UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs,	)	
v.	)	Civ. No. 08-1953 (BMK, RJL, RMC)
FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	)	SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to the Court's Order dated May 5, 2009, Defendant Federal Election Commission ("Commission") respectfully submits this supplemental reply memorandum in support of its motion to dismiss Plaintiffs' Amended Complaint.

In attempting to avoid the application of *res judicata* to his claims, Plaintiff Michael Steele, Chairman of the Republican National Committee ("RNC"), asserts that he is not (1) the successor-in-interest to any "property right" of the RNC's previous Chair, (2) a public official, or (3) "simply" an agent of the RNC. (*See* Pls.' Supplemental Opp. to FEC's Mot. to Dismiss at 2-4 (Docket No. 80).) The first two of these arguments are straw men, as the Commission has not argued that Steele has a "property" interest in this case or that he is a public official. Rather, the Commission has noted that the same important interests in legal finality and judicial economy that support the application of *res judicata* to property transferees and to successive holders of government office apply with equal or greater force to Steele. (*See* Def. FEC's Supplemental Mem. in Supp. of Its Mot. to Dismiss at 3-4 (Docket No. 74) (citing *Am. Forest Council v. Shea*, 172 F. Supp. 2d 24, 27 (D.D.C. 2001); 18A Wright, Miller & Cooper,

Federal Practice & Procedure § 4458 nn. 15-16 (2d ed. 2002); Restatement (Second) of Judgments § 36 cmt. e (1982 & Supp. 2008)).) Steele's response relies entirely on *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008), but that case disapproved a theory of preclusion — "virtual representation," *see id*. at 2173-74 — that the Commission has never asserted. Far from casting doubt on the application of *res judicata* to Steele, the analytical "framework" in *Taylor* specifically encompasses nonparty preclusion in situations materially indistinguishable from the instant case. (*See* FEC's Supplemental Mem. at 2-3 (discussing *Taylor*, 128 S. Ct. at 2172-73).) Steele provides no authority or reasoning to counter the Commission's showing on those points.

As to Steele's bringing suit as an agent of the RNC, his position appears to be that, because the RNC and Steele are putatively asserting separate claims here,[1] the Chairman is "not acting as a proxy of the RNC." (*See* Pls.' Supplemental Opp. at 4.) This argument fails as a matter of law, for Steele is subject to the fundraising restrictions he challenges *only* when he acts as an agent of the RNC. 2 U.S.C. § 441i(a)(2) (applying soft-money solicitation restriction to "any officer or agent acting on behalf of . . . a national committee"); *McConnell v. FEC*, 540 U.S. 93, 157 (2003) ("The reach of the solicitation prohibition . . . is limited. It bars only solicitations of soft money by national party committees and by party officers in their official capacities. . . . [O]fficers of national parties are free to solicit soft money in their individual capacities . . . .").[2] Thus, Steele cannot be challenging the prohibition on soft-money solicitations in any capacity other than as an agent of the RNC. Because "preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a

---

[1] Counts 1-6 of the Amended Complaint are brought jointly by the RNC and Steele (Am. Compl. ¶¶ 29-45), Count 7 is brought by Steele alone (*id*. ¶¶ 46-48), and Counts 8-9 are brought by the other Plaintiffs (*id*. ¶¶ 49-54).

[2] Because the statute applies without distinction to all party officers in their official capacities, it is irrelevant — contrary to Steele's suggestion (Pls.' Supplemental Opp. at 4) — that Steele's predecessor held a different title during *McConnell* than Steele does now.

judgment," *Taylor*, 128 S. Ct. at 2173, Steele cannot relitigate as the RNC's agent a challenge that the RNC itself is precluded from relitigating. (*See* FEC's Supplemental Mem. at 4.)[3]

Finally, Steele appeals to *Taylor*'s observation that the need to apply *res judicata* to nonparties is lessened where "courts swiftly . . . dispose of repetitive suits" as a matter of *stare decisis*. *See Taylor*, 128 S. Ct. at 2178. On that point, we agree: Prompt dismissal of this lawsuit under *stare decisis* would promote finality and judicial economy as effectively as would dismissal of the claims as *res judicata*. (*See* FEC's Supplemental Mem. at 5 (noting that Steele's claims fail as a matter of law under *McConnell*).)

For the foregoing reasons, the Commission respectfully requests that the Court dismiss the Amended Complaint for failure to state a claim on which relief can be granted.[4]

Respectfully submitted,

Thomasenia P. Duncan (D.C. Bar No. 424222)
General Counsel

David Kolker (D.C. Bar No. 394558)
Associate General Counsel

/s/ Kevin Deeley
Kevin Deeley
Assistant General Counsel

Adav Noti (D.C. Bar No. 490714)
Attorney

[3] Steele states that he is not the RNC's agent in challenging the prohibition on *party* solicitation of soft money "because he is not a national party committee." (Pls.' Supplemental Opp. at 4-5.) To the extent it is possible to draw a distinction between the RNC's solicitations and its officers' official-capacity solicitations, however, Steele would have no cause of action to challenge the provisions governing parties, and his challenge to the provisions applicable to party officials would be precluded because his predecessor litigated and lost it in *McConnell*.

[4] As discussed in the Commission's prior briefs, Plaintiffs' argument that this case presents a different cause of action than did *McConnell* fails because a mere change in legal theory cannot avoid the preclusive effect of a prior judgment on the same nucleus of facts. (*See* Def. FEC's Mem. in Support of Mot. to Dismiss (Docket No. 20) at 19-20, 22-24; Def. FEC's Reply Mem. in Support of Mot. to Dismiss (Docket No. 36) at 4-6.)

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

Dated: June 8, 2009