IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REAL TRUTH ABOUT OBAMA, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:08-cv-00483-JRS
	)	
FEDERAL ELECTION COMMISSION,	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendants.	)	

UNITED STATES DEPARTMENT OF JUSTICE'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff seeks a preliminary injunction to enjoin the United States Department of Justice and the Federal Election Commission ("FEC") from enforcing three FEC regulations as well as a Federal Register Notice describing the FEC's approach to determining "political committee" status. See Compl. ¶¶ 27-53. As set forth in the FEC's opposition brief, Plaintiff's motion should be denied because Plaintiff has not demonstrated that it will suffer irreparable harm in the absence of the injunction, because the balance of harms weighs in favor of the Defendants, and because Plaintiff is unlikely to succeed on the merits. Moreover, as a threshold matter, the motion should be denied because there is no case or controversy and thus no subject matter jurisdiction. The Department of Justice hereby incorporates all of the arguments made by the FEC on each of these issues, which it will not repeat here.

There are, however, additional, distinct considerations that warrant denial of the preliminary injunction that is sought against the Department. As set forth below, Plaintiff cannot demonstrate a reasonable fear that the Department will criminally prosecute it for engaging in

the proposed activities that are described in its Complaint. Accordingly, Plaintiff lacks standing to seek an injunction against the Department of Justice.

BACKGROUND: STATUTORY AND REGULATORY AUTHORITY OF THE FEDERAL ELECTION COMMISSION AND THE DEPARTMENT OF JUSTICE

The FEC, not the Department of Justice, has the statutory authority to interpret the Federal Election Campaign Act ("FECA" or the "Act") and FEC's own regulations. See 2 U.S.C. §§ 437c(b)(1) ("The Commission shall administer . . . and formulate policy with respect to[] this Act . . . ."), 437d(a)(7) (authorizing Commission to "render advisory opinions" regarding application of the Act or the Commission's regulations), 437d(a)(8) (giving Commission authority "to develop such prescribed forms and to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of this Act . . . ."); see also FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981) ("Congress has vested the Commission with 'primary and substantial responsibility for administering and enforcing the Act,' . . . providing the agency with 'extensive rulemaking and adjudicative powers.'") (quoting Buckley v. Valeo, 424 U.S. 1, 109-110 (1976)); U.S. Department of Justice, Federal Prosecution of Election Offenses 198 (7th ed. 2007) ("[T]he Commission has statutory authority to interpret the statute through regulations and advisory opinions, and its opinion should be given deference.") (available at http://www.usdoj.gov/criminal/pin/).

The Department of Justice's authority is limited to investigating and prosecuting persons who "knowingly and willfully commit[] a violation" of FECA or other federal criminal statutes. 2 U.S.C. § 437g(d)(1) (describing criminal penalties for knowing and willful violations of the Act); see also Federal Prosecution of Election Offenses at 4 ("to be a crime, a FECA violation must have been committed knowingly and willfully"), 5 ("FECA violations that . . . do not present knowing and willful violations, e.g., those resulting from negligence or mistake on the

part of the offender as to what the law required or forbade . . . are handled noncriminally by the Federal Election Commission (FEC) under the statute's civil enforcement provisions."), 14 ("FECA violations become potential crimes when they are committed knowingly and willfully, that is, by an offender who knew what the law forbade and violated it notwithstanding that knowledge."), 179 ("knowing and willful FECA violation requires 'knowing, conscious, and deliberate flaunting' of the Act") (quoting AFL-CIO v. FEC, 628 F.2d 97, 101 (D.C. Cir. 1980)).

ARGUMENT

As the Fourth Circuit has recognized, "[w]hen a party . . . brings a preenforcement challenge to a statute or regulation, it must allege 'an intention to engage in a course of conduct arguably affected with a constitutional interest,' and there must exist 'a credible threat of prosecution' under the statute or regulation." Virginia Society for Human Life, Inc. v. Federal Election Comm'n, 263 F.3d 379, 386 (4th Cir. 2001) ("VSHL") (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 302 (1979)). "The fear of prosecution cannot be imaginary or wholly speculative." Id.

Under the Department of Justice's published "policies . . . related to the investigation and prosecution of election offenses," Federal Prosecution of Election Offenses at 1, a criminal investigation (or prosecution) of Plaintiff for violation of the campaign finance laws would be unwarranted unless the circumstances suggested that Plaintiff "knew [that] the law forbade" its activities and that it "violated [the law] notwithstanding that knowledge." Id. at 13, 14. Here, however, the FEC has stated publicly that the proposed activities described in Plaintiff's complaint are not restricted by the FEC's regulations or by the Federal Register notice that Plaintiff seeks to challenge. See FEC Opp. to Pl. Mot. for Prelim. Inj. at 6. In light of the FEC's stated position that Plaintiff's intended activities would not be subject to regulation and the

deference that the Department of Justice affords the FEC with respect to the interpretation of the Act and the FEC's own regulations, Plaintiff cannot show that it has an objectively reasonable fear that engaging in the activities described in its complaint will expose Plaintiff to criminal prosecution for conduct or activities that it knew the law forbade. Accordingly, Plaintiff lacks standing to seek an injunction against the Department of Justice.

VSHL does not require a different result. There, the Fourth Circuit held that a plaintiff challenging one of the FEC regulations that is also at issue here had a credible fear of prosecution notwithstanding the FEC's statement that it would not enforce the regulation in the Fourth Circuit. Id. at 389. In the instant case, by contrast, the FEC has not simply asserted that it will forego, in one particular jurisdiction, the enforcement of an otherwise applicable regulation. Rather, it has announced its interpretation that the regulations at issue do not apply to the proposed activities described in Plaintiff's complaint. As the FEC has argued in its opposition brief, given the lack of any disagreement between Plaintiff and the FEC regarding the applicability of the challenged regulations to the proposed activities described in Plaintiff's complaint, there is no case or controversy within the meaning of Article III.

This conclusion applies with equal, if not greater, force to the claims asserted and the injunction sought against the Department of Justice. In order to prosecute Plaintiff for *criminal* violations, the Department would not only have to set aside its normal deference to the FEC and reach its own independent and contrary interpretation of the FEC regulations, it would have to conclude that Plaintiff had engaged in knowing and willful violations of the Act, notwithstanding the fact that the FEC had notified Plaintiff and this Court that Plaintiff's proposed activities were

not subject to regulation. It is wholly speculative and, indeed, counterintuitive, to suggest that there is a credible fear of criminal prosecution in these circumstances.[1]

CONCLUSION

For the reasons set forth above and in the opposition brief filed by the FEC, the Court should deny Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

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[1] North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999) ("NCRL"), is also distinguishable. There, the Fourth Circuit found that a plaintiff faced a credible fear of prosecution notwithstanding North Carolina's statement that it did not interpret a state election law as applying to issue advocacy. Id. at 710. In that case, however, the court held that, notwithstanding the state's interpretation, the statute in question "appear[ed] by its terms" to restrict Plaintiff's activities. Id. Moreover, North Carolina had not indicated "that it would interpret the statute to mean anything other than what its plain language would suggest" when NCRL wrote seeking guidance prior to filing suit. Id. As explained in the FEC's brief, Plaintiff in this case did not make any effort to obtain guidance from the FEC, but instead filed this lawsuit one week after it incorporated.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2008 I have electronically filed the foregoing pleading with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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In addition, I have caused a copy of this pleading to be served this 14th day of August by hand upon the following:

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