IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendant.

No. 1:22-cv-639
Hon. Douglas R. Cole

SUPPLEMENTAL REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO CERTIFY QUESTION TO THE EN BANC COURT OF APPEALS

INTRODUCTION

Plaintiffs have asked this Court to certify a single question to the *en banc* Sixth Circuit under 52 U.S.C. § 30110: Whether the limits on coordinated party expenditures in 52 U.S.C. § 30116 violate the First Amendment, either on their face or as applied to party spending in connection with "party coordinated communications" as defined in 11 C.F.R. § 109.37. Plaintiffs' Mot. To Certify Question To The En Banc Court Of Appeals 1 (Cert. Mot.) (Doc. 20, PageID#215). The FEC does not oppose certification. Indeed, it acknowledges "this Court's mandate to expedite constitutional review of federal campaign finance law" here. Partial Opp. To Mot. To Certify Question To The En Banc Court Of Appeals 2 (Partial Opp.) (Doc. 45, PageID##5285). The FEC nevertheless offers three quibbles about the question's wording. None of its arguments holds water.

First, this Court need not decide whether former Representative Chabot has standing. The FEC concedes that "three of the plaintiffs here have constitutional standing," rendering Chabot's status under Article III entirely academic. Partial Opp. 19 (Doc. 45, PageID#5302).

Second, there is no need to lop off the final 19 words in the question presented. Plaintiffs' facial and as-applied challenges are both aimed at the Federal Election Campaign Act (FECA), not an FEC regulation. The reference to 11 C.F.R. § 109.37's definition of "party coordinated communications" is merely shorthand for a subset of conduct prohibited by FECA.

Third, no matter how the question presented is phrased, no Sixth Circuit ruling will implicate the comity concerns conjured up by the FEC. The FEC's real beef is not with the precedential effect of a Sixth Circuit ruling, but with the scope of a potential future injunction. But those concerns are premature, and the phrasing of the certified question will not affect the scope of any remedy. This Court should therefore "immediately … certify" the question presented by Plaintiffs, especially given that the 2024 election is less than a year away. 52 U.S.C. § 30110.

ARGUMENT

I. FORMER REPRESENTATIVE CHABOT'S STATUS UNDER ARTICLE III IS IRRELEVANT.

"[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," and thus eliminates the need to "determine whether the other plaintiffs have standing." *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006). Courts at all levels of the Judiciary therefore regularly decline to decide whether a particular party has standing where other parties satisfy Article III. *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 826 n.1 (2002) (agreeing with the district that there was no need to "address whether [another plaintiff] also has standing"); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016). The same goes for mootness. *See., e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 712 n.1 (2005). These principles apply with full force to questions certified under 52 U.S.C. § 30110. *See Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 187 n.6 (1981) (ruling that because "[t]he individual appellants in this case … have a sufficiently concrete stake in this controversy to establish standing to raise the constitutional claims," there was no need to "address the question whether" other parties may "raise constitutional claims" as well).

The FEC correctly concedes that "three of the plaintiffs here"—namely, NRSC, NRCC, and Senator Vance—"have constitutional standing to challenge the statute at issue." Partial Opp. 19 (Doc. 45, PageID#5302). That is enough for purposes of § 30110 certification. If the FEC wishes to move to dismiss the claims of former Representative Chabot once the appellate process has concluded, it remains free to do so. *See Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1029 (6th Cir. 2022). In the meantime, the fact that he did not win reelection and does not plan to seek office in the future only confirms that FECA's coordinated party expenditure limits chill core political activity.

II. PLAINTIFFS CHALLENGE FECA, NOT THE FEC'S REGULATION.

The FEC next asks the Court to rewrite the question presented to eliminate any reference to whether FECA's coordinated party expenditure limits are unconstitutional "as applied to party spending in connection with 'party coordinated communications' as defined in 11 C.F.R. § 109.37." Cert. Mot. 1 (Doc. 20, PageID#215); *see* Partial Opp. 14-20 (Doc. 45, PageID##5297-5303). According to the FEC, this as-applied challenge should not be certified because it targets a "regulation" rather than "FECA itself." *Id.* at 20 (Doc. 45, PageID#5303).

