

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
SPEECHNOW.ORG, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Civ. No. 08-248
v.)	
)	MOTION
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
_____)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S
MOTION TO ALTER OR AMEND THE JUDGMENT**

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, defendant Federal Election Commission (“Commission”) moves this Court to alter or amend its May 26, 2010 Order Granting Plaintiffs’ Motion for Entry of Judgment [Doc. #78]. The Court granted plaintiffs’ motion two days before the Commission filed a timely partial opposition to that motion. The Court erred by issuing an incomplete judgment, one that did not include judgment in favor of the Commission regarding the provisions of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455 (“Act”), that the Court of Appeals upheld against plaintiffs’ as-applied challenge. The Commission therefore asks this Court to alter or amend its judgment consistent with the Commission’s Memorandum of Points and Authorities in Partial Opposition to Plaintiffs’ Motion for Entry of Judgment [Doc. #77] and its accompanying proposed order, wherein the Commission objected to plaintiffs’ requests for an injunction against the government and relief regarding unspecified regulations.

BACKGROUND

Under 2 U.S.C. § 437h, a unique provision of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455 (“Act”), eligible voters and the national committees of political parties can bring suit to challenge the constitutionality of any provision of the Act and have certified questions answered in the first instance by a court of appeals sitting en banc. On February 14, 2008, SpeechNow.org and several individual donors (“plaintiffs”) brought suit under section 437h and moved for a preliminary injunction to prevent the Commission from enforcing the individual contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). On July 1, 2008, after a hearing, this Court denied the preliminary injunction motion [Doc. #32].

On July 11, 2008, the Court granted plaintiffs’ motion under 2 U.S.C. § 437h to certify constitutional questions for the Court of Appeals to consider en banc [Doc. #35]. On September 28, 2009, the Court issued its findings of fact [Doc. #73] and, on October 7, 2009, sent these findings and five certified questions of law to the Court of Appeals. On October 26, 2009, the appellate court consolidated SpeechNow’s appeal of the denial of its motion for a preliminary injunction with the section 437h merits proceeding.

The en banc Court of Appeals heard argument on the matter on January 27, 2010, and issued its opinion on March 26, 2010. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). Finding that the Supreme Court’s decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), resolved the certified questions on appeal, the Court of Appeals held that the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to the plaintiffs. Nevertheless, the Court of Appeals also held in the Commission’s favor that application of the reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a) and the organizational requirements

of 2 U.S.C. §§ 431(4) and 431(8) to plaintiffs is constitutional.¹ The Court of Appeals vacated this Court's denial of plaintiffs' motion for preliminary injunction and remanded the case for further proceedings in accordance with its opinion.² On April 16, 2010, plaintiffs moved in the Court of Appeals for immediate issuance of its mandate. The appellate court granted the motion on May 3, 2010, and issued its mandate to the Clerk of this Court that same day.

Plaintiffs moved for entry of final judgment on May 14, 2010 [Doc. #76]. In accord with Local Civil Rule 7, the Commission's opposition was due fourteen days later, on May 28, 2010. Two days prior to that deadline, on May 26, 2010, this Court signed the Order plaintiffs had proposed granting their Motion for Entry of Judgment. That order entered final judgment on behalf of plaintiffs and declared that the contribution limits set forth in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) – as well as any Commission regulations that implemented those provisions – could not be constitutionally applied against SpeechNow.org, the individual plaintiffs, and others who wish to contribute to SpeechNow.org. The Court also permanently enjoined the Commission from enforcing against plaintiffs the contribution limits in the Act and any implementing regulations. The Court did not, however, declare that the organizational, administrative, and reporting requirements set forth in 2 U.S.C. §§ 432, 433, 434(a), 431(4), and 431(8) are constitutional as applied to plaintiffs.

¹ The judgment of the Court of Appeals specified that “the contribution limits set forth in certified questions 1, 2, and 3 [2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)] cannot be constitutionally applied against SpeechNow and the individual plaintiffs; and there is no constitutional infirmity in the application of the organizational, administrative, and reporting requirements set forth in certified questions 4 and 5 [2 U.S.C. §§ 432, 433, 434(a), 431(4), and 431(8)].”

² As explained in the Commission's partial opposition (at 3 n.2), SpeechNow.org has remained pending before this Court as a non-section 437h plaintiff, and this Court should separately grant summary judgment to it before entering judgment for all plaintiffs in the required “separate document.” Fed. R. Civ. P. 58(a).

On May 28, 2010, the deadline for oppositions to the plaintiffs' Motion for Entry of Judgment, the Commission filed a Memorandum of Points and Authorities in Partial Opposition to Plaintiffs' Motion for Entry of Judgment. In this partial opposition, the Commission urged the Court to deny plaintiffs' motion to the extent it asked for injunctive relief or for relief specifically involving the Commission's regulations. On June 1, 2010, the Commission received notice via the Court's ECF system that Judge Robertson had granted Plaintiffs' Motion for Entry of Final Judgment. *See* Garr Decl. (attached hereto). The electronic copy of the order received by the Commission through ECF showed that the Court had signed the order on May 26, 2010. The order was date-stamped as received by the Clerk's office on May 27, 2010. The case docket indicates that the order was entered on June 1, 2010.

