United States District Court
Eastern District of North Carolina
Northern Division

Holly Lynn Koerber and **Committee for Truth in Politics, Inc.**, *Plaintiffs*, *v.* **Federal Election Commission**, *Defendant*.	**Case No.** _____

Motion to Consolidate

Plaintiffs, Holly Lynn Koerber and Committee for Truth in Politics, Inc. ("CTP"), move to consolidate the hearing on its preliminary-injunction motion with a trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2) (2008).

I. Questions of Law

This action presents legal questions of whether certain sections of federal law violate the First Amendment and whether the Federal Election Commission should be preliminarily and permanently enjoined from enforcing this law.

This action does not require any factual inquiry regarding the intent, effect, or context of the communications at issue. On the contrary, this court should look only to the "objective . . . substance of the communication[s]." *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2666 (2007) ("*WRTL II*"). In *WRTL II*, the Supreme Court explained:

> The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. To safeguard this liberty, the proper standard . . . must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. It must

> entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. . . . In short, it must give the benefit of any doubt to protecting rather than stifling speech.

Id. at 2666-67 (internal citations and quotation marks omitted). Unnecessary discovery places "a severe burden" on First Amendment freedoms that must be avoided. *See id* at 2666 & n.5. The Supreme Court has thus recognized the need for rapid resolution of the litigation in a First Amendment issue advocacy context, *see id*, which this action presents.

Plaintiffs' communications should be judged solely on their objective content, rather than on the totality of the circumstances or on extrinsic evidence. To do otherwise would place the speaker at the mercy of the listeners, however "reasonable" they might be, to determine whether a communcation is express advocacy. In such a situation, it would be impossible for a speaker to know whether his speech will be regulable until after he speaks. This cannot be permitted under the First Amendment. Focusing instead on the objective content eliminates the usual time-consuming process of formal discovery that typifies civil litigation.

Therefore, Plaintiffs submit that the facts necessary to decide the foregoing questions are in their verified complaint. Plaintiffs also submit their other contentions require no factual inquiry beyond what is in Plaintiffs' verified complaint.

II. Conservation of Judicial Resources and Facilitation of Expedition

Consolidating the hearings will allow this Court to avoid repetitive presentations of evidence. The drafters of Rule 65(a)(2) noted that consolidation "can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application [for a preliminary injunction] will be relevant to the merits . . . ." Fed. R. Civ. P. 65(a)(2) (1966 advisory committee's note). In such actions, a "routine" accelerated trial "preserve[s] judicial resources and save[s] the parties from wasteful duplication of effort." *See NOW v. Operation*

Rescue, 747 F. Supp 760, 768 (D.D.C. 1990). Many courts have recognized the utility of Rule 6(a)(2) consolidation. *See, e.g.*, *West Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986) ("This procedure is a good one, and we wish to encourage it."); *Bright v. Nunn*, 448 F.2d 245, 247 n.1 (6th Cir. 1971) (consolidation is appropriate when material facts are uncontested); *United States* ex. rel *Goldman v. Meredith*, 596 F.2d 1353, 1358 (8th Cir. 1979) (trial on the merits was not justified and consolidation was proper because the only disputed question was one of law); *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 464 F.2d 1055, 1057 (7th Cir. 1972) (when discovery is concluded or unnecessary, "consolidation may serve the interests of justice").

Here, Plaintiffs will present the same facts at any hearing on the merits as they will at a preliminary-injunction hearing. And, as set out above, this action turns on legal issues. Thus, in ruling on the preliminary-injunction motion, the court will have the same facts, contentions, and analysis as it would for a trial on the merits. Consolidation will therefore preserve judicial time and effort by avoiding duplicative hearings.

Consolidating the hearings will also help ensure an expeditious resolution to Plaintiffs' claims. This is necessary to have the dispute resolved quickly "without chilling speech through the threat of burdensome litigation." *WRTL II*, 127 S. Ct. at 2666 n.5. Consolidation will permit the parties a full opportunity to be heard on the merits in an expedited manner and will not deprive Defendant of its right to notice and a full and fair opportunity to be heard.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion to consolidate the preliminary-injunction hearing with a trial on the merits.

Proposed Order

A proposed order is attached.

Dated: October 2, 2008

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion to Consolidate was served by certified mail on the persons identified below on October 3, 2008. In addition, a courtesy copy was sent by email to the FEC at tduncan@fec.gov, dkolker@fec.gov, and kdeeley@fec.gov, and a courtesy copy was sent by FedEx overnight service to General Mukasey.

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