Nonsense. The speech defined as "party coordinated communications" in 11 C.F.R. § 109.37 is merely a *subset* of the speech FECA itself prohibits. *Compare* 52 U.S.C. § 30116 *with* 11 C.F.R. § 109.37. And it is that *statutory* restriction that Plaintiffs target in their as-applied challenge here. Plaintiffs have referred to the regulation only as shorthand for the applications of FECA at issue, not as a freestanding challenge seeking relief only from an FEC regulation.

That makes sense. As even the FEC recognizes, if the regulation were set aside, Plaintiffs would still be subject to the exact same restrictions under FECA itself. *See* Partial Opp. 19 & n.3 (Doc. 45, PageID#5302 & n.3) (contending that a challenge to the regulation alone would leave Plaintiffs' injuries unredressed). That was exactly the scenario in *FEC v. Cruz*: there, the Supreme Court held that the plaintiff had properly challenged a campaign-finance statute rather than an implementing regulation because his injury was "traceable to the operation of [the statute] itself." *FEC v. Cruz*, 596 U.S. 289, 301 (2022).

The FEC attempts to limit *Cruz*, but is simply wrong that *Cruz* addressed "only whether the plaintiff had standing." Partial Opp. 19 (Doc. 45, PageID#5302). In *Cruz*, the district court's "subject-matter jurisdiction" was, as in this case, "limited to actions challenging the enforcement of the statute" under a judicial-review provision similar to § 30110. 596 U.S. at 300; *compare* 52 U.S.C. § 30110 (procedure for "actions … to construe the constitutionality of any provision of

[FECA]"), *with* Bipartisan Campaign Reform Act of 2002 § 403(a), 116 Stat. 113 (procedure for "action[s] … to challenge the constitutionality of any provision of [BCRA]"). The Supreme Court held not only that the plaintiff had standing to challenge the statute; it further held that because the plaintiff was challenging a "statutory provision that, through the agency's regulation, is being enforced," "jurisdiction was proper in the three-judge District Court" under the judicial-review provision. *Cruz*, 596 U.S. at 302.

Here as well, Plaintiffs seek relief from § 30116(d), not from any FEC regulation. Complaint 26-27 (Doc. 1, PageID##26-27). And until now, that has always been the understanding of the parties and the Court. The Complaint made clear that "the application of limits on coordinated party expenditures, *including those under 52 U.S.C. § 30116(d)*, to party coordinated communications violates the First Amendment[]." *Id.* at 26 (Doc. 1, PageID#26) (emphasis added). Thus, this Court recognized early on that "Plaintiffs seek to enjoin the FEC from enforcing a provision of the Federal Election Campaign Act ('FECA')." Op. 1 (Doc. 18, PageID#151). And before its latest missive, even the FEC acknowledged that Plaintiffs "have challenged the constitutionality of the provisions on their face, and in the alternative as applied to a subset of expenditures known as party coordinated communications, as defined in an FEC regulation, 11 C.F.R. § 109.37." FEC's Opp. To Mot. To Certify Question To The En Banc Court Of Appeals 3 (Doc. 26, PageID#306) (emphasis added). Plaintiffs could not have put it better themselves.

While the FEC cites three cases in an attempt to muddy the waters, Partial Opp. 15-18 (Doc. 45, PageID##5209-5301), none cuts against certification here. Two involved challenges in which "the alleged constitutional infirmities [were] found in the implementing regulations rather than the statute itself." *McConnell v. FEC*, 540 U.S. 93, 223 (2003); *see Holmes v. FEC*, 823 F.3d 69, 75 (D.C. Cir. 2016) (explaining that the challenged asymmetry in contribution limits was "a function

