IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MICHAEL CALLAGHAN,

Plaintiff,

v. **CIVIL ACTION NO. 2:12-cv-03419**

NATALIE E. TENNANT in her official capacity as West Virginia Secretary of State; NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission,

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

A. THE COURT SHOULD NOT GRANT INJUNCTIVE RELIEF WHEN THE PLAINTIFF'S ALLEGED HARM IS CONTINGENT ON EVENTS WHICH MAY NOT OCCUR.

The Plaintiff alleges that the matching funds component of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program will cause injury to his rights under the First Amendment because his campaign contribution will result in a dollar-for-dollar payment toward the campaign of a candidate he opposes. However, in his petition the Plaintiff sets out facts that show this dollar-for-dollar payment has not taken place and may not occur. Due to the events that have since happened in a related state court proceeding, it is likely that the Plaintiff's campaign contribution may not result in any matching payment. Under these circumstances, the harm alleged

by the Plaintiff is merely speculative and the Plaintiff cannot satisfy the first element of proof for injunctive relief.

The first factor in any claim for injunctive relief is the likelihood of irreparable harm to the plaintiff. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies", *Beacon Theaters v. Westover*, 359 U.S. 500, 507, 79 S. Ct. 948, 954 (1959). When the alleged harm is contingent upon events or factors that may not occur or are unlikely, then there is an insufficient factual basis for the exercise of the Court's injunctive power. *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802 (4th Cir. 1991) (Plaintiff must show irreparable harm that is "neither remote nor speculative, but actual and imminent.")[1]

As the Plaintiff himself avers in his complaint, the West Virginia State Election Commission has not ordered the release of any matching funds to Candidate Loughry. ("Complaint for

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[1]Because the Plaintiff seeks to enjoin an anticipated administrative decision of the State Election Commission that may never occur, it is not "ripe" for purposes of issuing a preliminary injunction. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court explained:

> The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy `ripe' for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

The ripeness doctrine applies to anticipated actions of state as well as federal agencies. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Com'n*, 461 U.S. 190 (1983).

Declaratory and Injunctive Relief," CM/ECF Doc. 1, ¶ 34.) In the absence of any order, or imminent order, for the release of these funds, the Plaintiff's contemplated contribution is simply that: a campaign contribution like any other direct contribution to a candidate for office. Because there have been only four members serving on the State Election Commission, this situation regarding the release of matching funds is not likely to change until an additional member is appointed to the Commission by the West Virginia Governor. This, again, suggests that the risk of harm to the Plaintiff is by no means "imminent."

The Plaintiff's motion could, thus, fail under its own statement of facts, but events subsequent to the filing of the complaint may make the alleged harm even less likely. By filing his case for mandamus in the West Virginia Supreme Court of Appeals, Candidate Loughry has attempted to address the release of matching funds directly and conclusively. In seeking this relief, Candidate Loughry's case presents the same free speech issues, involving the same authorities, as the Plaintiff raises in the action before the District Court. The Plaintiff has filed an amicus brief with that Court (Exhibit A hereto) that is substantially identical to legal argument he presents to this Court in his Memorandum in Support of Preliminary Injunction (Doc. 23). The matter was argued before the State's highest court on September 4 and has now been submitted for decision.

Only if the West Virginia Supreme Court orders the release of the funds will Plaintiff be harmed. Until then, the Plaintiff cannot prove that his alleged harm is "actual and imminent," so the District Court cannot grant preliminary relief to the Plaintiff.

Plaintiff largely bypasses the issue of whether he will be "irreparably harmed" in the absence of a preliminary injunction, because Plaintiff inappropriately equates his "likelihood of success on

the merits" with the likelihood of irreparable harm. While, in many First Amendment cases, these two factors may appropriately be merged, this is not such a case.

As justification for ignoring "irreparable harm," Plaintiff relies on *West Virginia Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave,* 553 F.3d 292, 298 (4th Cir. 2009), stating that "irreparable harm" and "likelihood of success on the merits" are "inseparably linked" when the question before the court is whether to temporarily enjoin a law or regulation that precludes the exercise of a First Amendment right. (Plaintiff's Memorandum at 11 - Doc. 23.) That linkage was obvious in the cited case, in which video lottery operators challenged a West Virginia law that imposed severe restrictions on their advertising. In such a case, the question of whether plaintiffs were "harmed" turned on whether the First Amendment guaranteed them the right to engage in the prohibited advertising. In such a case, entry of a preliminary injunction would prevent the harm caused by the plaintiffs' inability to otherwise advertise during the period the injunction was in place.

There is no such "linkage" in this case. There is no State law that prohibits Plaintiff from making a contribution or an independent expenditure. Whether or not an injunction is entered, Plaintiff is free to engage in the conduct protected by the First Amendment.

