

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 REPLY IN SUPPORT OF
PARTIAL MOTION TO DISMISS**

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September 14, 2023

INTRODUCTION

Defendant-appellee the Federal Election Commission (“FEC” or “Commission”) hereby replies in support of its Partial Motion to Dismiss this appeal for lack of jurisdiction pursuant to Federal Rule of Appellate Procedure 27(a) and Circuit Rule 27(g) (Document #2014480) (the “Motion” or “Mot.”). Plaintiff-appellant Ready to Win’s (“RtW”) Opposition to FEC’s Partial Motion to Dismiss (Document #2015872) (the “Response” or “Resp.”) helpfully disavows any intent to directly appeal the district court’s denial of final judgment at this stage, and as a result, fails to present any reason the Commission’s Motion should not be granted. The Commission filed its Motion because RtW’s statement of issues expressed a clear intent to raise precisely this challenge. Though RtW has now stated in its brief that that its appeal will be limited to the district court’s preliminary injunction order, this Court should grant the instant Motion to clarify and streamline the briefing process.

The bulk of RtW’s Response, however, makes clear that it still seeks to circumvent the district court’s rejection of its motion for final judgment by having *this* Court dismiss its complaint in its entirety, in the likely event the Court affirms the district court’s preliminary injunction order. RtW sought a similar outcome in the proceedings below, which it described as necessary to facilitate its appeal and avoid what it regarded as needless discovery. The district court, at the

Commission's request, declined to enter final judgment in this matter, and instead permitted discovery that has since been suspended pending this appeal. RtW now seeks an end run around that decision, arguing, paradoxically, that the preliminary injunction order in effect requires the dismissal of its claims. This Court should not reward such tactics. RtW is seeking a final ruling that could be the subject of further review and would permanently alter longstanding rules governing federal campaign finance regulation. It should not be able to do so on the basis of the expedited, largely one-sided presentation of evidence from the preliminary-injunction process.

The Court should grant the Commission's Motion to clarify the scope of the appeal in a manner to which RtW apparently does not object and facilitate fair and expeditious briefing that will not unduly delay further proceedings at the district court.

ARGUMENT

I. THE FEC'S PARTIAL MOTION TO DISMISS PROPERLY CHALLENGES AN ISSUE RTW PLANS TO RAISE IN THIS APPEAL

RtW's Response clarifies that it is not asking this Court to assert pendent jurisdiction over the district court's decision not to enter final judgment in this matter. Resp. at 11. Rather, "[t]he only order RTW intends to challenge in its appeal is the district court's denial of its motion for preliminary injunction[.]" *Id.*

Nonetheless, “RTW further intends to argue . . . that in the event this Court agrees with the district court’s legal determinations, the proper disposition of this appeal would be to remand with instructions to dismiss the complaint.” *Id.* This argument is meritless, is at odds with the language of the statement of issues itself, and evidences an intent to circumvent rulings by the district court to deny final judgment and to authorize the normal process of discovery.

The Commission filed its Motion because RtW’s statement of issues expressed a clear intent, consistent with its efforts in the lower court, to challenge the *district court’s* failure to enter final judgment in this appeal. *See* Pl.-Appellant’s Statement of Issues to be Raised at 2, Doc. # 2012178 (the “Statement of Issues”). The Statement of Issues queried whether, “based on *the district court’s* legal conclusions, . . . *the district court* should have dismissed RTW’s Complaint as a matter of law rather than simply denying the injunction[.]” *Id.* (emphasis added). The Commission’s Motion asks for nothing more than for this Court to declare this particular question outside the scope of its jurisdiction to consider RtW’s preliminary injunction appeal. Given RtW’s apparent concession that it will not raise this question, Resp. at 11, it should have no objection to the Commission’s Motion and the Motion should accordingly be granted.

Even assuming RtW has not conceded to narrowing the scope of its appeal, however, this Court should so narrow it. As the FEC has explained, Mot. at 9-11,

the district court's decision not to enter final judgment in this matter 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 ex rel. Salazar v. D.C.*, 671 F.3d 1258, 1261–62 (D.C. Cir. 2012) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)). Nor was this decision either "inextricably intertwined" with the appealable order or "necessary to ensure meaningful review[.]" *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)). Here RtW does not allege, much less demonstrate, that the decision not to dismiss its complaint is a necessary component of this interlocutory appeal. Indeed, at the time of the preliminary injunction order appealed from, no party had filed a motion seeking final relief. *See* Pl.-Appellant's Submission of Underlying Decision From Which Appeal Arises, Doc. #2012179, filed August 11, 2023 ("Preliminary Order"). And treating final judgment as inextricably linked with rulings on preliminary injunctions would make what is supposed to be a narrow exception under 28 U.S.C. § 1292(a)(1) swallow the rule. In addition, the district court's denial of final judgment is a particularly unsuitable candidate because "the district court's expert judgment on trial management is a relevant consideration weighing against an exceptional exercise of pendent jurisdiction." *Harris v. Med.*

Transp. Mgmt., Inc., 77 F.4th 746, 767 (D.C. Cir. 2023) (citing *Swint*, 514 U.S. at 47).

