

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WISCONSIN RIGHT TO LIFE, INC.,)	
)	
Plaintiff-Appellant,)	No. 04-5292
)	
v.)	
)	MOTION TO DISMISS
FEDERAL ELECTION COMMISSION,)	
999 E Street, N.W.)	
Washington, DC 20463)	
)	
Defendant-Appellee.)	

**FEDERAL ELECTION COMMISSION’S MOTION TO DISMISS
APPEAL FOR LACK OF JURISDICTION**

Wisconsin Right to Life, Inc. (“WRTL”) has appealed to this Court an order entered on August 12, 2004, by a three-judge district court that denied WRTL’s motion for a preliminary injunction. Because that decision could have been appealed to the Supreme Court under 28 U.S.C 1253, this Court has no jurisdiction under 28 U.S.C 1292(a)(1) to hear WRTL’s appeal, so this appeal must be dismissed.

An appeal from the three-judge court’s denial of WRTL’s request for a preliminary injunction is governed by 28 U.S.C 1253. Section 1253 provides that

any party may appeal to the Supreme Court from an order granting or denying ... an interlocutory or permanent injunction in any civil action ... required by any Act of Congress to be heard and determined by a district court of three judges.

Section 403 of the Bipartisan Campaign Reform Act (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81 (2002), required that this case be heard in the first instance by a three-judge district court.¹ Accordingly, 28 U.S.C 1253 explicitly permits a direct appeal to the Supreme Court from the order of the three-judge court denying a preliminary injunction in this case.

This circumstance deprives this Court of jurisdiction over this appeal under the explicit language of 28 U.S.C. 1292(a)(1). That provision states that the courts of appeals shall have jurisdiction of appeals from (emphasis added):

Interlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing or dissolving injunctions ..., except where direct review may be had in the Supreme Court[.]

In other words, because 28 U.S.C 1253 permits WRTL to appeal the district court’s order to the Supreme Court, the “except” clause in 28 U.S.C 1292(a)(1) bars this Court from exercising jurisdiction over this case.

The Supreme Court’s decision in Donovan v. Richland County Ass’n for Retarded Citizens, 454 U.S. 389 (1982), is dispositive. In Donovan, the Court construed 28 U.S.C 1292 in conjunction with another provision — then-existing 28 U.S.C 1252 — that allowed a direct appeal to the Supreme Court. Section 1252 provided:

“Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States ... holding an Act of Congress unconstitutional in any civil action ...”

Donovan, 454 U.S. at 389 n.1 (quoting then 28 U.S.C. 1252; emphasis added). The Court held that the “right to pursue a direct appeal to this Court also served to deprive the Court of Appeals

¹ Section 403(a) provides: “If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision” of BCRA, ... the “action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.”

of jurisdiction, however, for 28 U.S.C § 1292 provides that “[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... except where a direct review may be had in the Supreme Court.”” Donovan, 454 U.S. at 389-90. And the Court found the combined effect of these provisions depriving the court of appeals of jurisdiction to be unambiguous, noting the “appellants’ simple failure in this case to follow the clear commands of 28 U.S.C § 1252 and 28 U.S.C § 1291.” Id. at 390-91. As in Donovan, WRTL’s “right to pursue a direct appeal to [the Supreme] Court” under 28 U.S.C. 1253 also “serve[s] to deprive the Court of Appeals of jurisdiction” under 28 U.S.C. 1292. Id. at 389-90.

WRTL alleges no other basis for this Court’s jurisdiction to review the district court’s order denying a preliminary injunction; indeed, WRTL has not even addressed this Court’s appellate jurisdiction in any of its filings. In its Notice of Appeal WRTL cites 28 U.S.C. 1657, but that provision merely requires expedition of certain actions and does not purport to provide jurisdiction to any court. WRTL also cites BCRA section 403 in its Notice of Appeal, but that section provides that appellate review of a “final decision” is available “only by appeal directly to the Supreme Court of the United States” (BCRA section 403(a)(3)), and that it “shall be the duty of the United States District Court ... and the Supreme Court ... to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal” (BCRA section 403(a)(4)). Section 403 does not say anything about proceedings of any sort in the court of appeals. Thus, the only statute providing appellate jurisdiction of a three-judge court’s denial of a preliminary injunction for failure to establish a likelihood of success on the merits of a constitutional claim is 28 U.S.C. 1253, which grants such jurisdiction only to the Supreme Court.

In sum, WRTL brought a constitutional challenge to BCRA that was required to be heard by a three-judge court. That court denied WRTL’s request for a preliminary injunction based

upon its assessment of the merits of WRTL's constitutional claim, and WRTL therefore had a right under 28 U.S.C 1253 to appeal that decision directly to the Supreme Court. Accordingly, 28 U.S.C 1292 deprives this Court of jurisdiction and this case should be dismissed.

WHEREFORE, the Commission respectfully requests that this Court dismiss this appeal for want of jurisdiction and deny all of WRTL's pending motions as moot.

Respectfully submitted,

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