ORAL ARGUMENT NOT YET SCHEDULED

No. 23-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

READY TO WIN,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

FEDERAL ELECTION COMMISSION'S PARTIAL MOTION TO DISMISS

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27(a) and Circuit Rule 27(g), the Federal Election Commission ("FEC" or "Commission") respectfully moves to dismiss this appeal in part for lack of jurisdiction.

This appeal stems from a lawsuit by plaintiff-appellant Ready to Win ("RtW") challenging a Federal Election Commission ("FEC" or "Commission") advisory opinion which applied well-settled precedent to conclude, pursuant to the Federal Election Campaign Act ("FECA"), that RtW may not provide a potential (and now declared) presidential candidate with an in-kind contribution in the form of a "contact list" of supporters which exceeds FECA's well-established limitations.

The district court rightly denied RtW's motion for a preliminary injunction vacating the FEC's advisory opinion, in which the court determined that RtW was unlikely to succeed on the merits of any of its claims. RtW has appealed that decision, as is its right pursuant to 28 U.S.C. § 1292(a)(1). The district court also considered whether to treat the preliminary injunction motion as one for summary judgment, but chose to do so only as to portions of RtW's Administrative Procedure Act ("APA") claims, reserving judgment on all claims to allow the parties to develop a factual record.

RtW's statement of issues now evidences an intent to appeal not merely the district court's preliminary order, but a further issue outside this court's interlocutory jurisdiction: whether the court should have dismissed plaintiff's complaint or entered final judgment in favor of the FEC. Both at the preliminary injunction stage and in a later order denying RtW's motion to enter final judgment, the district court made clear that because RtW relies on the First Amendment to support each of its claims, and because the FEC has sought to develop a factual record as to these issues, summary or final judgment as to any of RtW's claims was and remains inappropriate. Because that decision did not itself grant, deny, or modify an injunction, it is clearly outside narrow categories for which interlocutory appeal may be had under § 1292, and RtW's appeal of that decision should be dismissed by this Court for lack of jurisdiction.

For the ensuing reasons and in the interest of judicial economy, this Court should dismiss those portions of RtW's appeal that fall outside this Court's jurisdiction, which will facilitate a more streamlined and focused briefing that will not unduly delay proceedings in the district court.

STATEMENT OF FACTS

The Commission here sets forth an abbreviated legal and factual background in this matter, to the extent necessary for this Court to evaluate the instant partial motion to dismiss.

The FEC is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 ("FECA"). *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to, inter alia, make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8). At least four affirmative Commissioner votes are required for the Commission to take certain actions, including issuing advisory opinions. *Id*. §§ 30106(c), 30107(a)(6)-(9). Anyone may request an advisory opinion regarding the application of FECA and Commission regulations to a specific transaction or activity by that person. 52 U.S.C. § 30108(a); 11 C.F.R. § 112.1(a).

RtW requested an advisory opinion from the Commission by letter on May 25, 2022. RtW's advisory opinion request proposed to finance a nationwide petition to encourage Governor DeSantis to run for president in 2024, and to provide the extensive contact information it acquired — including each signatory's name and email address, in addition to any other contact information the signatory provides — to Governor DeSantis without charge.

In response the FEC Commissioners unanimously approved an advisory opinion which concluded that RtW could not provide the names and contact information to Governor DeSantis if he either becomes a federal candidate or

begins testing the waters for a potential federal candidacy because the value of that information would exceed the applicable contribution limits on funds used to test the waters.

On October 27, 2022, RtW filed a complaint against the Commission seeking preliminary and permanent injunctions prohibiting the Commission from applying the "testing the waters" statute or regulations to RtW's provision of the petition and signatories' contact information to Governor DeSantis; a declaratory judgment holding that 52 U.S.C. § 30116(a) and implementing regulations at 11 C.F.R. § 110.1(b) and (d) are unconstitutional as applied to the provision of a signed draft petition and the petition-related expenditure of funds raised outside the limits and prohibition of the FECA; a declaration that section 30116 does not limit transfers to a person who is not a candidate, and that 52 U.S.C. § 30116(a)(8) allows RtW to act as a conduit to pass signatures and contact information from a petition's signatories to the recipient; a declaration that 11 C.F.R. § 100.72 (the "testing the waters" regulation) is void and unenforceable; and a request to the Court to vacate the advisory opinion. Plaintiff's complaint included six causes of action: Count I (First Amendment); Count II (Challenge to FECs Refusal to Issue Requested Advisory Opinion under the APA); Count III (Declaratory Judgment under 28 U.S.C. § 2201); Count IV (Equality Claim for Injunctive Relief); Count

V (52 U.S.C. § 30116(a)(1)(A), (a)(8)); and Count VI (Challenge to FEC's "testing the waters" Regulation under the APA, 5 U.S.C. § 702).

