United States District Court
Eastern District of Virginia
Richmond Division

The Real Truth About Obama, Inc., *Plaintiff*, *v.* **Federal Election Commission and United States Department of Justice**, *Defendants*.	**Case No.** 3:08-cv-00483-JRS

Motion to Consolidate Hearings on Preliminary Injunction and Merits & Brief In Support

Motion

Plaintiff, The Real Truth About Obama, Inc. (RTAO), moves to consolidate the hearing on its *Motion for Preliminary Injunction and Summary Judgment* with the trial on the merits, Fed. R. Civ. Proc. 65(a)(2), i.e., so that the hearings on preliminary injunction and summary judgment will be consolidated and conducted at the conclusion of the currently scheduled briefing. Defendants consent to this motion.

Brief in Support

A. Resolution of This Case Turns on Purely Legal Issues.

This case presents the concise legal question of whether (**a**) 11 C.F.R. § 100.22(b) ("expressly advocating" definition) and the FEC's enforcement policy regulating determination of PAC status, including interpreting and applying the Supreme Court's major-purpose, *see*

Buckley v. Valeo, 424 U.S. 1, 79 (1976), are unconstitutionally overbroad, void for vagueness, and contrary to law, as violating the First and Fifth Amendments of the Constitution of the United States and exceeding the FEC's statutory authority under FECA, 2 U.S.C. § 431 et seq.; (**b**) the regulations and the enforcement policy are void and should be set aside under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; and (**c**) the FEC and DOJ should be preliminarily and permanently enjoined from enforcing FECA based on the regulation and policy, both facially and as applied, to RTAO and to its intended activities set out therein.

All the facts necessary to resolve this case are contained in RTAO's *Verified Amended Complaint* and the memorandum in support of its *Motion for Preliminary Injunction and Summary Judgment*. The only issues to be resolved are legal questions.

B. Consolidation of the Hearings Will Preserve Judicial and Party Resources.

Consolidating the hearings will allow the 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 cases the use of 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). Numerous courts have recognized the utility of Rule 65(a)(2) consolidation. *See e.g.'s West Pub. 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); *U.S. ex rel. Goldman v. Meredith*, 596 F.2d 1353, 1358 (8th Cir. 1979) (trial on 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*., 463 F.2d 1055, 1057 (7th Cir. 1972) (when discovery is concluded or unnecessary "consolidation may serve the interests of justice").

Here, the parties will present the same facts on summary judgment as at a preliminary-injunction hearing. Thus, in determining the motions for preliminary injunction and summary judgment, this Court will have before it the same facts, arguments and legal analysis. Consolidation will therefore preserve judicial time and effort by avoiding duplicative hearings.

Additionally, consolidating the hearings will help ensure an expeditious resolution to RTAO's claims. The stated goal of as-applied challenges "to resolve disputes quickly without chilling speech through the threat of burdensome litigation," should apply here. *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 468 n.5 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.) (This opinion states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977)).

C. Consolidation Will Not Unfairly Prejudice the FEC and DOJ

Consolidating the hearings will not deprive the FEC or DOJ of their right to notice and a full and fair opportunity to be heard. In fact, in conferring over the Joint Proposed Briefing Schedule (Dkt. 123), Defendants consented to this motion.

In sum, because of the purely legal nature of this case, preservation of judicial resources, the need for an expedited resolution and adequate notice to the FEC and DOJ, granting the *Motion for Consolidation* is appropriate. For the stated reasons, RTAO asks this Court to

consolidate the hearings on preliminary injunction and summary judgment.

Respectfully submitted,

James Bopp, Jr.,* jboppjr@aol.com
Richard E. Coleson,* rcoleson@bopplaw.com
Barry A. Bostrom,* bbostrom@bopplaw.com
Kaylan Phillips,** kphillips@bopplaw.com
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
*admitted pro hac vice
**pro hac vice application pending
Lead Counsel for Plaintiff

/s/
Michael Boos (VA State Bar No. 37524)
Law Office of Michael Boos
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030
703/691-7717 telephone
703/691-7543 facsimile
michael.boos@gte.net
Local Counsel for Plaintiff

Certificate of Service

I hereby certify that on September 20, 2010, I served upon the below listed persons copies of this document by electronically filing this document for electronic transmission.

John Richard Griffiths
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
john.griffiths@usdoj.gov

Debra Jean Prillaman
Office of U.S. Attorney
600 East Main Street, Suite 1800
Richmond, VA 23219
debra.prillaman@usdoj.gov

J. Gerald Hebert
J. Gerald Hebert, P.C.
5019 Waple Ln
Alexandria, VA 22304
ghebert@campaignlegalcenter.org

Thomasenia P. Duncan
tduncan@fec.gov
Audra Anne Hale-Maddox
ahale-maddox@fec.gov
David Kolkler. dkokler@fec.gov
Kevin Deeley, kdeeley@fec.gov
Holly Baker, hbaker@fec.gov
Vivien Clair, vclair@fec.gov
Seth Nesin, snesin@fec.gov
Adav Noti, anoti@fec.gov
Claire Rajan, crajan@fec.gov
Federal Election Commission
999 E Street NW
Washington, DC 20463

And I hereby certify that I will mail the document by U.S. mail to the following non-filing users:

Daniel R. Ortiz
John Allan Love Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1738

Jonathan Lee Riches
F.C.I. Williamsburg
P.O. Box 340
Salters, SC 29590

Richard Briffault
Joseph P. Chamberlain Professor of Legislation
Columbia University School of Law
435 West 116th Street
New York, NY 10027

/s/

Michael Boos (VA State Bar No. 37524)
Law Office of Michael Boos
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030
703/691-7717 telephone
703/691-7543 facsimile
michael.boos@gte.net

United States District Court
Eastern District of Virginia
Richmond Division

The Real Truth About Obama, Inc., *Plaintiff*, *v.* **Federal Election Commission and United States Department of Justice**, *Defendants*.	**Case No.** 3:08-cv-00483-JRS

Order Granting Consent Motion to Consolidate

It is hereby ORDERED that the Plaintiff's *Motion to Consolidate the Hearings on Preliminary Injunction and Merits* be GRANTED for the reasons stated in the Plaintiff's motion.

SO ORDERED this ____ day of ________________2010.

____
James R. Spencer
United States District Judge

Distribution:

Michael Boos
Law Office of Michael Boos
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030

James Bopp, Jr.
jboppjr@aol.com
Richard E. Coleson
rcoleson@bopplaw.com
Barry A. Bostrom
bbostrom@bopplaw.com
Kaylan L. Phillips
kphillips@bopplaw.com
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510

John Richard Griffiths
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044

Debra Jean Prillaman
OFFICE OF U.S. ATTORNEY
600 East Main Street, Suite 1800
Richmond, VA 23219

J. Gerald Hebert
J. GERALD HEBERT, P.C.
5019 Waple Ln
Alexandria, VA 22304

Thomasenia P. Duncan
David Kolkler
Kevin Deeley
Holly Baker
Vivien Clair
Seth Nesin
Adav Noti
Claire Rajan

Audra Anne Hale-Maddox
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463

Daniel R. Ortiz
John Allan Love Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1738

Jonathan Lee Riches
F.C.I. Williamsburg
P.O. Box 340
Salters, SC 29590

Richard Briffault
Joseph P. Chamberlain Professor of Legislation
Columbia University School of Law
435 West 116th Street
New York, NY 10027