United States District Court
District of Columbia

Shaun McCutcheon et al., *Plaintiffs* v. **Federal Election Commission**, *Defendant*	**Civ. No. 1:12-cv-01034-JEB-JRB-RLW** THREE-JUDGE COURT

Plaintiffs' Opposition to Motion to Dismiss

FEC has filed a Motion to Dismiss ("Motion") based on Federal Rule of Civil Procedure 12(b)(6). (Doc. 21.) Plaintiffs oppose the Motion.

Rule 12(b)(6) provides that parties may assert by motion a defense based on "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

The Rule 12(b)(6) test has been revised in recent years. In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court stated the interplay between Rule 8 (pleading) and Rule 12(b)(6) as follows: "[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. In *Bell Atlantic Corporation v. Twombly*, 55 U.S. 544 (2007), the Court noted questions raised regarding the "no set of facts" test and clarified that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563. It continued: "*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Id.* In *Ashcroft*

v. Iqbal, 556 U.S. 662 (2009), the Court further elaborated on the test, including this statement: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face.'" *Id.* at 1949 (citation omitted). Where a complaint is inadequate, leave to amend the complaint is common. *See, e.g.*, *Butt v. United Brotherhood of Carpenters & Joiners of America*, No. 09–4285, 2010 WL 2080034 (E.D. Pa. May 19, 2010).

But FEC asserts no *factual* inadequacy in the Complaint—and seeks dismissal "with *prejudice* after the consolidated motion hearing." (Motion 2 (emphasis added).) Rather, it claims that "as a matter of law" it has "demonstrated the constitutionality" of the challenged individual biennial contribution limits. (Motion 1.) FEC particularly relies on the notion that *Buckley v. Valeo*, 424 U.S. 1 (1976), foreclosed Plaintiffs' as-applied and facial challenge to "the aggregate contribution limit." (Motion 1.).

These arguments go to the merits, and Plaintiffs have already addressed the merits at length in their Verified Complaint ("VC") (Doc. 1), Preliminary-Injunction Memo ("PI-Mem.") (Doc. 8-1), and Preliminary-Injunction Reply ("PI-Reply") (Doc. 20)—all refuting the FEC's claim that it has "demonstrated" the constitutionality of the challenged limits and all establishing the unconstitutionality of the limits as challenged.

As shown below, (A) *Buckley* did not foreclose as-applied challenges; (B) *Buckley* did not rule on the new biennial-contribution-limits statute and its revised statutory context; (C) FEC has not proven the constitutionality of the present limits; and (D) this Court has already left open possible additions to the record.

A. *Buckley*'s Facial Holding Could Not Have Foreclosed As-Applied Challenges.

FEC argues that *Buckley* foreclosed this challenge "as a matter of law." This line of attack

will sound familiar to anyone familiar with the FEC's strategy in the landmark litigation resulting in the decision in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*").[1] *WRTL-II* is designated as a "*II*" because there was a "*I*," i.e., *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (per curiam) ("*WRTL-I*"). In *Wisconsin Right to Life v. FEC*, No. 04-1260, 2004 WL 3622736 (D.D.C. Aug. 17, 2004), a three-judge court denied a preliminary injunction to WRTL and ordered briefing on FEC's argument that the facial upholding of the ban on corporate electioneering communications (2 U.S.C. § 441b) in *McConnell v. FEC*, 540 U.S. 93 (2003), foreclosed as-applied challenges. Then the court held that " WRTL's 'as-applied' challenge to BCRA is foreclosed by the Supreme Court's decision in *McConnell*. Accordingly, WRTL's case is dismissed with prejudice." *WRTL*, No. 04-1260, 2005 WL 3470512 (D.D.C. May 10, 2005).

This dismissal was appealed to the Supreme Court. Oral argument was January 17, 2006; a decision issued January 23, 2006. *See* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/04-1581.htm (Supreme Court docket). The Court vacated the decision below, reversed, and remanded for the three-judge court "to consider the merits of WRTL's as-applied challenge in the first instance. *WRTL-I*, 546 U.S. at 412. The Court's holding was simple: "In upholding [the ban on corporate electioneering communications] against a facial challenge, we did not purport to resolve future as-applied challenges." *Id.* at 411-12.

On remand, the three-judge court considered cross-motions for summary judgment and held in favor of WRTL. *WRTL*, 466 F. Supp. 2d 195 (D.D.C. 2006). Of course, the Supreme Court affirmed that three-judge court in *WRTL-II*, 551 U.S. 449—which ultimately led to the decision striking facially the corporate ban in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), in principle

[1]Two of Plaintiffs' counsel herein (Bopp and Coleson) were counsel for Wisconsin Right to Life ("WRTL") in the cited litigation.

part because "the FEC adopted a two-part, 11-factor balancing test to implement *WRTL*'s ruling, *id.* at 895, creating a scheme that "function[ed] as the equivalent of prior restraint," *id.* at 896, and was " precisely what *WRTL* sought to avoid," *id.* And regarding the facial versus as-applied issue, *Citizens United* noted the following:

> The controlling opinion in *WRTL*, which refrained from holding the statute invalid except as applied to the facts then before the Court, was a careful attempt to accept the essential elements of the Court's opinion in *McConnell,* while vindicating the First Amendment arguments made by the *WRTL* parties. 551 U.S., at 482, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.).

