Oral Argument Not Scheduled

No. 23-5161

U.S. Court of Appeals for the District of Columbia

READY TO WIN,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the U.S. District Court for the District of Columbia

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PLAINTIFF-APPELLANT READY TO WIN'S OPPOSITION TO FEDERAL ELECTION COMMISSION'S PARTIAL MOTION TO DISMISS

September 7, 2023

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Defendant-Appellee Federal Election Commission's ("FEC") Motion to Dismiss is premature, based on a fundamental misconception, and meritless. This Court should deny the FEC's motion because this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

BACKGROUND ON THE CASE

The FEC opens its brief by offering an incomplete, misleading characterization of this case. The FEC claims Plaintiff-Appellant Ready to Win ("RTW")[1] filed this case so it could "provide a potential (and now declared) presidential candidate with . . . a 'contact list' of supporters" with a value exceeding federal contribution limits. *Federal Election Commission's Partial Motion to Dismiss*, at 1 (Aug. 28, 2023) [hereinafter, "FEC Mot."].

To the contrary, as the Complaint expressly explains, RTW has spent a substantial amount of money inviting people to join a political petition to Governor Ron DeSantis to express their support for him and encourage him to become, and remain, a candidate for the Republican nomination for President (and, ultimately, a candidate for President in the general election). *See* Complaint, Dist. Ct. D.E. #1, ¶ 9

[1] When this case commenced, Plaintiff-Appellant's name was Ready for Ron. *See* Compl., D.E. #1, ¶ 3. Once Florida Governor Ron DeSantis declared his candidacy for President, Plaintiff-Appellant was required to change its name under 52 U.S.C. § 30102(e)(4); *accord* 11 C.F.R. § 102.14(a). Accordingly, it adopted the new name Ready to Win, and the district court allowed it to continue litigating this case under that name. *See* District Court Docket Entry ("Dist. Ct. D.E."), unnumbered (June 25, 2023) (order).

(Oct. 27, 2022) [hereinafter, "Compl."]. RTW's solicitations through various media specified that, by electronically signing the petition, the petition's signatories were asking their self-provided name and contact information be added to the petition and provided to Governor DeSantis on their behalf. *Id.* ¶¶ 11-15. RTW wished to retain these complete virtual signature blocks as an integral part of its complete signed petition for a variety of reasons, among them:

- political petitions, including modern candidacy petitions, traditionally include signatories' names and contact information;
- including contact information from each signatory who asked RTW to include it in the petition to convey to Governor DeSantis on their behalf allows such signatories to more meaningfully identify themselves, rather than being effectively anonymous (i.e., "John Smith"), and distinguish themselves from others with the same name;
- providing contact information makes a signature appear more authentic than a lone name, and allows the petition's recipient to confirm the signatures' authenticity; and, perhaps most importantly,
- contact information facilitates political expression and association by allowing the petition's recipient, if he chooses, to respond to the petition's signatories, rather than requiring communication to be exclusively a one-way street. *Id.* ¶ 20.

RTW sought an advisory opinion from the FEC to confirm providing the complete, signed petition, including signatories' names and contact information, to Governor DeSantis would not violate the Federal Election Campaign Act ("FECA"). *Id*. ¶¶ 28-29. The FEC concluded the FECA prohibited RTW from providing the complete signed petition to Governor DeSantis once he began testing the waters to become a presidential candidate, or actually became a candidate. *Id*. ¶¶ 41-43.[2] The FEC explained the value of the signatory contact information contained in the signature blocks of the complete signed petition exceeded the FECA's contribution limits. *Id*. ¶ 42.

PROCEDURAL HISTORY

RTW filed this lawsuit in the U.S. District Court for the District of Columbia, making three main arguments. ***First***, its complete signed political petition should not be deemed a "contribution" under FECA. *Id*. ¶¶ 56-58, 60-71. ***Second***, the signatory contact information in the petition should at most be deemed a "conduit contribution" under 52 U.S.C. § 30116(a)(8). *Id*. ¶¶ 78-85. ***Third***, RTW and the petition's signatories have a fundamental First Amendment right to provide its

[2] The Commission further concluded the FECA prohibited RTW from funding its independent expenditures to solicit signatures for its petition from its independent-expenditure-only "*Carey*" account, *see Carey v. FEC*, 864 F. Supp. 2d 57 (D.D.C. 2002). Compl. ¶ 44. It deadlocked on the antecedent issue of whether RTW could provide the complete signed petition to Governor DeSantis before he began testing the waters to become a candidate. *Id*. ¶ 45.

complete signed political petition to Governor DeSantis without having to redact the signatories' self-provided contact information, render its signatories effectively anonymous, and preclude Governor DeSantis from responding to them if he wishes. *Id*. ¶¶ 46-55, 59. RTW filed a motion for a preliminary injunction prohibiting the FEC from ever initiating enforcement proceedings against it for either spending funds from its *Carey* account to solicit petition signatures or providing its signed political petition or any subsequent updates to Governor DeSantis, during the pendency of this lawsuit. *Plaintiff Ready for Ron's Motion for Preliminary Injunction*, D.E. #8 (Dec. 21, 2022).

