UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 08-248 (JR) RESPONSE

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN PARTIAL OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT

Plaintiffs have moved this Court for both declaratory and injunctive relief. Although plaintiffs merit declaratory relief, they have not made the showing required to warrant the stronger medicine of injunctive relief. Because the Federal Election Commission ("FEC" or "Commission") is precluded from relitigating the constitutional issues decided by the Court of Appeals against plaintiffs in this or any other forum, they have not demonstrated a cognizable danger of future injury sufficient to obtain prohibitory injunctive relief. Moreover, because the Commission is presumed to obey a declaratory judgment, any further relief would be unnecessary. Since the Court is to exercise its remedial powers only to the extent necessary to protect parties from irreparable harm, this Court should only grant the plaintiffs' motion insofar as it asks for declaratory relief consistent with the judgment of the Court of Appeals.

BACKGROUND

Under 2 U.S.C. § 437h, a unique provision of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455 ("Act"), eligible voters and the national committees of political parties can bring suit to challenge the constitutionality of any provision of the Act and have certified questions answered in the first instance by a court of appeals sitting en banc. On February 14, 2008, SpeechNow.org and several individual donors ("plaintiffs") brought suit under section 437h and moved for a preliminary injunction to prevent the Commission from enforcing the individual contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). On July 1, 2008, after a hearing, this Court denied the preliminary injunction motion.

On July 23, 2008, plaintiffs filed a notice of appeal of the Court's denial of a preliminary injunction. On November 7, 2008, however, after the Court of Appeals had issued scheduling orders in the injunction appeal and the parties had filed preliminary documents, SpeechNow moved to hold the appeal in abeyance. More than seven months later, on June 23, 2009, SpeechNow revived its preliminary injunction appeal and, on July 15, 2009, successfully moved to expedite it.

Before plaintiffs originally noticed their appeal, this Court, on July 11, 2008, granted plaintiffs' motion under 2 U.S.C. § 437h to certify constitutional questions for the Court of Appeals to consider en banc. The parties conducted discovery and submitted proposed findings of fact and briefs on evidentiary and other issues. On September 28, 2009, the Court issued its findings of fact and, on October 7, 2009, sent these findings and five certified questions of law to the Court of Appeals. On October 26, 2009, the appellate court consolidated SpeechNow's appeal of the denial of its motion for a preliminary injunction with the section 437h merits proceeding.

The en banc Court of Appeals heard argument on the matter on January 27, 2010, and issued its opinion on March 26, 2010. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). Finding that the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), resolved the certified questions on appeal, the Court of Appeals held that the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to the plaintiffs. The Court of Appeals also held that the reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a) and the organizational requirements of 2 U.S.C. §§ 431(4) and 431(8) can be applied to the plaintiffs.[1] The Court of Appeals vacated this Court's denial of plaintiffs' motion for preliminary injunction and remanded the case for further proceedings in accordance with its opinion.[2]

On April 16, 2010, plaintiffs moved in the Court of Appeals for immediate issuance of its mandate. The appellate court granted the motion on May 3, 2010, and issued its mandate to the Clerk of this Court that same day.

ARGUMENT

The Court should grant plaintiffs only declaratory relief. An injunction is an "extraordinary remedy" that "directs the conduct of a party, and does so with the backing of its full coercive powers." *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (internal quotation marks and citation omitted). "The purpose of an injunction is to prevent future violations . . ." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (citation omitted). Accordingly, "[u]nder

[1] The judgment of the Court of Appeals specified that "the contribution limits set forth in certified questions 1, 2, and 3 cannot be constitutionally applied against SpeechNow and the individual plaintiffs; and there is no constitutional infirmity in the application of the organizational, administrative, and reporting requirements set forth in certified questions 4 and 5."