Id. at 894.

FEC's current effort to persuade this Court that *Buckley* foreclosed *as-applied* challenges to a biennial contribution limit—even if *Buckley* were binding as to a *facial* challenge, which it is not, *see infra*—simply recycles a rejected litigation tactic doomed to failure again.

B. *Buckley* Did Not Rule Facially on the *Present* Limits in the *Present* Context.

FEC claims that *Buckley* "upheld the aggregate contribution limit as a constitutional means of . . . reducing . . . corruption." (Motion 1.) Analytically, FEC still fails to argue with the precision required where First Amendment burdens on core political activity exist because *Buckley* relied on a *circumvention* interest, not a generic corruption interest. (PI-Mem. 8-10, 13-30). *Buckley*'s facial holding does not control—though its analysis guides the analysis (PI-Mem. 8-10)— because, inter alia, Congress fixed the problems that *Buckley* identified (PI-Mem. 10-12), in BCRA, Congress repealed and replaced the old overall ceiling that *Buckley* considered (PI-Mem. 12), and *Buckley* did not even *mention* contributions to candidates as posing a potential circumvention problem in its brief discussion facially upholding the old ceiling (PI-Mem. 33-41).

C. FEC Has Not Proven the Constitutionality of the Present Limits.

As part of FEC's claim that "as a matter of law" it has "demonstrated the constitutionality"

of the challenged individual biennial contribution limits (Motion 1), it points to various parts of its Preliminary-Injunction Memorandum that it incorporates by reference (Motion 1-2). Of course, Plaintiffs may (and do hereby) simply incorporate by reference their Preliminary-Injunction Memo and Reply, which rebut each of FEC's assertions. But in particular, Plaintiffs note that FEC here still relies on inapplicable soft-money cases (e.g., *McConnell v. FEC*, 540 U.S. 93 (2003)) and forbidden theories of corruption (e.g., access, gratitude, and influence) (Motion 1-2), instead of meeting its burden of proving that a conduit contribution can get through to a particular candidate in light of all the existing prophylaxes in place without the biennial limits. (PI-Mem. 13-31, 33-41.)

D. This Court Has Already Addressed the Possibility of Expanding the Record.

FEC seeks dismissal with prejudice immediately after the hearing on September 6. (Motion 2.) But this Court has already issued an order explaining how it shall proceed, which requires rejection of FEC's present motion on yet another basis. In a July 12 Minute Order this Court stated as follows:

> MINUTE ORDER: As discussed with the parties in today's conference call and as agreed by all three judges designated to hear this case, the Court ORDERS that: 1) A hearing on the Motion for Preliminary Injunction shall be consolidated with a hearing on the merits of the case, provided that, in the event the Court determines that the resolution of disputed factual issues is necessary for its merits determination, it may require a further merits hearing following discovery; 2) The consolidated hearing shall be held on Sept. 6, 2012, at 10:30 a.m.; and 3) The courtroom for the hearing and any time limits for argument shall be the subject of a further ORDER. Signed by Judge James E. Boasberg on 7/12/12. (lcjeb4)

Part of what was "discussed with the parties" in connection with consolidating the preliminary-injunction and merits hearings was the potential need for Plaintiffs to put in the record certain evidence, e.g., an expert report about whether candidate committees actually pose a cognizable risk of allowing conduit contributions to pass through them from contributors to in-

tended candidates, in the event the Court found that its decision turned on such evidence instead of being purely based on matters of law. By this Minute Order, the Court has already ruled on that question: "[P]rovided that, in the event the Court determines that the resolution of disputed factual issues is necessary for its merits determination, it may require a further merits hearing following discovery." FEC's current motion to dismiss seems designed to end-run that settled ruling and so should be rejected for that reason, too. If this Court makes a ruling on the merits, as a matter of law, as was the expectation of the discussion cited and the Minute Order, there will be a decision one way or the other on the merits and no need for a dismissal of Plaintiffs' Complaint. If this Court finds that further facts would be necessary to its decision, then those will be provided under a prior order of this Court.

For the foregoing reasons and all the others discussed in the Plaintiffs' Verified Complaint, Preliminary-Injunction Memorandum, and Preliminary-Injunction Reply, the present Motion to Dismiss should be denied.

Respectfully submitted,

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*Pro Hac Vice Application Granted

Certificate of Service

I hereby certify that the foregoing document was served on September 4, 2012 on the following persons by this Court's electronic case filing service ("ECF"):

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