The district court denied that motion on May 17, 2023. *See Memorandum Opinion and Order*, D.E. #30 (May 17, 2023) [hereinafter, "Op."]. Though the court was ruling only on RTW's request for interim relief, its opinion contained a range of legal determinations that were sufficient to completely dispose of RTW's constitutional and statutory claims as a matter of law. ***First***, the court held RTW's petition should be deemed a contact list, *id*. at 2, 15, and contact lists qualify as in-kind contributions under the FECA, *id*. at 54. This ruling empowered the FEC to limit pure political expression between groups of voters and declared or potential candidates, chilling and substantially burdening one of the oldest and most important forms of political association in American history—political petitions—*see Brown v. Glines*, 444 U.S. 348, 363 (1980) (Brennan, J., dissenting), through FECA's

cumbersome restrictions.. ***Second***, the district court held "the FEC reasonably decided that RFR is not acting as a mere conduit for the contributions of others and . . . its decision is not inconsistent with any prior advisory opinions . . . ." *Id.* at 38. ***Finally***, the court rejected RTW's argument the FECA's contribution limits were subject to strict scrutiny as applied to its complete signed petition, *id.* at 49. It went on to state providing the complete signed petition to Governor DeSantis raised a risk of quid pro quo corruption, *id.* at 55-56, and barring RTW from doing so "places no serious burden on anyone's ability to express support for Governor DeSantis and to join together with others in so doing," *id.* at 57-58. The court concluded RTW's claim that "the application of FECA's contribution limits to its proposed course of action 'imperils [it] First Amendment rights' is 'flawed.'" *Id.* at 59-60 (citations omitted). RTW filed a timely notice of appeal. *See Notice of Appeal* (July 14, 2023). A true and complete copy of RTW's Notice of Appeal is attached as Exhibit 1 to this filing.

THIS COURT HAS SUBJECT-MATTER JURISDICTION OVER RTW'S APPEAL

This Court has subject-matter jurisdiction over this appeal. RTW's Notice of Appeal in this case, filed on July 14th, 2023, declared RTW was appealing from the order the district court "entered on May 17, 2023, denying Plaintiff's Motion for Preliminary Injunction [Docket Entry #30]." Exh. 1, at 1. This Court has jurisdiction over RTW's appeal pursuant to 28 U.S.C. § 1292(a)(1), which grants courts of

appeals "jurisdiction of appeals from . . . interlocutory orders of the district courts of the United States . . . or of the judges thereof . . . refusing . . . injunctions . . . ."[3] RTW timely filed its notice of appeal within sixty days of the district court's ruling; that extended deadline applied since the FEC, "a United States agency," is a party to this case. Fed. R. App. P. 4(a)(1)(B)(ii).

RTW's notice of appeal contained all of the information required by Fed. R. App. P. 3(c)(1). First, it identified the party taking the appeal: RTW itself. *Id*. R. 3(c)(1)(A). Second, the notice designated the "appealable order . . . from which the appeal is being taken": the district court's order of May 17, 2023, refusing a preliminary injunction. *Id*. R. 3(c)(1)(B). Finally, RTW's notice named "the court to which the appeal is taken": the U.S. Court of Appeals for the D.C. Circuit. *Id*. R. 3(c)(1)(C). Accordingly, this Court has subject-matter jurisdiction over this appeal.

THE FEC'S MOTION TO DISMISS IS PREMATURE

The FEC nevertheless claims RTW "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." Mot. at 2. It later

[3] This Court likewise may exercise jurisdiction over the district court's rulings on issues for which it treated RTW's motion as a request for a permanent injunction, *see* Op. at 13, since 28 U.S.C. § 1291(a)(1) applies to appeals from all interlocutory rulings concerning injunctions.

elaborates, "[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." *Id*. at 10. As explained below, these assertions are patently false, *see infra* p. 11. 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.

Pursuant to Fed. R. App. P. 30(b)(1), RTW served the FEC with a "statement of the issues [it] intends to present for review," for the sole purpose of allowing the FEC to designate additional parts of the district court record it wishes RTW to include in the appendix. A true and correct copy of this document is attached to this Opposition Memorandum as Exhibit 2. RTW's statement "provide[d] notice" to the FEC that RTW "presently intends to raise the following issue on appeal: whether the district court's ruling in response to [RTW's] motion for a preliminary injunction was erroneous." *See* Exh. 2, at 1.