[2] SpeechNow.org has remained pending before this Court as a non-section 437h plaintiff, and this Court should separately grant summary judgment to it before entering judgment for all plaintiffs in the required "separate document." Fed. R. Civ. P. 58(a).

general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, *and that there is a 'cognizable danger of recurrent violation.'"* *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 n.3 (1994) (quoting *W.T. Grant*, 345 U.S. at 633) (emphasis added); *accord Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1508 (D.C. Cir. 1995) ("[W]ithout adequate proof of a threatened injury, plaintiff lacks both standing and an adequate basis in equity for an injunction.").[3]

I. PLAINTIFFS CANNOT SHOW THAT THEY WILL SUFFER A COGNIZABLE DANGER OF RECURRENT VIOLATIONS OF THE LAW ABSENT AN INJUNCTION

Arguing that declaratory relief by itself will not adequately protect their rights, plaintiffs ask (Br. 4) this Court for injunctive relief. The Commission, they allege (*id.*), might enforce the contribution limits against them in another forum. But the Commission is foreclosed from doing so by the doctrine of collateral estoppel. Because plaintiffs have obtained a valid judgment on the merits of their claims, the Commission is plainly precluded from relitigating those issues against plaintiffs anywhere they may choose to engage in the activities that the Court of Appeals found to be protected by the First Amendment.

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[3] As district courts in this circuit have noted, "In determining whether to enter a permanent injunction, the Court considers a modified iteration of the factors it utilizes in assessing preliminary injunctions: (1) success on the merits, (2) whether the plaintiffs will suffer irreparable injury absent an injunction, (3) whether, balancing the hardships, there is harm to defendants or other interested parties, and (4) whether the public interest favors granting the injunction." *Breaking the Chain Found., Inc. v. Capitol Educ. Support, Inc.*, 589 F. Supp. 2d 25, 30 (D.D.C. 2008) (quoting *ACLU v. Mineta*, 319 F. Supp. 2d 69, 87 (D.D.C. 2004); *Lifted Research Group, Inc. v. Behdad, Inc.*, 591 F. Supp. 2d 3, 7 (D.D.C. 2008) (same). In this case, plaintiffs have already succeeded on the merits. But as we explain below, plaintiffs will not suffer irreparable injury and the public interest is not served by unnecessarily enjoining the government.

Also known as issue preclusion, collateral estoppel provides that a party that litigates a factual or legal question and receives a final decision on that question may not litigate it again in a subsequent action. *See* Restatement (Second) of Judgments § 33 (1982) ("A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action."); *Forsyth v. City of Hammond*, 166 U.S. 506, 518 (1897) ("Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions.").

Collateral estoppel and the related doctrine of claim preclusion (collectively known as res judicata) are meant to "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and . . . prevent serial forum-shopping and piecemeal litigation." *McGee v. District of Columbia*, 646 F. Supp. 2d 115, 123 (D.D.C. 2009) (internal quotation marks and citation omitted). For collateral estoppel to apply, "[1], the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case[; 2], the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case[; and] [3], preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (alterations in original).

Since the parties here raised and contested the constitutionality of the Act's contribution limits as applied to plaintiffs, and the Court of Appeals actually and necessarily passed judgment on this issue, the Commission is precluded from seeking another forum in which to challenge

plaintiffs' claims with regard to that judgment. *See Nat'l Post Office Mail Handlers v. Am. Postal Workers Union*, 907 F.2d 190 (D.C. Cir. 1990) (holding that issue preclusion prevented appellants from relitigating issue in D.C. Circuit decided by the Ninth Circuit in case involving the same parties); *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 258 (D.C. Cir. 1992) ("[T]he fact that the substantive law may be different in the two jurisdictions does not affect the application of issue preclusion. 'The doctrine of issue preclusion counsels us against reaching the merits of this case . . . regardless of whether we would reject or accept our sister circuit's position.'") (quoting *Nat'l Post Office*, 907 F.2d at 194).[4]