But what about the "burden" of which Plaintiff complains – the risk that such a contribution or expenditure would generate matching funds for Mr. Loughry's campaign? Under the facts of this case at this time, this "burden" is not only speculative, but would not be eliminated by entry of a preliminary injunction. At present, the SEC has not distributed matching funds, and may never do

so (depending on the outcome of the pending State case). Consequently, there is no "imminent" threat of matching funds being distributed in the absence of a preliminary injunction.[2]

Even if such an injunction were entered, it would not eliminate the risk of which Plaintiff complains. Nowhere in his pleadings, affidavit or otherwise does Mr. Callaghan indicate that he would make contributions or third-party expenditures if this Court entered a preliminary injunction. (*See* Affidavit of Michael Callaghan - Doc. 23-2, in which he alleges that he will not contribute or make third-party expenditures "because of the existence of [matching funds].") If he did, those contributions or expenditures could, even with an injunction in place, generate matching funds for distribution if the injunction is subsequently dissolved. Thus, such an injunction will not eliminate the "burden" imposed by the risk of matching funds, but only marginally change the risk of which Plaintiff complains. If a preliminary injunction would change his mind as to whether to make such contributions or expenditures, why doesn't his affidavit say so?

The oft-quoted elements or standards for a grant of a preliminary injunction comprise four elements and the Defendants are mindful that all four elements should be weighed together by a court when ruling upon a motion for a preliminary injunction. However, since the Plaintiff cannot make the requisite showing that the irreparable harm is likely, the Court's consideration of the other elements would be pointless. Based upon the decision in the case of *Winter v. Natural Resources*

[2]There is an interesting irony that illustrates the absence of "linkage" between "likelihood of success" and "irreparable harm:" In the absence of a preliminary injunction, whether matching funds will be distributed will depend upon the decision of the West Virginia Supreme Court of Appeals, which must and will decide the same First Amendment issue presented here. Only if that Court determines that Plaintiff's First Amendment argument lacks merit would a preliminary injunction be necessary to enjoin the distribution of matching funds. In such a case, the State's highest court will have determined that Plaintiff's "likelihood of success" is nil.

Defense Council, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 375 (2008), a preliminary injunction will not be issued simply to prevent the *possibility* of some future injury.

> Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction. * * * Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. 555 U.S. at 22, 129 S.Ct. at 375 (citations omitted).

For this reason, the Defendants need not argue, and the District Court need not consider, the weight to be given to the other elements for issuance of an injunction.[3] In the absence of actual harm, the Plaintiff is not entitled to any relief.

B. THE EXTRAORDINARY CIRCUMSTANCES OF THIS CASE AND THE PARALLEL ACTION IN THE STATE COURT SUPPORT AND JUSTIFY THE COURT'S ABSTENTION UNDER THE *COLORADO RIVER* DOCTRINE.

In circumstances where there are parallel proceedings involving the same principal issues in both a federal court and a state court, the general rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction. However, there are principles "unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation Dist.*

[3] For consideration of arguments upon the other elements for injunctive relief, the Defendants commend the Court to the memorandum of Allen Loughry, Intervenor, filed in response to the "Plaintiff's Motion for a Preliminary Injunction."

v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 1246 (1976), citing *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S. Ct. 219 (1952).

The decision in the *Colorado River* case gave rise to a doctrine that is sometimes known as "*Colorado River* Abstention" or the "Extraordinary Circumstances Doctrine." The United States Supreme Court recognized that there may be extraordinary circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration. In the *Colorado River* decision, the Court mentioned several factors that may be considered in weighing whether concurrent federal proceedings should go forward. These factors included which court first assumed jurisdiction over the property subject to the litigation, the inconvenience of the federal forum, the desire to avoid piecemeal litigation, and the order in which jurisdiction was first obtained in each court. In the words of the Court, "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id*., 424 U.S. at 247, 96 S. Ct. at 1247.

Subsequent decisions in lower courts have fashioned these considerations into a series of elements for decision under this doctrine, but the Supreme Court only referenced these as examples of factors that may be considered. In a later opinion the Supreme Court provided this guidance:

> 'We declined to prescribe a hard and fast rule for dismissals of this type, but instead described some of the factors relevant to the decision. * * * [T]he decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case.' *Moses H. Cone Memorial Hosp. v. Mercury*

> *Const. Corp.*, 460 U.S. 1, 15, 103 S.Ct. 927, 937 (1983), (quotation omitted).

In the *Moses H. Cone* opinion, the Supreme Court even raised other factors for consideration in the relinquishment of federal court jurisdiction: whether state or federal law provides the law of decision upon the issue and whether the state court proceeding would adequately protect the litigants' rights.

Looking at all the circumstances of the state and federal actions in this matter, three of the Supreme Court's considerations have little bearing, but the other three considerations support the abstention of the District Court. The considerations of convenience of the state or federal forum, the risk of piecemeal litigation, and the nature of the 'property' over which the courts may exercise jurisdiction are not significant to the determination of the issues in this matter. Attention must be given, though, to considerations of the timing and extent of proceedings in each forum, the source of law to be applied, and the adequacy of the state proceeding to protect the interests of the litigants. With each of these considerations, the circumstances weigh strongly in favor of deference to the state court proceeding and abstention of the District Court's exercise of its authority.