As a matter of professionalism and comity to aid the FEC in identifying district court filings it wished to include in the appendix, RTW then went a step further, identifying a range of more specific "matters this issue may implicate." *Id*. One of the eight subsidiary matters RTW identified was: "[I]f 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*. As RTW's filing makes clear, this was not a separate issue or challenge to an independent order, but one of the many ways in which RTW is likely to argue the district court's May 17, 2023, ruling denying RTW's motion for a preliminary injunction was erroneous.

In response to this professional courtesy, the FEC filed the underlying motion. The FEC did not bother reaching out to undersigned counsel before doing so to confirm its understanding of the situation; attempt to resolve this issue in an amicable matter; or otherwise avoid vexatiously multiplying these proceedings. Rather, the FEC chose to impose further costs and burdens on RTW by compelling it to respond to an unnecessary and meritless jurisdictional motion.

The FEC has failed to cite a single case in which this Court dismissed an appeal—in whole or part—based on an appellant's identification, in the Statement of Issues the appellant served to facilitate preparation of the appendix, of a potential issue that may arise in the appeal. All of the cases the FEC cites to support this unusual procedural maneuver are inapposite. Each involved a challenge to the 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. In *SEC v. e-Smart Techs., Inc.*, 664 F. App'x 7, 7 (D.C. Cir. 2016) (per curiam) (mem. op.), *cited in* FEC Mot. at 8 n.1, for example, this Court dismissed an appeal from

the district court's final judgment because the notice of appeal had been filed more than sixty days afterward; this Court nevertheless adjudicated the appellant's challenge to the district court's subsequent denial of sanctions, since the notice of appeal was timely as to that later order. *See also Ross v. Washingtonian Mag.*, No. 04-7105, 2004 WL 3019527, at *1 (D.C. Cir. Dec. 30, 2004) (per curiam) (mem. op.) (likewise dismissing untimely appeal of one challenged order while summarily adjudicating the appeal of the other challenged order), *cited in* FEC Mot. at 8 n.1. Likewise, in *City of Tempe, Arizona v. Fed'l Aviation Admin.*, No. 01-1479, 2002 WL 1635314, at *1 (D.C. Cir. 2002) (mem. op.) (per curiam), *cited in* FEC Mot. at 8 n.1, this Court dismissed challenges identified in two paragraphs of the petition for review, which was jurisdictionally required to initiate the appellant's challenge to the Federal Aviation Administration's actions, *see* Fed. R. App. P. 15(a)(1).

Here, in contrast, the FEC's motion is not premised on some defect in, or other substantive concern about, the jurisdictionally required filing that gave rise to this Court's appellate jurisdiction over this case (that is, RTW's Notice of Appeal). As explained above, there is no question RTW has satisfied this Court's jurisdictional requirements. The FEC's cited authorities provide no support for a preemptive motion to dismiss part of an appeal concerning an issue that might be raised in the future, without even seeing the manner in which the issue arises.

THE FEC'S MOTION IS PREMISED ON A FUNDAMENTAL MISUNDERSTANDING OF RTW'S POTENTIAL ARGUMENT, WHICH THIS COURT HAS JURISDICTION TO ADJUDICATE

As explained above, the FEC's entire motion rests on the false premise RTW has "betray[ed]" a secret intention to appeal a district court order other than its denial of RTW's motion for preliminary injunction. FEC Mot. at 10. Because the FEC jumped the gun by filing this motion before RTW has actually presented any arguments and without bothering to raise its concerns with undersigned counsel, the FEC's motion completely misapprehends the situation. The only order RTW intends to challenge in its appeal is the district court's denial of its motion for preliminary injunction, as expressly set forth in RTW's Notice of Appeal. *See* Ex. 2, at 1. The FEC's lengthy discussion of the district court's subsequent order and pendent appellate jurisdiction, *see* Mot. at 10-13, is therefore wholly irrelevant and there is no need for RTW to engage with it.

RTW respectfully believes the district court's legal determinations concerning its constitutional and statutory claims were erroneous and hopes to persuade this Court to overturn them. RTW further intends to argue, however, 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. As explained above, the district court's legal conclusions concerning RTW's motion for

a preliminary injunction involved questions of pure constitutional and statutory interpretation and are legally sufficient to dispose of RTW's claims. *See supra* note 5-6. Should this Court adopt those legal rulings, then (absent subsequent review by the U.S. Supreme Court) there would be no need for further district court proceedings.

The FEC erroneously contends RTW is jurisdictionally precluded from making this argument:

- "[T]o the extent [RTW] intends to challenge the district court's failure to dismiss [RTW's] complaint in the Preliminary Order itself, that argument . . . provides no basis for the Court to exercise jurisdiction over such a question." *Id*. at 13.

- "[T]he 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 . . . ." *Id*. at 14.