RtW subsequently filed a motion for a preliminary injunction with respect to all its claims, which the Commission opposed. The district court held oral argument on the motion, followed by supplemental briefing. On May 17, 2023, the district court issued a memorandum opinion and order denying RtW's motion. *See* Pl.-Appellant's Submission of Underlying Decision From Which Appeal Arises, Doc. # 2012179, filed August 11, 2023 ("Preliminary Order"). Pursuant to an agreement of the parties, the court treated RtW's motion for a preliminary injunction as one for summary judgment with respect to "all non-First Amendment claims, whether asserted directly under the Constitution or pursuant to the APA." *Id.* at 13. However, the court evaluated RtW's constitutional claim (Count I) and those "portions of RFR's APA claims [that] assert essentially the same First Amendment challenge" solely with respect to the preliminary injunction standards, noting that "the FEC has requested discovery as to these issues[.]" *Id.* The FEC has since served RtW with discovery requests and has been building a factual record with respect to all First Amendment issues in this matter.

RtW later moved for an order granting final judgment as to all claims in the Commission's favor, or in the alternative granting judgment as to all but RtW's First Amendment claim pursuant to Federal Rule of Civil Procedure 54(b) or, as a

third alternative, staying discovery during the pendency of its planned appeal to this court. The FEC opposed this motion, emphasizing that it is entitled to seek discovery as to factual matters impacting RtW's claims for relief under the First Amendment. The district court issued an order on July 28, 2023, in which it denied RtW's motion to enter judgment in the Commission's favor as to all claims, noting that each of RtW's claims touch on First Amendment issues and that the Commission had preserved its right to seek discovery in that regard. *See* Exh. A at 1-2, *Order*, Civ. No. 22-3282 (Docket No. 42) (D.D.C. July 28, 2023) ("Final Judgment Denial"). However, the district court granted RtW's alternative request to stay discovery pending the outcome of this appeal. *Id.* at 2-3.

RtW subsequently noticed its appeal of the Preliminary Order to this Court. On August 11, 2023, RtW made a number of preliminary filings, including a Statement of Issues to be Raised. Pl.-Appellant's Statement of Issues to be Raised at 1, Doc. # 2012178 (the "Statement of Issues"). The Statement of Issues provided eight separate "matters" that the preliminary injunction decision "may implicate[.]" Among these, RtW raises "if RTW is not entitled to an injunction then, based on the district court's legal conclusions, whether the district court should have dismissed RTW's Complaint as a matter of law rather than simply denying the injunction[.]" *Id.* at 2.

STANDARD OF REVIEW

The party invoking this Court's jurisdiction bears the burden of establishing that the Court has jurisdiction over the appeal. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). When determining its own jurisdiction, the Court may consider documents outside of the administrative record. *Id.* at 900; *Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015) (collecting cases). And the Court may take judicial notice of facts on the public record, including in other proceedings. *Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005); *Conecuh-Monroe Cmty. Action Agency v. Bowen*, 852 F.2d 581, 583 (D.C. Cir. 1988) (taking judicial notice of administrative ruling issued after district court's decision); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("Courts may take judicial notice of official court records . . . .").

ARGUMENT

I. RTW CANNOT APPEAL THE DISTRICT COURT'S DETERMINATION NOT TO ENTER FINAL JUDGMENT OR THE COURT'S DECISION NOT TO DISMISS RTW'S COMPLAINT

Because this is "a court of limited jurisdiction, [the court's] inquiry must always begin by asking whether [it has] jurisdiction to decide a particular appeal." *Salazar ex rel. Salazar v. D.C.*, 671 F.3d 1258, 1261–62 (D.C. Cir. 2012) (citing *United States v. E–Gold, Ltd.*, 521 F.3d 411, 413 (D.C.Cir.2008); *Steel Co. v.*

Citizens for a Better Env't, 523 U.S. 83, 94 (1998)). If the Court concludes that it lacks jurisdiction, that is also where the inquiry ends.[1] *Id.*

Under 28 U.S.C. § 1291, appellate jurisdiction generally extends only to the "final decisions" of district courts. 28 U.S.C. § 1292(a)(1) provides an exception for certain "interlocutory orders" of district courts, including those granting, refusing, or modifying injunctions. However, "[t]he exception provided by § 1292(a)(1) is a limited one, and the Supreme Court has 'construed [it] narrowly.'" *Salazar*, 671 F.3d at 1261–62 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)). Because the "congressional policy against piecemeal review" remains an important concern, courts should "approach this statute somewhat gingerly lest a floodgate be opened." *Id.* (quoting *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966)). This Circuit recognizes "that the scope of the injunction is to be 'determined by the independent judgment of this Court[.]'"

