United States District Court
District of Columbia

Republican National Committee et al., ***Plaintiffs***, ***v.*** **Federal Election Commission** et al., ***Defendants***.	**Case No.** 08-1953 (BMK, RJL, RMC) THREE-JUDGE COURT

Plaintiffs' Supplemental Opposition to the Federal Election Commission's Motion to Dismiss

In accordance with this Court's May 5, 2009 order, Plaintiffs Republican National Committee *et al.* file this supplemental opposition to the FEC's motion to dismiss Plaintiffs' Amended Complaint. Following his election as Chairman of the RNC on January 30, 2009, Plaintiffs moved this Court to add Michael Steele as a plaintiff to replace outgoing Chairman Robert M. Duncan. (Dkt. 51). Plaintiffs' motion was granted on May 5, 2009. Chairman Steele raises the same claims as did Duncan before him, but unlike Duncan, Chairman Steele was not a party in *McConnell v. FEC*, 540 U.S. 93 (2003). The FEC supplemented its motion to dismiss to include Chairman Steele in lieu of former Chairman Duncan, (Dkt. 74), and argues that Chairman Steele's claims are precluded by *McConnell*. *FEC Supp. Mem.* at 1. Plaintiffs respond accordingly.

I. Chairman Steele's Claims are not Barred By Res Judicata.

Res judicata is no bar to Chairman Steele's claims because he was not a party to the proceedings in *McConnell*, 540 U.S. 93. Furthermore, res judicata is no bar to Chairman Steele's claims because they arise from a different cause of action than *McConnell* and *McConnell* did not

decide the issue in this case.

A. Chairman Steele was not a Party in *McConnell*.

Res judicata generally only bars successive claims by identical parties because "[a] person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate the claims and issues settled in that suit.'" *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (citation omitted). The "application of [res judicata] to non-parties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)).

The FEC does not dispute the fact that Chairman Steele was not a party in *McConnell*. *FEC Supp. Mem*. at 1. However, the FEC notes that the general rule against nonparty preclusion is subject to some narrow exceptions, *id*. at 2, and argues that an exception is warranted here. *Id*. But none of the exceptions permitting nonparty preclusion are applicable to Chairman Steele.

The Supreme Court recently reiterated the limited application of res judicata to non-parties. *Taylor*, 128 S. Ct. 2161. *Taylor* rejected the doctrine of "virtual representation," which had been employed by some lower courts to expand the application of res judicata to non-parties. *Id.* The Court noted that in dealing with nonparty preclusion ""crisp rules with sharp corners' are preferable to a round-about doctrine with opaque standards.'" *Id.* at 2177 (quoting *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 881 (6th Cir. 1997)). *Taylor* set out six recognized exceptions to the rule against nonparty preclusion: (1) when a party has agreed to be bound by a previous decision between other party's, (2) when there is a legal relationship between the party to a previous judgement, such as bailee and bailor or assignee and assignor, (3) when a person was adequately represented by a fiduciary in a previous suit or in certain class action suits, (4) if

the party assumed control over the previous litigation, (5) if a person seeks to relitigate his claims through a representative or agent serving as a proxy, or (6) in accordance with certain statutory schemes that are consistent with the principles of due process. *Id.* at 2172-73.

While the FEC claims that applying res judicata to Chairman Steele "is consistent with the categories of nonparty preclusion noted in *Taylor*," *FEC Supp. Mem*. at 3, it fails to demonstrate the applicability of any of those exceptions. First, the FEC argues that Chairman Steele is Duncan's "successor-in-interest" because Steele makes similar allegations and seeks relief for similar activities as Duncan previously did in this case. *Id.* But to the extent that *Taylor* recognized any such exception, it was in the case of a "pre-existing 'substantive legal relationship'" between parties and was based "'as much from the needs of property law as from the values of preclusion by judgment.'" 128 S. Ct. at 2172 (citation omitted). Chairman Steele is in no way Duncan's "successor-in-interest" to any property right and Chairman Steele and Duncan have no substantive legal relationship.

Moreover, Chairman Steele has not adopted former Chairman Duncan's claims. On the contrary, Chairman Steele is a plaintiff in his own name, has asserted his own claims, and has provided his own affidavit describing the activities that he intends to pursue. *Pls.' Motion to Amend,* Exh. 2, *Affidavit of Michael Steele* (Dkt. 51). That Chairman Steele intends to undertake the same fundraising activities as Duncan did does not establish any legal relationship between the two that might warrant the application of res judicata to a nonparty. Chairman Steele's claims are completely independent of any claims previously made by Duncan in this case or in

McConnell. Thus, Chairman Steele is not a successor-in-interest to any party in *McConnell*.[1]

Second, Chairman Steele is not a public official. Therefore, unlike public officials, he is not bound by any judgment involving his predecessors in office. The FEC's citations to authorities regarding successors in public office are irrelevant. *FEC Supp. Mem*. at 3-4. Morever, Chairman Steele is the Chairman of the RNC, whereas Duncan's participation in *McConnell* was in his capacity as treasurer of the RNC. So Chairman Steele does not even hold the same non-governmental office as did Duncan in *McConnell*.