of the regulations, not the Act"); *compare Cruz*, 596 U.S. at 301. And the third was one where "the plaintiffs specifically state[d] in their complaint that they [we]re challenging not only the constitutionality of [a statute] but also of its implementing regulation," and the regulation added to the statute by "prohibit[ing] specific types of election-related activities" by certain entities. *Bluman v. FEC*, 766 F. Supp. 2d 1, 4 (D.D.C. 2011). Here, by contrast, the statute itself imposes the restriction, and Plaintiffs refer to the regulation only as a convenient shorthand for the subset of FECA's restrictions that is the focus of their as-applied challenge. Merely alluding to FEC regulations and the confusion and harms they impose in attempting to implement FECA cannot defeat certification. *See, e.g.*, *In re Cao*, 619 F.3d 410, 418 (5th Cir. 2010) (en banc) (observing that "FECA must be read in light of the FEC regulations that implement the statute"); *Speechnow.org v. FEC*, No. 08-cv-0248, 2009 WL 3101036, at *8 (D.D.C. Sept. 28, 2009) (certifying question and finding that "[g]roups 'other than political committees' that make independent expenditures must report their activities pursuant to [specific] FEC regulations"); *Speechnow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc) (holding challenged statutory provision unconstitutional as applied); *see also Cruz*, 596 U.S. at 301.

III. THE COURT SHOULD NOT TRY TO LIMIT THE SIXTH CIRCUIT'S REVIEW.

Finally, the FEC asks this Court to "narrow" Plaintiffs' proposed question "to address only Sixth Circuit law to permit other circuits to weigh in on this important constitutional question." Partial Opp. 20 (Doc. 45, PageID#5303). That is a rather head-scratching request. No matter how the question is phrased, the Sixth Circuit can announce binding precedent only for courts within its jurisdiction. Accordingly, no Sixth Circuit decision could forbid "other circuits to weigh in on th[e] important constitutional question" here—so neither "comity" nor any other consideration warrants the FEC's rewrite of Plaintiffs' question presented. *Id.* (Doc. 45, PageID#5303).

Moreover, even if the Sixth Circuit were to break from another circuit, that would not be an affront to judicial "comity." *Id.* at 2 (Doc. 45, PageID#5285). As even the FEC admits (in the same breath), circuit splits are commonplace and valuable. *See id.* ("Supreme Court jurisprudence heavily favor[s] the development of thorny constitutional questions by numerous jurisdictions"). It is thus unsurprising that the FEC cannot identify a single case narrowing a § 30110 certification in the way it proposes. In fact, even the certified question in *In re Cao*—the Fifth Circuit decision allegedly animating the FEC's "comity" concern, *id.* at 21-24 (Doc. 45, PageID#5304-5307)—did not include such a narrowing clause, *In re Cao*, 619 F.3d at 424.[1]

It appears that the FEC's real concern is the possibility of facing a nationwide injunction should the Sixth Circuit correctly conclude that the coordinated party expenditure limits are unconstitutional. But that remedial question is not before the Court at the certification stage, nor will it be before the Sixth Circuit upon certification. Rather, any remedy will be implemented on remand, after an *en banc* ruling on the certified question. *See Speechnow.org*, 599 F.3d at 689, 698. This Court can address the scope of an injunction and any related comity concerns at that stage. For now, it should reject the FEC's ill-advised invitation to instruct the Sixth Circuit on the scope of that Court's precedential authority.

CONCLUSION

This Court should certify the question presented to the *en banc* Sixth Circuit.

[1] Contrary to the FEC's suggestion, it is far from clear that a Sixth Circuit ruling in Plaintiffs' favor would even conflict with *In re Cao*, 619 F.3d 410. *See* Partial Opp. 24 (Doc. 45, PageID#5307). As the FEC notes, *In re Cao* involved "an as-applied challenge to [the] coordinated expenditure limits," rather than the facial one here. *Id.* It also predated significant changes in the relevant legal backdrop. *See* Cert. Mot. 27-30 (Doc. 21, PageID##250-253).

December 20, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to all counsel of record.

/s/ Thomas Conerty
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