UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HIP-HOP SUMMIT ACTION NETWORK, HIP-HOP RESEARCH AND EDUCATION FUND, RUSSELL SIMMONS, and BENJAMIN CHAVIS, Plaintiffs, -v- THE NEW YORK TEMPORARY STATE COMMISSION ON LOBBYING, STEWART WAGNER, Chair of the New York Temporary State Commission on Lobbying, and DAVID GRANDEAU, Executive Director of the New York Temporary State Commission on Lobbying, Defendants.	03 Civ. 5553 (LAP) MEMORANDUM AND ORDER

LORETTA A. PRESKA, United States District Judge:

Hip-Hop Summit Action Network, Hip-Hop Research and Education Fund, Russell Simmons, co-founder and Chairman of the Hip-Hop Summit Action Network, and Dr. Benjamin Chavis, co-founder and CEO and President of Hip-Hop Summit Action Network (collectively "Plaintiffs"), bring this action against The New York Temporary State Commission on Lobbying ("Commission"), Stewart C. Wagner, as Chair of the New York Temporary State Commission on Lobbying, and David Grandeau, as Executive Director of the New York Temporary State Commission on Lobbying (collectively "Defendants"), seeking a declaration pursuant to 28 U.S.C. § 2200 et seq. that Defendants' actions are

unconstitutional and seeking preliminary and permanent injunctive relief pursuant to 28 U.S.C. § 2202 and 42 U.S.C. § 1983. Plaintiffs contend that defendants have violated their rights guaranteed under the First, Fifth and Fourteenth Amendments to the U.S. Constitution. (Complaint ("Compl.") ¶ 3). Specifically, Plaintiffs allege that the Commission's investigation of Plaintiffs' activities and threat of subpoenas, civil fines, additional investigations and the prospect of being required to register as lobbyists penalize Plaintiffs for exercising their First Amendment rights and have a chilling effect on their exercise of those rights. Additionally, Plaintiffs allege that the Commission concluded that Plaintiffs were engaged in lobbying before Plaintiffs even learned of the investigation and thereby violated their right to due process of law as guaranteed by the Fifth and Fourteenth Amendments. Defendants contend, inter alia, that this action should be dismissed by application of the doctrine of abstention set forth in Younger v. Harris, 401 U.S. 37 (1971). As set out below, the principles of federalism set out in Younger mandate that I abstain from deciding the questions presented in this action.

BACKGROUND

In July 2001, Mr. Simmons and Dr. Chavis founded the Hip-Hop Summit Action Network, "a non-partisan organization dedicated to harnessing the cultural relevance of hip-hop music

to serve as a catalyst for education advocacy and other societal concerns fundamental to the well-being of at-risk youth throughout the United States." (Compl. ¶ 14). In the fall of 2001, Mr. Simmons and Dr. Chavis founded the Hip-Hop Research and Education fund, "a non-profit organization that conducts research and engages in public education efforts to raise public awareness on issues that are important to the hip-hop community," (Compl. ¶ 14), and in May 2003, began speaking out on the unfairness of the Rockefeller Drug Laws. (Compl. ¶ 22). In early May 2003, Mr. Simmons and Dr. Chavis, working through the Hip-Hop Summit Action Network and the Hip-Hop Research and Education Fund, joined with others to launch the "Countdown for Fairness" campaign aimed at heightening public awareness of the Rockefeller Drug Laws. Those activities culminated with a rally in front of City Hall in Manhattan on June 4, 2003 (the "June 4 Rally"). (Compl. ¶ 23). A variety of organizations and activists joined together on this campaign which was loosely called the Coalition for Fairness. (Compl. ¶ 23).

In mid-June 2003, reports began appearing in the press that the Commission was investigating the activities of Mr. Simmons and Dr. Chavis. (Compl. ¶ 33). Plaintiffs allege that Mr. Grandeau "leaked" these initial stories to the press and had already concluded that Plaintiffs engaged in lobbying, which would subject Plaintiffs to substantial penalties. (Compl. ¶ 33-