Third, contrary to the FEC's assertion, Chairman Steele is not simply acting as an agent of the RNC. *FEC Supp. Mem.* at 4. *Taylor* stated that the agency exception to nonparty "preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication." 128 S. Ct. at 2179. Permitting the application of res judicata to a nonparty in such situations prevents a party from avoiding preclusion "by relitigating through a proxy." *Id.* at 2173. Here, Chairman Steele is not acting as a proxy of the RNC. Indeed, the RNC is itself a named party to this suit. Chairman Steele's claims in this action challenge the application of 2 U.S.C. § 441i(1) to him as an officer of a national party committee. And the RNC's claims challenge the application of 2 U.S.C. § 441i(1) to national party committees. So Chairman Steele does not bring the RNC's claims for it. Indeed, it

---

[1] The FEC's citation to *Am. Forest Resource Council v. Shea*, 172 F. Supp. 2d 24, 27 (D.D.C. 2001), is inapposite. In that case the court held that res judicata was applicable to the American Forest Resource Council (AFRC) because it was known "in its prior incarnation" as the Northwest Forest Resource Council (NFRC), which was a named plaintiff in the previous suit at issue. *Id*. at 28. NFRC was then "merged into AFRC," *id.* at 29, making AFRC its "direct successor-in-interest." *Id.* at 27. On the contrary, Chairman Steele and Duncan are separate persons with no legal relationship.

would be impossible for Chairman Steele to bring the claims asserted by the RNC in this suit because he is not a national party committee. The agency exception has no application to Chairman Steele.

Finally, the FEC argues that "[t]he practical effect" of "permitting Steele to proceed in this case demonstrates why he must be subject to preclusion." *FEC Supp. Mem*. at 4. In support of its conclusion the FEC posits that if Chairman Steele's claims were unsuccessful in this case, subsequent chairpersons of the RNC could bring similar suits in the future. *Id.* And if Chairman Steele's claims were successful here, "the Court's ruling would be effective only as to Steele himself" leaving the FEC free to enforce 2 U.S.C. § 441i(1) against future chairpersons of the RNC. *Id*. at 4-5. However, neither of these scenarios is at all unusual.

In fact, the FEC's argument was specifically rejected in *Taylor*. There it was argued that in the absence of nonparty preclusion "several persons could coordinate to mount a series of repetitive lawsuits." *Taylor*, 128 S. Ct. at 2178. The Court responded:

> [W]e are not convinced that this risk justifies departure from the usual rules governing nonparty preclusion. First, *stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare decisis* is not dispositive, "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others."

Id. at 2178 (citation omitted). Both of these points are equally applicable to the FEC's concern over the possibility of subsequent suits by future RNC chairpersons if Chairman Steele's claims are *unsuccessful* here. Likewise, if Steele's as-applied claims are *successful* res judicata might not preclude the FEC from enforcing 2 U.S.C. § 441i against future chairpersons, but *stare decisis* would advise against the FEC enforcing 2 U.S.C. § 441i in a manner that has been found

unconstitutional.

Because Chairman Steele was not a party in *McConnell* res judicata does not bar his claims.

B. Chairman Steele's Claims are Based on a Different Cause of Action Than *McConnell* and *McConnell* did not Decide the Issue in This Case.

In any event, irrespective of whether or not Chairman Steele was a party in *McConnell,* res judicata is no bar to his claims. As set out in *Plaintiffs' Memorandum in Opposition to the FEC's Motion to Dismiss* ("*Pls.' Mem*.") (Dkt. 27), claim preclusion is not applicable because, unlike *McConnell*, this is an as-applied challenge. *Pls.' Mem.* at 7-9. *McConnell* expressly contemplated future as-applied challenges, by the same parties, to provisions that it facially upheld. *Id.* at 7-9. Furthermore, Plaintiffs' as-applied claims, including Chairman Steele's, arise from a nucleus of facts that was not considered in *McConnell* and the material facts that *McConnell* relied on are not present here. *Id.* at 10-15.

Likewise, issue preclusion is also not applicable because *McConnell*'s facial holding did not purport to uphold the constitutionality of 2 U.S.C. § 441i in every application. *Pls.' Mem*. at 15-20. The issue of whether 2 U.S.C. § 441i can constitutionality be applied to Chairman Steele's intended activities in this case was not decided in *McConnell*. *Id*.

In sum, this case is not based on the same cause of action as *McConnell* and *McConnell* did not decide the issue in this case. Therefore, Chairman Steele's claims are not precluded by res judicata.

II. Plaintiffs' Claims do not Fail as a Matter of Law.

In *Plaintiffs' Memorandum in Support of Summary Judgment* (Dkt. 21) and in their

opposition to the FEC's motion to dismiss (Dkt. 27) Plaintiffs demonstrate at length why *McConnell* neither decides nor precludes this case. Therefore, like Duncan's claims before, Chairman Steele's claims do not fail as a matter of law.

Conclusion

For the reasons stated, the FEC's motion to dismiss should be denied.

Respectfully submitted,

/s/ James Bopp, Jr.

James Bopp, Jr., Bar #CO0041
Richard E. Coleson*
Clayton J. Callen*
Kaylan L. Phillips*
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for all Plaintiffs
*Pro Hac Vice

Charles H. Bell, Jr.*
Bell, McAndrews & Hiltachk, LLP
455 Capitol Mall, Suite 801
Sacramento, CA 95814
Tel: (916) 442-7757
Fax: (916) 442-7759
cbell@bmhlaw.com
Counsel for California Republican Party and Republican Party of San Diego County