

No. 08-1977

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE REAL TRUTH ABOUT OBAMA, INC., Plaintiff-Appellant,
v.
FEDERAL ELECTION COMMISSION, et al., Defendants-Appellees.

**FEDERAL ELECTION COMMISSION’S OPPOSITION TO
APPELLANT’S MOTION TO EXPEDITE APPEAL**

Appellee Federal Election Commission (“Commission”) opposes the motion of appellant The Real Truth About Obama (“RTAO”) to expedite its appeal.

RTAO challenges regulations that serve compelling government interests, yet its claims of First Amendment burdens are false. In any event, any arguable need for expedition will be addressed by this Court in the context of RTAO’s motion for an injunction pending appeal.

This appeal raises constitutional challenges to three distinct regulations, each of which plays a critical role in the federal campaign finance system. Specifically, RTAO raises facial and as-applied constitutional challenges to regulations that: (1) explain the meaning of “expressly advocating” the election or defeat of candidates, 11 C.F.R. § 100.22; (2) define when donations made in response to certain solicitations are “contributions” under the Act, 11 C.F.R. § 100.57; and (3) implement the Supreme Court’s decision in *FEC v. Wisconsin Right to Life, Inc.* (“*WRTL*”), 127 S. Ct. 2652 (2007), 11 C.F.R. § 114.15. RTAO also challenges the Commission’s enforcement policy concerning the “major purpose”

test established in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Any one of these issues would be substantial; indeed, given that RTAO seeks the *facial* invalidation of each regulation, this case potentially implicates a wide array of political committees and other organizations, their broadcast advertisements in this and future elections, and their disclosures to the public of their campaign spending. These regulations serve compelling government interests in preventing corruption and are of critical importance to the manner in which the people of the United States select their elected officials.

RTAO's purported emergency is of the group's own making. Although RTAO incorporated and filed this lawsuit in July, the challenged regulations have been in existence for periods ranging from nine months (11 C.F.R. § 114.15, effective December 2007) to more than ten years (11 C.F.R. § 100.22, effective July 1995). *See also* 11 C.F.R. § 100.57 (effective November 2004); Political Committee Status, 72 Fed. Reg. 5595 (Feb. 2007). According to RTAO, Senator Obama's views on abortion have been known since at least his tenure in the Illinois State Senate, and the date of the 2008 general election has obviously been known for much longer. Nonetheless, RTAO waited until late July 2008 to bring this action, and then pressed the Commission to litigate and the district court to rule with great speed. RTAO asserted before the district court a right to speedy preliminary relief under *WRTL*, and that relief was considered and promptly

denied; nothing in *WRTL* or any statute provides that further consideration must be conducted in a rushed manner.¹

As the Commission noted in its opposition to RTAO's motion for an injunction pending appeal, RTAO does not presently face any irreparable First Amendment burdens under the relevant regulatory provisions. RTAO allegedly fears that its fundraising and advertising will qualify the organization as a "political committee,"² but, even accepting this speculative assertion as valid, RTAO as a political committee could pay for unlimited independent campaign advocacy, including express advocacy and electioneering communications. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985). In other words, although RTAO conclusorily alleges that its speech is being chilled, that allegation is groundless because FECA imposes no limits on political committees'

¹ Section 403 of the Bipartisan Campaign Reform Act of 2002, which required expedition of certain challenges to the Act, does not apply here. *See* Pub. L. 107-155, § 403, 116 Stat. 113 (2002) (uncodified; set out as Judicial Review note to 2 U.S.C.A. § 437h) (West 2008). Indeed, even for those BCRA challenges that require expedition, Congress nonetheless made clear that it did not want to force courts to decide cases in haste, as one of BCRA's principal Senate sponsors stated during floor debate. *See* 147 Cong. Rec. S3189 (Mar. 30, 2001) (statement of Sen. Feingold); *see also id.* at S3189-90 (statement of Sen. Dodd).

² Under the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-55 ("FECA"), an organization that receives \$1,000 in contributions or makes \$1,000 in expenditures in a year is a "political committee." 2 U.S.C. § 431(4)(A). Political committees must register with the Commission and file periodic reports of their receipts and disbursements for disclosure to the public. *See* 2 U.S.C. §§ 433, 434. No person may contribute more than \$5,000 per calendar year to any one political committee. 2 U.S.C. § 441a(a)(1)(C).

spending for speech of any kind. Moreover, RTAO has not alleged or shown that its fundraising would be harmed by abiding by the \$5,000 limit per contributor on contributions to political committees, or that it would suffer any reprisals from abiding by the reporting requirements for political committees. Thus, RTAO fails to make even a rudimentary showing of the type of burden that would justify expeditious consideration of its appeal.

In any event, RTAO's request for expedition is unnecessary in light of RTAO's motion for an injunction pending appeal. If it were entitled to emergency relief — which it is not — RTAO would obtain such relief through its injunction motion that is currently pending and fully briefed before this Court.

Accordingly, the Court should deny RTAO's motion to expedite this appeal and instead issue a standard briefing and hearing schedule, thereby permitting the Commission to present its full defense of the significant provisions of federal law at issue here.

Respectfully submitted,

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September 26, 2008

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2008, I will electronically file the foregoing using the Court's CM/ECF system, which will then send a notification of such filing to the following:

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