The FEC's complete inability to provide even a single citation to support any of these flatly incorrect legal assertions is a red flag. Rather, the FEC chose to ignore this Court's binding precedents directly addressing this issue, *cf*. D.C. R. Prof'l Cond. 3.3(a)(3)—including precedents RTW had brought to its attention in district court proceedings.

In *Wagner v. Taylor*, 836 F.2d 578, 586 n.49 (D.C. Cir. 1987), this Court held, a case "may be dismissed in its entirety" when "inquiry pertaining to a ruling respecting [a] preliminary injunction reveals that the case is entirely without merit,"

in order to prevent "a waste of judicial resources." Adjudicating the merits is "most appropriate" when the district court's ruling concerning the injunction "rests on a question of law and it is plain that the plaintiff cannot prevail." *Munaf v. Green*, 553 U.S. 674, 691 (2008); *see also City and Cnty. of Denver v. N.Y. Tr. Co.*, 229 U.S. 123, 136 (1913) (holding a court reviewing an interlocutory appeal concerning a preliminary injunction may go beyond the injunction itself to determine "whether there is any insufferable objection, in point of jurisdiction ***or merits***, to the maintenance of [the] bill and, if so, to direct a final decree dismissing it" (emphasis added)).

For example, in *Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agriculture*, 573 F.3d 815, 821 (D.C. Cir. 2009) (citing 28 U.S.C. § 1292(a)(1)), the district court—as in the instant case—denied the plaintiffs' motion for a preliminary injunction. The plaintiff took an interlocutory appeal to this Court. This Court held the plaintiff had "no likelihood of success on the merits" and affirmed the denial of a preliminary injunction. *Id*. at 833. It went on to declare, as a matter of law, "there is an 'insuperable objection'" to several of the plaintiffs' claims. *Id*. It therefore concluded "those claims in [the] complaint must be dismissed for failure to state a claim" and ordered the district court to dismiss them. *Id*.; *see also Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 110 (4th Cir. 1993); *Morris v. District of Columbia*,

38 F. Supp. 3d 57, 62-63 (D.D.C. 2014). Numerous other authorities, both from this Court and other jurisdictions, further bolster this point.

RTW is not litigating the merits of this issue here, and will likely set forth its argument at greater length in its forthcoming Appellant's Brief. For present purposes, it is enough to point out a range of U.S. Supreme Court and D.C. Circuit precedents squarely hold an appellate court adjudicating an interlocutory appeal from a district court's ruling concerning a preliminary injunction has jurisdiction to rule the plaintiffs' claims lack legal merit and should be dismiss. RTW hopes and intends to prevail on the merits of this appeal and obtain a mandate from this Court reversing the district court's judgment and ordering it to enter a preliminary injunction protecting RTW's constitutional and statutory rights to provide its complete signed petition to Governor DeSantis. This Court also has jurisdiction, however, to consider an alternative argument: when assessing RTW's likelihood of success on the merits, should this Court conclude RTW's claims fail as a matter of law, the appropriate remedy is to order dismissal.

Bizarrely, throughout the district court proceedings, the FEC has been fighting vociferously ***not*** to win this case, and to ***prevent the district court from entering final judgment in its favor***. *See, e.g.*, *Federal Election Commission's Opposition to Plaintiff's Motion for Entry of Judgment*, D.E. #36 (July 19, 2023). The FEC's only dubious explanation is that it wishes to "develop a factual record" concerning RTW's

First Amendment claims. Mot. at 2. Federal Rule of Civil Procedure 1 requires the parties to apply the rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 11(b)(1) likewise prohibits litigants from "caus[ing] unnecessary delay, or needlessly increas[ing] the cost of litigation." If this Court's legal rulings in the course of adjudicating this appeal establish RTW has failed to state valid First Amendment and statutory claims, or those claims otherwise fail as a matter of law, the "factual record" the FEC emphatically demands would be completely superfluous. The FEC cannot insist on punishing RTW for bringing this case (and perhaps attempting to deter future litigants from pursuing other constitutional challenges) by unnecessarily extending proceedings for nearly an additional year to go on a fishing expedition and imposing the substantial costs and burdens of intrusive, unnecessary discovery on RTW—especially when RTW's activities are already a matter of public record through its detailed FEC filings, online advertisements, and other public solicitations for petition signatures.

CONCLUSION

The FEC should withdraw this motion. The motion is premature and premised on a single sentence in a preliminary filing intended to assist with preparation of the joint appendix. The motion is based on a fundamental misunderstanding of RTW's intended arguments and strategy. And, even under the FEC's view of events, RTW's intended arguments would be fully within this Court's interlocutory jurisdiction

under 28 U.S.C. § 1292(a)(1). Should the FEC insist on vexatiously multiplying these proceedings by standing on this ill-conceived motion, this Court should deny it.

September 7, 2023

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(b) because it contains 3,477 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(d)(2)(A) and 32(f).

This 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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