As of the date of this filing, this case has yet to be reassigned under Local Civil Rule 40.6(b), which provides, *inter alia*, for the reassignment of cases following a judge's retirement. Pursuant to Local Civil Rule 7(m), the Commission has conferred with plaintiffs' counsel who have indicated that they oppose this motion.

ARGUMENT

Among the reasons that a Court can grant a Rule 59(e) motion to alter or amend a judgment is to correct "clear error." *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004). The Court clearly erred by failing to enter judgment for the Commission on the provisions of the Act upheld by the Court of Appeals. The judgment of the Court of Appeals specified that "the contribution limits set forth in certified questions 1, 2, and 3 [2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)] cannot be constitutionally applied against SpeechNow and the individual plaintiffs; *and there is no constitutional infirmity in the application of the organizational, administrative, and reporting requirements set forth in certified questions 4 and 5* [2 U.S.C. §§ 432, 433, 434(a),

431(4), and 431(8)].” (emphasis added). This Court’s judgment made no mention of these provisions. The proposed judgment that the Commission filed with its partial opposition [Doc. #77-1] correctly reflected all the relief ordered by the D.C. Circuit. Accordingly, the Court should amend its judgment to include a declaration that these statutory provisions are constitutional as applied to plaintiffs.

The Court also erred by granting Plaintiffs’ Motion for Entry of Judgment before the Commission could be heard on the issues raised therein. “The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). This Court did not, however, provide the Commission an opportunity to do so. The Court granted Plaintiffs’ motion on May 26, 2010, two days before the Commission’s deadline to respond. Due process therefore requires the Court to consider the reasons given in the Commission’s partial opposition to plaintiffs’ motion (to which the Court is respectfully referred). Plaintiffs are not entitled to injunctive relief or to relief specifically involving the Commission’s regulations.

CONCLUSION

For the foregoing reasons, the Commission respectfully asks this Court to alter or amend its judgment by including a declaration that the organizational, administrative, and reporting requirements provisions of the Act are constitutional as applied to plaintiffs, and to reflect that the plaintiffs are not entitled to injunctive relief or relief specifically involving the Commission’s regulations.

Respectfully submitted,

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June 11, 2010

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SPEECHNOW.ORG, <i>et al.</i> ,)	
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Plaintiffs,)	
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)	DECLARATION
FEDERAL ELECTION COMMISSION,)	
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Defendant.)	
_____)	

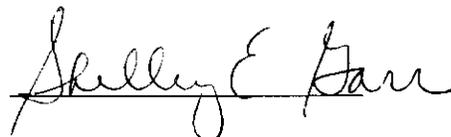
DECLARATION OF SHELLEY E. GARR

1. My name is Shelley E. Garr. I am a resident of the State of Maryland and am over 18 years of age. I am the Special Assistant to the Associate General Counsel for Litigation at the Federal Election Commission. I make this declaration based on my personal knowledge.

2. On June 1, 2010, I received via email a Notice of Electronic Filing message from the Court's CM/ECF system (attached hereto) indicated that the Court had granted the plaintiffs' Motion for Entry of Final Judgment. The Notice specified that the Order was entered on June 1, 2010, and that Judge Robertson had signed it on May 27, 2010. The Order indicated that Judge Robertson had signed it on May 26, 2010, and it was then date-stamped May 27, 2010.

3. The attached Notice of Electronic Filing was the first and only notification I received from the CM/ECF system indicating that the Court entered final judgment in this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Washington, D.C. on the 10th of June, 2010.

A handwritten signature in cursive script that reads "Shelley E. Garr". The signature is written in black ink and is positioned above a horizontal line.

Shelley E. Garr



DCD_ECFNotice@dcd.uscourts.gov

06/01/2010 02:36 PM

To DCD_ECFNotice@dcd.uscourts.gov

cc

bcc

Subject Activity in Case 1:08-cv-00248-JR SPEECHNOW.ORG et al v. FEDERAL ELECTION COMMISSION Order on Motion for Entry of Final Judgment

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

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U.S. District Court

District of Columbia

Notice of Electronic Filing

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Case Name: SPEECHNOW.ORG et al v. FEDERAL ELECTION COMMISSION

Case Number: 1:08-cv-00248-JR

Filer:

Document Number: 78

Docket Text:

ORDER granting [76] Motion for Entry of Final Judgment. Signed by Judge James Robertson on 5/27/10. (cp,)

1:08-cv-00248-JR Notice has been electronically mailed to:

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1:08-cv-00248-JR Notice will be delivered by other means to::

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