Oral Argument Not Yet Scheduled

No. 08-5223

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPEECHNOW.ORG, et al.,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

FEDERAL ELECTION COMMISSION'S RESPONSE TO APPELLANTS' MOTION TO EXPEDITE CONSIDERATION OF APPEAL FROM DENIAL OF PRELIMINARY INJUNCTION

On July 15, 2009, appellants (collectively "SpeechNow") asked this Court to expedite the briefing and oral argument in this appeal.[1] SpeechNow originally filed the appeal of the district court's July 1, 2008, denial of a preliminary injunction on July 23, 2008, and after this Court set a briefing schedule, moved to hold the appeal in abeyance. The Commission does not object to the Court's

[1] This Court's July 1, 2009, scheduling order set December 1, 2009, for appellants' opening brief; December 31 for the Commission's brief; January 15, 2010, for amicus curiae's brief; and January 29, 2010, for appellants' reply brief.

advancing the schedule in SpeechNow's renewed appeal. But the Commission notes some errors in the motion to expedite.

First, neither of the two statutes on which SpeechNow relies (Mot. at 2, 4) requires this Court to expedite its consideration of the underlying case or the district court's denial of a preliminary injunction. Contrary to SpeechNow's suggestion (Mot. at 2) , 2 U.S.C. § 437h—the jurisdictional basis for this challenge to the constitutionality of several provisions of the Federal Election Campaign Act ("Act")—does not require this Court to expedite its review of the constitutional issues. Indeed, Congress repealed the Act's expedition requirement (2 U.S.C. § 437h(c)) a quarter of a century ago. An Act to Amend Title 28, United States Code, Pub. L. No. 98-620, Title IV, § 402(1)(B), 98 Stat. 3335, 3357 (1984). The two Supreme Court cases that SpeechNow cites (Mot. at 2) predate the repeal.

The other statute on which SpeechNow relies, 28 U.S.C. § 1657 ("Priority of civil actions"), does not unconditionally mandate expedited review of the denial of a preliminary injunction. SpeechNow quotes (Mot. at 4) only part of the provision. The omitted portion states that a court "shall expedite" consideration of an action for preliminary injunctive relief "if good cause therefore is shown. . . . '[G]ood cause' is shown if a right under the Constitution . . . would be maintained in a factual context that indicates that request for expedited consideration has merit."

Although the Commission does not contest a change in the briefing schedule, it does not concede that the "factual context" of this case—a test case challenging decades-old law—indicates a meritorious request for expedition. Indeed, SpeechNow's delay in pursuing a preliminary injunction may "indicate [the] absence of irreparable harm required to support a preliminary injunction." *Rodriguez v. De Buono*, 175 F.3d 227, 235 n.9 (2d Cir. 1999) (citations omitted); *see also* 11A Wright, Miller, & Kane, *Federal Practice and Procedure* § 2948.1, 156 n.12 (2007). Moreover, SpeechNow has never attempted to raise the funds it seeks in accordance with the Act's $5,000 contribution limit, so its claims of irreparable harm remain unproven. If as few as twenty other individuals would each contribute the maximum $5,000 to SpeechNow.org, then their $100,000 plus $20,000 total from the four individuals mentioned in Keating's accompanying affidavit (¶ 4 at 3) would give the organization $120,000 for advertising, the approximate amount that SpeechNow had planned to spend in the last election cycle.

Second, the Supreme Court has indicated that Congress may constitutionally limit the aggregate annual dollar amount a person may contribute to a political committee that makes only independent expenditures. In *FEC v. Mass. Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238 (1986), for example, the Court addressed the electoral activities of a nonprofit, pro-life organization and noted that "[s]hould

MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. And "[a]s such, [MCFL] would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." *Id.*

In *California Medical Ass'n v. FEC ("Cal Med")*, 453 U.S. 182 (1981), the Supreme Court upheld the Act's $5,000 aggregate annual limit on a person's contributions to a multicandidate political committee. The Court "conclude[d] that [the limit] applies equally to all forms of contributions specified in [the Act.]" *Id.* at 198 n.19. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court noted that the Act's source and dollar limits on contributions apply not only to contributions to candidates but also to "funds available to engage in express advocacy and numerous other noncoordinated expenditures." *Id.* at 152 n.48 (discussing *Cal Med*).

Contrary to SpeechNow's assertion (Mot. at 7), therefore, Justice Blackmun in *Cal Med* is not the "only Supreme Court justice to express an opinion on the issue." Justice Blackmun presented his views in dicta in a solo concurring opinion, and those views clash with the Court's opinions in *MCFL* and *McConnell*.

Respectfully submitted,

Thomasenia P. Duncan
General Counsel

/s/ David Kolker
Associate General Counsel

Kevin Deeley
Assistant General Counsel

/s/ Vivien Clair
Attorney

FOR DEFENDANT-APPELLEE
FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

July 21, 2009

CERTIFICATE OF SERVICE

I certify that on this 21st day of July 2009, I caused to be filed electronically using this Court's ECF system and sent via the ECF electronic notification system a true copy of the Federal Election Commission's RESPONSE TO APPELLANTS' MOTION TO EXPEDITE CONSIDERATION OF APPEAL FROM DENIAL OF PRELIMINARY INJUNCTION on the following counse for plaintiffs-appellants:

Robert Gall
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203.

I further certify that on this date I sent by e-mail an electronic copy of the Commission's Response to wmellor@ij.org; ssimpson@ij.org; bgall@ij.org; psherman@ij.org; dsimon@sonosky.com; and GHebert@campaignlegalcenter.org.

July 21, 2009

/s/ Vivien Clair
Attorney

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650