RtW's Response is devoted in large part, Resp. at 11-15, to making the uncontested assertion that this Court may, in "an interlocutory appeal from . . . a preliminary injunction . . . rule the plaintiffs' claims lack legal merit and should be dismiss [sic]." Resp. at 14. This point is inapposite and immaterial to the instant Motion, however, which was prompted by RtW's express intent to challenge the *district court's* decision not to enter final judgment. Statement of Issues at 2. The Court should take this opportunity to clarify that the parties' briefs need not address that question.¹

RtW has been clear that, in addition to seeking review of the district court's Preliminary Order, it also seeks the entry of final judgment against it, which would circumvent the normal process of discovery, overturn an unappealable interlocutory order, and enable further review of a final judgment on an insufficient record. The district court explicitly declined to enter final judgment and instead

¹ Because RtW's uncontroversial observation does not bear on the substance of the instant Motion, the Court need not consider its planned fallback argument further at this juncture. It is worth noting, however, that dismissals of complaints from interlocutory proceedings are rare, appropriate only where the appeal "reveals that the case is entirely without merit," and there is an "insufferable objection" or "insuperable objection" to the claims. *Wagner v. Taylor*, 836 F.2d 578, 586 n.49 (D.C. Cir. 1987). To make the alternative argument it plans, RtW will be required to argue first that its claims are meritorious and second that they are "entirely without merit," Resp. at 12 (citing *Wagner*, 836 F.2d at 586 n.49).

permitted discovery and further record development. RtW cites no case, and the Commission is aware of none, in which this Court entered final judgment in the defendant's favor over the defendant's objection in contravention of a denial of motions for final judgment or partial judgment pursuant to Federal Rule of Civil Procedure 54(b), as RtW seeks here. While such maneuvers would be inappropriate in any circumstance, they are particularly so here where RtW seeks an expedited ruling that would revise well-settled federal campaign finance requirements, on the basis of the expedited and largely one-sided presentation of evidence within one party's possession during the preliminary injunction process. This Court should reject RtW's gamesmanship to sidestep discovery and secure final judgment, and instead limit the scope of RtW's appeal to the determination regarding its motion for preliminary injunction.

II. THE FEC'S PARTIAL MOTION TO DISMISS IS TIMELY AND IN THE INTEREST OF JUDICIAL ECONOMY

At the outset of its Response, RtW noted that “[t]his Court has jurisdiction over RTW’s appeal pursuant to 28 U.S.C. § 1292(a)(1),” which includes “appeals from . . . interlocutory orders of the district courts of the United States . . . or of the judges thereof . . . refusing . . . injunctions[.]” Resp. at 6-7. This point is uncontested. As explained in the FEC’s Motion, the FEC does not dispute this Court’s jurisdiction to hear RtW’s appeal of the district court’s decision not to grant RtW’s request for a preliminary injunction. Mot. at 1; *see* Preliminary Order.

RtW goes further, however, and charges that “The FEC has needlessly wasted this Court’s time by prematurely filing a motion to challenge wholly fabricated jurisdictional improprieties that have not occurred and, in fact, will never occur.” Resp. at 8. The crux of its argument is that any motion to dismiss at this stage in proceedings may be based only upon “organic documents that were jurisdictionally required to both give this court jurisdiction over an appeal, as well as to define the contours and scope of that appeal.” *Id.* at 9. RtW further avers that three cases cited in the FEC’s Motion fit this description. *Id.* at 9-10. However, none of these referenced authorities state or even imply such a limitation on jurisdictional challenges at this stage of proceedings. RtW’s statement of issues to be raised was required by the Court’s July 14, 2023 Order (Doc. #2007857), and compliance with that order is not a mere “matter of professionalism and comity,” as RtW contends. Resp. at 8. RtW cites no authority, and the FEC is aware of none, that limits consideration of RtW’s “Statement of Issues” to questions related to the contents of the appendix or otherwise prohibits or discourages this Court from considering it as evidence of the scope of RtW’s planned appeal.

In any event, ambiguities about RtW’s plans stemming from statements in its Response fail to counteract the obvious efficiency benefits from a partial dismissal of issues outside of this Court’s jurisdiction. RtW’s Response itself provides evidences that it intends to seek dismissal of its claims, in the likely event

that this Court affirms the district court's preliminary injunction order. RtW criticizes the FEC's challenge to "an issue that might be raised in the future," Resp. at 10, without repudiating plans to raise this issue. RtW proceeds to provide reasons why this Court should dismiss RtW's complaint in its entirety, rather than simply remanding the matter for further proceedings, including the discovery that was authorized by the district court and had commenced.² Resp. at 14-15 (describing a "fishing expedition" imposing "substantial costs and burdens of intrusive, unnecessary discovery"). Such arguments mirror those raised by RtW in its Motion for Entry of Judgment in the proceedings below. *See* Plaintiff's Motion for Entry of Judgment at 1-2, Civ. No. 22-3282 (Docket No. 33) (D.D.C. June 23, 2023) (charging that the FEC is refusing to have judgment entered in its favor "for the sole purpose of punitively subjecting Plaintiff to months of burdensome and (now) completely unnecessary discovery"). Thus, while RtW has effectively conceded that it may not challenge the district court's denial of final judgment in this appeal, it is nonetheless attempting to relitigate this issue.

Under these circumstances there is no reason for this Court to blind itself to the intended scope of RtW's appeal. By narrowing the issues to only those the

² As the FEC has noted, though portions of RtW's claims were appropriate to decide on an administrative record, the district court in this matter declined to enter final judgment as to any of RtW's claims to permit discovery and further record-building with respect to at least portions of all of RtW's claims. Mot. at 5-6.

Court will consider pursuant to its interlocutory jurisdiction, 28 U.S.C. § 1292(a)(1), the Court will streamline further briefing to address only the propriety of the district court's preliminary injunction without distractions that seek to improperly relitigate issues in the proceedings below.

CONCLUSION

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

Respectfully submitted,

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September 14, 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 2,245 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.

/s/ Kevin Deeley

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 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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