34). On June 25, 2003, Mr. Grandeau sent Dr. Chavis a letter demanding copies of "all documents related to the Hip-Hop Summit Action Network's 2002 and 2003 lobbying activity" and asking Dr. Chavis and Mr. Simmons to appear at his office in Albany to give sworn testimony on June 22 and 23, respectively. (Compl. ¶ 35). On July 15, 2003, after correspondence between Plaintiffs (or their representatives) and the Commission, Plaintiffs filed with the Commission a registration statement and related reports on behalf of the Coalition for Fairness. (Compl. ¶ 36). On July 17, 2003, Plaintiffs delivered a letter to the Commission stating that they would provide documentation to support the filings on the condition that they would not testify. (Pls' Reply at 14).[1] On July 23, 2003, the Commission served two subpoenas for Dr. Chavis, one addressed to him at the Hip-Hop Summit Action Network and the second addressed to him at the Hip-Hop Research and Education Fund. Those subpoenas required him to give sworn testimony on August 13, 2003 and to produce a broad range of documents related to the June 4 Rally. (Compl. ¶ 40). On July 28, 2003, Plaintiffs filed the instant suit.

DISCUSSION

Before reaching the merits of this action, it must be determined whether abstention is required under Younger v.

[1]Reference is to Plaintiffs' Reply Memorandum of Law in Further Support of Their Motion for a Preliminary Injunction dated October 14, 2003.

Harris. The Court of Appeals in Diamond "D" Construction Corp. v. McGowan, 282 F.3d 191 (2d Cir. 2002), explained that Younger abstention "generally requires federal courts to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." Id. at 198 (citing Younger, 401 U.S. at 43-44). Although originally applied in the context of state criminal proceedings, Younger abstention "applies with equal force to state administrative proceedings." Id. (citing Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 (1986)).

The purpose of this doctrine lies in "Our Federalism":

> [A] system in which is there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, 401 U.S. at 44. Younger abstention "rests foursquare on the notion that, in the ordinary course, a state proceeding provides an adequate forum for the vindication of federal constitutional rights." Diamond "D", 282 F.3d at 198 (internal quotations and citations omitted). As Judge McLaughlin explained for the Court in Diamond "D":

> Younger is grounded in concern for comity toward our co-equal sovereigns. This comity and the deference to states it often requires is the cornerstone of our federal system. We give states the first opportunity--but not the only, or last--to correct those errors of a federal constitutional dimension that infect its

> proceedings. We give states this opportunity to correct their own mistakes because such deference reaffirms the competence of the state courts, and thereby enhances the dignity of the state sovereign.

Id. at 199-200 (citations omitted).

The Court of Appeals has instructed that Younger abstention is required when three factors are present: "(1) there is an ongoing state proceeding; (2) an important state interest in implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims." Diamond "D", 282 F.3d at 198 (citing Grieve v. Tamerin, 269 F.3d 149, 152 (2d Cir. 2001). However, an exception exists "upon a showing of 'bad faith, harassment or any other unusual circumstances that would call for equitable relief,'" which plaintiff bears the burden of establishing. Id. (quoting Younger, 401 U.S. at 54).

The first two prongs of the three-part test are clearly satisfied here by the Commission's ongoing proceeding and the State's substantial public interests in enforcing the lobbying disclosure laws. Indeed, Plaintiffs do not challenge the presence of these two factors.

With respect to the third prong, Plaintiffs contend that there is no adequate state forum in which to raise their constitutional challenges in a way that would prevent the alleged irreparable injury now facing the Plaintiffs, that is, the

investigation itself. (Pls' Reply at 19). Plaintiffs allege that their constitutional claims cannot be aired before the Commission. Plaintiffs further claim that they cannot adequately raise their constitutional challenges in an Article 78 proceeding and they dispute Defendants' contention that Plaintiffs may seek a writ of prohibition through an Article 78 proceeding to enjoin the investigation.

New York Civil Practice Law and Rules Article 78 authorizes a civil judicial proceeding to raise "whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction." N.Y. C.P.L.R. § 7803(2). Such a proceeding, in the nature prohibition, "is available only where there is a clear legal right and only when the body or officer acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction." McGinley v. Hynes, 51 N.Y.2d 116, 122 (N.Y. 1980). The New York Court of Appeals has emphasized that prohibition is "the means to prevent an arrogation of power in violation of a person's rights, particularly constitutional rights." Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597 (N.Y. 1980). However, the remedy of prohibition is available "to prevent or control judicial or quasi-judicial action only, as distinguished from legislative, executive or

ministerial action." McGinley 51 N.Y.2d at 123 (citations omitted). The merits of the claim are immaterial to the basic determination of the availability of a proceeding in the nature of prohibition. Nicholson, 50 N.Y.2d at 606.

