third party beneficiary of a Federal contract is not subject to the prohibition." *Id*. at 2 (citation omitted). Unlike Medicare and Medicaid, the CJA program is operated directly by the federal government, and the criminal defendants that plaintiffs represent have no right to receive reimbursements that they assign to their lawyers. For those reasons, CJA lawyers are not analogous to the physicians whose status was discussed in Advisory Opinion 2012-13.

Although the FEC has wasted several weeks in preparing an Opposition saying that it needs certain information, instead of simply asking for the information that it wants, there is still time to provide that information and for the Court to certify the facts and constitutional questions so that the en banc Court of Appeals, not the FEC, will decide whether the "just, speedy, and inexpensive determination" of these constitutional questions is better served by hearing this case

with *Wagner*. Accordingly, this Court should exercise its inherent power to prevent undue delay and expense, as well as its express power under Rule 16(a), to require the attorneys for the parties to appear, within five days, for a pretrial conference before the Court. Each party should be required to serve on the other party, no later than 24 hours before the conference, any document requests, interrogatories, and requests for admissions that the party seeks, and the receiving party shall be prepared at the conference to state when such information will be provided. The parties should also be prepared at such conference to propose a schedule for submitting proposed certification orders to the Court.

It is not too late to overcome the FEC's delaying tactics and preserve the option for the Court of Appeals to hear this case with *Wagner*. Plaintiffs' counsel are prepared to do what is necessary, but they cannot do it alone, or expect the voluntary cooperation of the FEC in obtaining the "just, speedy, and inexpensive determination" of this action.

Respectfully submitted,

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Dated: August 11, 2014

ADDENDUM

WAGNER PLAINTIFFS' REQUEST FOR ADMISSION

4. The ban in section 441c applied to individuals who contract in all of the following circumstances: (a) the individual is hired by an agency, including but not limited to the Department of Justice, or by a federal court, to be an expert witness in either administrative or court litigation; (b) the individual is hired to represent the United States, a federal agency, officer, or employee, where the Department of Justice may have a conflict of interest or in other circumstances authorized by law; (c) the individual is hired by the Judicial Conference or another entity within the Judicial Branch to be a reporter for one of the Rules Committees or to provide training to judges; (d) the individual is hired to provide expert advice to the federal government in law, medicine, the hard or social sciences, or in any other area where the government lacks the necessary expertise among its officers or employees; and (e) the individual is hired to provide translation or interpretation services in federal court or at a federal agency proceeding.