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[1] Notably, and relevant to the instant motion, an appellee may challenge a portion of the issues raised on appeal, and the court will dismiss those matters over which it does not have jurisdiction. This Court has on several occasions granted a partial motion to dismiss which disposed of portions of a case that were outside the scope of what the Court was permitted to consider on appeal. *See, e.g., Sec. & Exch. Comm'n v. e-Smart Techs., Inc.*, 664 F. App'x 7 (D.C. Cir. 2016) (granting motion to dismiss in part where portion of appeal filed outside of 60 day window following entry of the appealable order per Fed. R. App. 4(a)(1)(B)); *City of Tempe Ariz. v. F.A.A.*, No. 01-1479, 2002 WL 1635314, at *1 (D.C. Cir. July 23, 2002) (granting motion for partial dismissal where certain challenged agency determinations did not constitute final agency action subject to appeal); *Ross v. Washingtonian Mag.*, No. 04-7105, 2004 WL 3019527, at *1 (D.C. Cir. Dec. 30, 2004) (granting motion for partial dismissal for lack of jurisdiction).

United States v. Philip Morris USA Inc., 686 F.3d 839, 844 (D.C. Cir. 2012) (quoting *Int'l Ass'n of Machinists & Aero. Workers v. E. Air Lines, Inc.*, 849 F.2d 1481, 1485 (D.C. Cir. 1988)).

Where the order appealed from "does not grant or deny a request to dissolve an injunction, it may still be appealable if it has the 'practical effect' of doing so." *Id.* (quoting *Salazar*, 671 F.3d at 1262). On this basis, this Court has dismissed for lack of jurisdiction appeals from orders that did not have the "practical effect" of granting, refusing, or modifying an injunction. *Salazar*, 671 F.3d at 1265 (order denying in part motion to terminate consent decree was not immediately appealable); *Phillip Morris,* 686 F.3d at 845 (district court's order defining term "Disaggregated Marketing Data," in injunction did not constitute final order, and did not modify injunction); *see also Ass'n of Co-op. Members, Inc. v. Farmland Indus., Inc.*, 684 F.2d 1134, 1137-38 (5th Cir. 1982) (on appeal from interlocutory order granting injunctive relief, district court's determination that infringement was willful was not reviewable under § 1292(a)(1) where there was no showing that willfulness was condition of injunctive relief in action for infringement of common-law trademark); *Amador v. Andrews*, 655 F.3d 89, 95 (2d Cir. 2011) (Court of Appeals, on appeal from a denial of injunctive relief, lacked pendent appellate jurisdiction to review interlocutory orders dismissing damages claims).

Here, RtW has made clear that it is appealing "U.S. District Judge Randolph D. Moss' ruling denying Plaintiff Ready to Win's Motion for a Preliminary Injunction[,]" citing the district court's Preliminary Order issued May 17, 2023. *See* Pl.-Appellant Ready to Win's Certificate as to Parties, Rulings and Related Cases at 2, Doc. # 2012177 (the "Certificate"). RtW's initial filings do not state that RtW is challenging any other order or decision of the district court in the context of this appeal. *Id.* Nonetheless, RtW's Statement of Issues betrays an intention to challenge not only the district court's Preliminary Order, but also that court's Final Judgment Denial, issued over two months later, denying RtW's request that the district court enter final judgment in the FEC's favor on all counts. Specifically, the Statement of Issues indicates RtW intends to raise the issue of "if RTW is not entitled to an injunction then, based on the district court's legal conclusions, whether the district court should have dismissed RTW's Complaint as a matter of law rather than simply denying the injunction[.]" Statement of Issues at 2. But because the Final Judgment Denial did not itself grant, deny, or modify an injunction, and did not have the practical effect of doing so, that order is not subject to the "narrow[]" exception to the final judgment rule at 28 U.S.C. § 1292(a)(1), and may not be appealed prior to the entry of final judgment by the district court. *Salazar*, 671 F.3d at 1261–62 (quoting *Carson*, 450 U.S. at 84). It is also neither "'inextricably intertwined'" with the appealable order nor "'necessary

to ensure meaningful review of the latter.'" *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 51 (1995)).

The district court's Final Judgment Denial explicitly *declined* to enter final judgment as to *any* of RtW's claims, and plainly falls outside the scope of this Court's jurisdiction to hear appeals of final judgments.[2] 28 U.S.C. § 1291. Pendent appellate jurisdiction is particularly inappropriate here where "the appealing party has, intentionally or not, circumvented the district court's authority to decide whether to endorse an interlocutory appeal under . . . Federal Rule of Civil Procedure 54(b)." *Gilda Marx, Inc.*, 85 F.3d at 679. The district court carefully considered RtW's request and declined to issue judgment on a subset of its claims pursuant to Rule 54(b), and that decision is not appealable at this juncture. Final Judgment Denial at 2.