The cases plaintiffs rely upon do not suggest otherwise. As plaintiffs note (Br. 4), the Commission previously litigated the constitutionality of the Commission's regulation defining "expressly advocating," 11 C.F.R. § 100.22(b), outside the circuit in which it had already been declared unconstitutional.[5] But in none of these cases did the Commission seek to enforce regulations in other circuits against the same parties that had obtained declaratory relief. Indeed, in the cases cited by the plaintiffs, the Commission was not even seeking to enforce 11 C.F.R. § 100.22(b). Rather, in these cases, the Commission defended the constitutionality of the regulation in three separate suits brought by three different nonprofit corporations: the Maine Right to Life Committee, the Right to Life Committee of Dutchess County, and the Virginia Society for Human Life. And in these cases, under the doctrine of intercircuit nonacquiescence,

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[4] The possibility that the Court of Appeals decision in this case may yet be reviewed by the Supreme Court does not diminish the preclusive effect of the Court's judgment. *See Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983) ("Under well-settled federal law, the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court.").

[5] *See Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *Va. Soc'ty for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001).

collateral estoppel did not bar the Commission from litigating the regulation's constitutionality in other circuits against non-parties to the prior judgments.

"Intercircuit nonacquiescence" permits an agency to refuse to treat as precedent an adverse ruling when the same issue arises in another case in another circuit. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989). This practice was implicitly approved by the Supreme Court in *United States v. Mendoza*, 464 U.S. 154 (1984). In *Mendoza*, the Court held that the doctrine of nonmutual collateral estoppel did not apply to the federal government.[6] The Court observed that estopping the government from challenging an adverse circuit court decision in other circuits would largely foreclose the development of circuit splits, which the Supreme Court relies on in selecting its docket.

> A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. Indeed, if nonmutual [collateral] estoppel were routinely applied against the government, this Court would have to revise its practice of waiting for a conflict to develop before granting the government's petitions for certiorari.

Id. at 160 (citations omitted). Accordingly, the circuit courts generally have recognized that the government can pursue similar claims in different circuits against *non-parties* to prior judgments.[7]

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[6] "Mutual" collateral estoppel refers to circumstances in which both parties in a second case were parties in the first case; "nonmutual" collateral estoppel refers to when a party in a second case who was not a party in the first case seeks to estop an opponent who was a party to the first case. *Gibson v. U.S. Postal Serv.*, 380 F.3d 886, 890 (5th Cir. 2004).

[7] *See generally Givens v. U.S. R.R. Retirement Bd*., 720 F.2d 196, 200 (D.C. Cir. 1983) ("Federal appellate courts can, and do, differ in their conclusions as to the law affecting agency action. That is what makes horseraces and Supreme Court cases.") (internal quotation marks

The cases cited by plaintiffs where the Commission defended 11 C.F.R. § 100.22(b) are thus inapposite. The Commission's past nonacquiescence against non-parties to a previous judgment in no way suggests that the Commission can enforce in another forum parts of the Act found unconstitutional against *these very plaintiffs*. Even if the Commission chose to defend or enforce the contribution limits in other circuits in cases brought by or against parties similar to plaintiffs, it would not do so in litigation against these plaintiffs. Because the Commission is precluded from pursuing plaintiffs in other circuits, the movants have adduced nothing which plausibly suggests that they face a cognizable threat of injury in the absence of an injunction. "[W]ithout adequate proof of a threatened injury," plaintiffs have failed to establish "an adequate basis in equity for an injunction." *Taylor*, 56 F.3d at 1508; *see also Madsen*, 512 U.S. at 765 n.3.[8]

II. INJUNCTIVE RELIEF IS PARTICULARLY UNNECESSARY AGAINST A GOVERNMENT PARTY THAT IS PRESUMED TO OBEY DECLARATORY JUDGMENTS

Recognizing the "fundamental limitations on the remedial powers of the federal courts," the Supreme Court has explained that federal courts' equitable powers may "be exercised only on the basis of a violation of the law and [may] extend no farther than required by the nature and the extent of that violation." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 399 (1982) (internal quotation marks and citation omitted). Courts thus eschew granting equitable remedies broader than necessary to vindicate the rights of parties threatened with irreparable harm. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity

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omitted); *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002) ("Allowing one circuit's statutory interpretation to foreclose APA review of the question in another circuit would squelch the circuit disagreements that can lead to Supreme Court review.").