In Nicholson, petitioners sought a writ of prohibition against the investigation of alleged improprieties in a judicial campaign by the New York Commission on Judicial Conduct. It was undisputed that the Commission on Judicial Conduct was vested with the authority to investigate such improprieties. Yet, the petitioner's claim was "that the investigation into allegedly improper campaign activities has a chilling effect on the exercise of First Amendment rights." Id. The Court held that "[i]f indeed the investigation impermissibly chills the exercise of these rights, the commission would be acting in excess of power and prohibition would be the appropriate remedy." Id. at 606-07. Further, "[t]hat the issues could be raised on appeal from any disciplinary action taken is not a persuasive reason in this instance for denying the availability of the remedy." Id. at 607.

The same situation is presented here. It cannot be disputed that the Commission is charged to "administer and enforce all the provisions of [the Lobbying Act]," N.Y. Legis. Law § 1-d(c)(1), and has a "duty" to "conduct any investigation necessary to carrying out the provisions of [the Lobbying Act]."

§ 1-d(c)(1) & (2). Indeed, Plaintiffs "recognize the importance of requiring the disclosure of the activities of lobbyists and their use of funds, and do not challenge the Commission's right to regulate lobbying." (Compl. ¶ 2). However, Plaintiffs have alleged that the Commission made an "erroneous determination that Plaintiffs qualified as lobbyists subject to the regulatory requirements of the New York Lobbying Act." (Compl. ¶ 45). As a result, Plaintiffs contend, inter alia, that the Commission has "infringed and threatened to continue infringing Plaintiffs' constitutional right to organize . . . under the guise of enforcing the New York lobbying laws." (Pls' Mem. in Support at 1).[2] Plaintiffs allege that the Commission has "opened a sweeping investigation into Plaintiffs' activities," including making accusations in the press and issuing subpoenas for sworn testimony and documents, all of which "run[] roughshod over Plaintiffs' constitutional rights and ha[ve] had - and will continue to have - a chilling effect on Plaintiffs' exercise of their First Amendment rights." (Pls' Mem. in Support at 1). Here, as in Nicholson, because Plaintiffs have demonstrated, without contradiction (Compl. ¶ 41; Chavis Decl. ¶ 72),[3] that

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[2]Reference is to Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and a Preliminary Injunction dated July 28, 2003.

[3]Reference is to the Declaration of Dr. Benjamin Chavis in Support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction dated July 25, 2003.

"the investigation impermissibly chills the exercise of [their First Amendment] rights, the commission would be acting in excess of power and prohibition would be the appropriate remedy." Nicholson, 50 N.Y.2d at 606-07.[4]

Despite this clear holding in Nicholson, Plaintiffs contend that an Article 78 proceeding in the nature of prohibition is unavailable to them because the Commission's proceeding is still in its investigatory phase and therefore does not qualify as judicial or quasi-judicial action. (Pls' 10/29/03 ltr).[5] In support, Plaintiffs cite McGinley, which held that the actions of a public prosecutor that were "limited to investigating the circumstances surrounding [petitioner's] financial transactions and gathering testimony for the purposes of ascertaining whether a crime has been committed. . . related only to his 'executive' functions and are in no way connected with the 'quasi-judicial' functions he may perform in other contexts." Id. at 126.

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[4] Also as in Nicholson, the availability of a right to appeal or otherwise review any action that might eventually be taken by the Commission would be insufficient to alleviate the harm alleged by Plaintiffs. Similarly, simply moving to quash the subpoenas issued by the Commission might not be sufficient in that the remedy of suspension of the entire investigation might not be available.

[5] Reference is to the letter dated October 29, 2003 from Stephen P. Younger to the Court.

As of October 29, 2003, materials in the record here indicated that the Commission's investigation was still in its investigative stage. The Commission had issued official inquiry notices and subpoenas, and no formal charge had been made. As of November 21, 2003, however, it appears that the Commission's agenda for its December 3, 2003 meeting includes consideration of Civil Penalty Referrals with respect to the Coalition for Fairness for false filing and with respect to the Hip-Hop Summit Action Network and the Hip-Hop Education and Research Fund for failure to file. (Pls's 11/21/03 ltr).[6] Thus, the Commission's investigatory phase seems to be at an end.