It is equally clear that the Final Judgment Denial did not grant, deny, or modify an injunction, and therefore does not fall within the scope of this Court's jurisdiction to consider appeals of such orders prior to final judgment. 28 U.S.C. § 1292(a)(1). In that order the district court noted that RtW does not "disavow its

[2] Nor is the Preliminary Order itself a final judgment given that, as the district court itself acknowledged, it is black letter law that "a determination of likelihood of success on the merits is not a final adjudication of the merits of a dispute." Final Judgment Denial at 2.

reliance on the First Amendment" and that "the FEC has sought leave to develop a factual record before the Court resolves any First Amendment claim or argument." Final Judgment Denial at 2. The court explained that because "neither side is prepared to withdraw or to concede any such claim or argument. It follows that the Court cannot yet enter final judgment with respect to any claim contained in RTW's complaint." *Id.* Indeed, prior to this order the Commission served RtW with discovery requests relating to RtW's First Amendment claims, and has been building a factual record that will inform the district court's eventual entry of judgment in this matter.

The district court gave no indication whatsoever that it intended the Final Judgment Denial to modify or alter the Preliminary Order that RtW now appeals. Nor did the lower court's Final Judgment Denial have the "practical effect" of granting, denying or modifying an injunction. Rather, by declining to enter final judgment on any of RtW's claims, and by staying discovery in this matter pending the outcome of this appeal, the Final Judgment Denial merely froze the status quo.[3]

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[3] The operative text of the Final Judgment Denial at 3 reads in full:

> For these reasons, it is hereby ORDERED that RTW's motion for entry of judgment or, in the alternative, entry of partial judgment, and/or stay pending interlocutory appeal, Dkt. 33, is DENIED in part and GRANTED in part. Proceedings before this Court are hereby STAYED pending further order from this Court. The parties shall file a joint status report proposing next steps before this Court within 30 days of a decision from the Court of Appeals on RTW's pending appeal.

By contrast, in appeals of orders with a much more plausible relationship to a preliminary injunction order, this Court has nonetheless declined to bring such orders within the scope of its authority to consider interlocutory appeals of preliminary injunction orders prior to final judgment. *See Philip Morris*, 686 F.3d at 845 (district court's order defining term in injunction did not constitute final order, and did not modify injunction); *Salazar*, 671 F.3d at 1265 (order denying in part motion to terminate consent decree was not immediately appealable).

Furthermore, to the extent RtW intends to challenge the district court's failure to dismiss RtW's complaint in the Preliminary Order itself, that argument is equally meritless, and provides no basis for the Court to exercise jurisdiction over such a question. At the time of the lower court's Preliminary Order no party had moved for the court to dismiss RtW's claims, and the court accordingly did not consider that question. In that order the court explicitly declined to consider whether summary judgment was warranted as to RtW's First Amendment claims. Preliminary Order at 13. The court subsequently explained its decision not to enter final judgment as to any of RtW's claims by noting that "each of RTW's claims . . . implicate the First Amendment to some degree[,]" and that it resolved RtW's preliminary injunction motion with the understanding that "the FEC has sought leave to develop a factual record before the Court resolves any First Amendment claim or argument." Final Judgment Denial at 2. "[B]ecause RTW has not

previously, and does not now, disavow its reliance on the First Amendment," *id.*, final judgment as to any of RtW's claims would have been inappropriate at the time the court issued its Preliminary Order, and remains inappropriate until the parties have had the opportunity to build a factual record. *See Gilda Marx, Inc.*, 85 F.3d at 679 (noting that this Court "must be careful not to accept pendent appeals prematurely, without the benefit of an adequate record").

Because the question of whether the district court should have dismissed each of RtW's claims, or entered final judgment in the FEC's favor, is clearly outside the scope of this Court's jurisdiction to consider interlocutory appeals of the district court's decision to grant, deny, or modify a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1), this portion of the appeal should be dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the Commission's motion to dismiss should be granted, and the indicated portions of this appeal dismissed for lack of jurisdiction.

Respectfully submitted,

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August 28, 2023

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(B) because it contains 3,668 words, excluding the parts of the motion exempted by Fed. R. App. P. 27 (d)(2) and 32(f).

The motion also complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it was prepared using Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2023, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF System.

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CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the Federal Election Commission hereby certifies that Ready to Win, was the plaintiff in the district court and has been designated as the appellant in this Court. The Federal Election Commission was the defendant in the district court and has been designated as the appellee in this Court. There were no *amici curiae* in the district court.