[8] Although plaintiffs suggest otherwise (Br. 3), the Court of Appeals' vacature of this Court's denial of preliminary injunctive relief is not dispositive as to whether they now merit a permanent injunction.

jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."). Here, declaratory relief is all that is necessary to protect plaintiffs from further litigating the issues resolved by the Court of Appeals.

Absent allegations and proof to the contrary, the government is presumed to comply with the law as declared by the courts. Thus, because declaratory relief will adequately protect the rights of prevailing parties, injunctions are unnecessary against the government. As the Supreme Court explained in the context of "a state statute or local ordinance," "[a]t the conclusion of a successful federal challenge . . . , a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

Similarly, in *Poe v. Gerstein*, 417 U.S. 281 (1974), a three-judge district court declared a Florida statute unconstitutional but declined to enjoin its enforcement "anticipat[ing] that the State would respect the declaratory judgment." The Supreme Court in *Poe* held that the "the District Court properly refused to issue the injunction; for there was 'no allegation here and no proof that respondents would not, nor [could the Court] assume that [the state] will not, acquiesce in the decision . . . holding the challenged ordinance unconstitutional." *Id*. (internal quotation marks omitted). Similarly, in *Roe v. Wade*, the Supreme Court declined to address whether the district court properly withheld injunctive relief, assuming instead that government authorities would "give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." 410 U.S. 113, 166 (1973).

The presumption that the government will obey a declaratory judgment means that courts consider declaratory relief as effective a remedy as injunctive relief in circumstances like those here. *See, e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) ("We note

in this regard that the discretionary relief of declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court."); *Kantrowitz v. Weinberger*, 388 F. Supp. 1127, 1131 (D.D.C. 1974) ("Since there has been no allegation that [federal government] defendants would refuse to obey a declaratory judgment of this Court, injunctive relief would, in any event, be inappropriate.").[9] No injunction should therefore issue.

Plaintiffs have also asked (Br. 6) for declaratory relief with respect to the regulations that implement the provisions of the Act held unconstitutional as applied to plaintiffs. This request asks for relief that would be unnecessary and should be denied. Because the Commission cannot enforce the statutory provisions at issue, it plainly cannot enforce the relevant implementing regulations either.[10]

CONCLUSION

For the foregoing reasons, the Commission respectfully asks this Court to deny plaintiffs' motion to the extent it asks for injunctive relief or for relief specifically involving the Commission's regulations.

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[9] Plaintiffs' reliance on *Minnesota Chamber of Commerce v. Gaertner*, Civ. No. 10-426, 2010 WL 1838362 (D. Minn. May 7, 2010), to argue (Br. 4-5) that they need the additional protection of an injunction is misplaced. Central to the district court's reasoning there was "the very real danger that an elected county attorney from *outside* [the county of the defendant attorney] might consider himself or herself not bound by the Court's decision." *Id*. at *4 (emphasis added). Such danger does not exist here, where the Commission is vested with exclusive civil enforcement jurisdiction over the Act, 2 U.S.C. § 437c(b)(1), and will presumptively obey any declaratory judgment issued by this Court.

[10] This request, moreover, involves Commission regulations that were not technically before the D.C. Circuit. Section 437h, the provision of the Act pursuant to which all but one of the plaintiffs obtained a ruling from that Court, empowers courts to entertain actions only to "construe the constitutionality of any provision of this Act." The certified questions, the Court of Appeals opinion, and its mandate do not refer to any Commission regulations.

Respectfully submitted,

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