The Court in McGinley recognized the difficulty in defining the scope of quasi-judicial activity:

> There can be no bright, clear line separating the investigative activities of a public prosecutor from his 'quasi-judicial' activities. Each case must be considered individually in accordance with its peculiar facts and without regard to mechanistic verbal formulations that serve no purpose other than to becloud the issues and confound reasoned analysis.

Id. at 124. While one might debate how far the investigation by the Commission has proceeded here, Plaintiffs' contention has always been that their First Amendment rights were violated by the very commencement of the investigation and will continue to be violated if the investigation is permitted to proceed. As

[6]Reference is to the letter dated November 21, 2003 from Stephen P. Younger to the Court.

noted above, they assert without contradiction that merely permitting the investigation to continue will have a "chilling effect" on their First Amendment rights of speech and association. (Compl. ¶ 41; Chavis Decl. ¶ 72). This immediate and ongoing injury demonstrated by Plaintiffs distinguishes the facts here from those in McGinley. Indeed, the Court in McGinley specifically noted that "the traditional remedy of a motion to quash provides adequate protection to those who feel themselves aggrieved by the conduct of a public prosecutor who pursues an investigation in excess of his legitimate authority." Id. 126 n.3. Thus, petitioner McGinley could obtain the full relief she was seeking in a traditional motion to quash and had asserted no constitutional claim or deprivation of rights by the investigation itself. Because Plaintiffs' claim here is that the commencement and continuation of the investigation impermissibly chills the exercise of their First Amendment rights and neither review on appeal nor a motion to quash the subpoenas will effectuate full relief, a proceeding in the nature of prohibition is available to Plaintiffs. Nicholson, 50 N.Y.2d at 606-07. Thus, Plaintiffs can obtain in the State court all the relief they seek here.

Plaintiffs also allege that they do not have an adequate opportunity to raise their claims in the administrative proceeding because Defendants have prejudged the case by making

an "erroneous determination that Plaintiffs qualified as 'lobbyists' subject to the regulatory requirements of the New York Lobbying Act." (Compl. ¶ 45; Pls.' Reply at 19). Plaintiffs cite numerous statements by Mr. Grandeau in support of this contention. See, e.g., Pl's Reply at 18. However, because I find Plaintiffs are free immediately to file an Article 78 proceeding in the nature of prohibition to obtain the relief they seek before this Court, the contention that the Commission has prejudged their case is not relevant. Accordingly, the third-prong of the test for Younger abstention is satisfied.

Even where the Younger test is satisfied, an exception exists upon a showing of "bad faith, harassment or any other unusual circumstance that would call for equitable relief." Younger, 401 U.S. at 54. The Supreme Court has held that "extraordinary circumstances" constitute those that would "render the state court incapable of fairly and fully adjudicating the federal issues before it." Kugler v. Helfant, 421 U.S. 117, 124 (1975). The plaintiff "bears the burden of establishing that one of the exceptions applies." Younger, 401 U.S. at 54. To the extent that Plaintiffs' contention that Mr. Grandeau, and thus the Commission, have prejudged the case can be construed as a contention that the "bad faith, harassment or any other exceptional circumstances" exception applies, that contention is rejected for the reasons stated above, viz., that Plaintiffs can

obtain full relief in the state court and there has been no showing that the state court is "incapable of fairly and fully adjudicating the federal issues before it." Kugler, 421 U.S. at 124. Indeed, in Diamond "D", the Court of Appeals held that the where "expeditious" state remedies are available to plaintiffs, "'a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.'" Id. at 202 (quoting Pennzoil v. Texaco, 481 U.S. 1, 15 (1987)).

For the reasons stated above, abstention is mandatory, Diamond "D", 282 F.3d at 202, and I may not address the merits of this case. While I recognize the importance to many participants in political debate, including non-profit organizations, of knowing where the line is between merely being heard publicly on issues that are vital to their missions and actually triggering an obligation to register as a lobbyist under New York law, just as there is no such thing as "interesting question jurisdiction," Michael v. INS, 48 F.3d 657, 674 (2d Cir. 1995) (Jacobs, J., dissenting), there is no "important case" exception to abstention. Thus, the overriding principles of "Our Federalism" mandate abstention, and therefore the line between public advocacy and lobbying must be drawn by the State court.

CONCLUSION

For the reasons set out above, abstention is mandated pursuant to Younger v. Harris, 401 U.S. 37 (1971), and the action is dismissed.

SO ORDERED

November ___, 2003

LORETTA A. PRESKA, U.S.D.J.