The complaint in this action was filed on July 18, 2012, twelve days prior to the initiation of the mandamus action in the West Virginia Supreme Court of Appeals. The Plaintiff in this case did not take any other steps to advance his case, though, until five weeks later when the Motion for Preliminary Injunction was finally submitted to the District Court. In the meantime, the state court issued a scheduling order, a rule to show cause was issued, initial briefs were submitted by some counsel in the case and Plaintiff Callaghan moved to intervene in the state court action. All participants in the state court – including Plaintiff Callaghan as an amicus – have since submitted briefs in support of their positions and oral arguments have been presented in the state court. Thus, although the federal court jurisdiction was invoked first, all significant action and progress has

occurred in the state court. These circumstances are similar to those in the *Colorado River* case, in which the Supreme Court noted "the apparent absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss," *Colorado River*, 424 U.S., at 820, 96 S. Ct., at 1248. "[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions," *Moses H. Cone*, 460 U.S. at 21, 103 S. Ct. at 940. In the present case, substantial progress has occurred in the state proceeding and a decision of that court is now pending. There is a significant chance that the state court could issue a decision soon that would the Plaintiff's claim moot. Such circumstances are at the heart of the *Colorado River* opinion's "regard to conservation of judicial resources and comprehensive disposition of litigation."

The next consideration is the source of the relevant law that will govern the decision. At first blush, the issue raised by the Plaintiff appears to be a constitutional question for which District Court jurisdiction is appropriate and warranted. However, the steps in analysis of that question involve determinations of the intent and policy of the state legislature. These are matters in which the state court is more ideally suited. If we assume that the Plaintiff's First Amendment rights are, as alleged, adversely impacted by the state statutes implementing the campaign finance pilot program, then the next step in the analysis is to determine whether the state law is supported by a substantial and legitimate public policy or, as Plaintiff argues, a "compelling state interest." It becomes necessary for the appropriate court to ascertain the intent and policy of the State's legislature in enacting the provisions of the state Code. Such is the appropriate domain of the West Virginia Supreme Court. *See e.g.*, *Preston v. Leake*, 660 F. 3d 726 (4th Cir. 2011) (In construing a state statute for an overbreadth challenge within the First Amendment context, the courts "give

deference to the State's interpretation of the statute.") *citing United States v. Stevens*, —— U.S. ——, 130 S. Ct. 1577, 1593–94, 176 L. Ed. 2d 435 (2010).

Another critical factor for determining whether the District Court should proceed is whether the state court proceeding is adequate to protect the interests of the litigants in the District Court action. The answer is that the state court proceeding is more than adequate here. The issue raised within the Plaintiff's complaint has been squarely presented to the West Virginia Supreme Court of Appeals and is central to the determination of that case. The Supreme Court of Appeals cannot enter an opinion without addressing the constitutional question at the heart of the Plaintiff's claim in the District Court. In order to determine whether the State Elections Commission has a legal duty to release the matching funds, the West Virginia Supreme Court must first determine whether the campaign finance pilot program provisions impermissibly impact on First Amendment freedoms. A decision on the First Amendment question, in consideration of the state legislature's policy and intent, will therefore be determinative of the Plaintiff's issue.

The Plaintiff may claim that his role as an amicus curiae in the state court puts him in a diminished position as opposed to that of a party in the District Court. This argument would be a matter of misdirection because the question is not the litigant's role in the proceeding, but whether the proceeding is adequate to protect his interests. The Plaintiff has been permitted to raise his specific issue in the West Virginia court and to submit an amicus brief in argument of the state law's particular impact upon him. In addition to this, the West Virginia Attorney General has intervened in the state court proceeding to argue in support of the position set forth in Opinion cited by the Plaintiff in his federal complaint. ("Complaint," CM/ECF Doc. #1, ¶27 and Exhibit A.) Not only has the Plaintiff been able to bring his issue and circumstances to the attention of the state court, he

has also the additional benefit of a public official arguing the same position in the proceeding. In the end, any claim by Plaintiff that the State forum is inadequate is predicated upon an unspoken assumption that the West Virginia Supreme Court of Appeals will ignore the United States Constitution and, consequently, incorrectly decide the matter there pending.

C. CONCLUSION.

The Plaintiff is not able to satisfy the crucial element of proof for the award of a preliminary injunction – irreparable harm. Because the issues raised by the Plaintiff have been advanced in a parallel state court proceeding, in which a decision is now pending and that decision requires the determination of the policy and intent of the West Virginia Legislature, the District Court should abstain from the exercise of its jurisdiction to grant any preliminary relief before the state court renders its decision.

WHEREFORE, Defendants pray that the motion for preliminary injunction be denied.

Respectfully submitted,

NATALIE E. TENNANT in her official capacity as West Virginia Secretary of State; NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission,

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2012, I electronically filed the foregoing "Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction" together with Exhibit A with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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