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.*, Defendants.	Civ. No. 22-639 (DRC) PARTIAL OPPOSITION TO MOTION TO CERTIFY

DEFENDANT FEDERAL ELECTION COMMISSION'S PARTIAL OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY QUESTION TO EN BANC COURT OF APPEALS

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INTRODUCTION

Pursuant to this Court's November 30, 2023 Minute Entry, defendant Federal Election Commission ("FEC" or "Commission") hereby renews its opposition, in part, to plaintiffs National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), James David ("J.D.") Vance, and Steven Joseph Chabot's motion to certify a constitutional question to the en banc Court of Appeals and seeks to narrow plaintiffs' request for certification in the following respects: *First*, plaintiff Steven Joseph Chabot should be dismissed prior to any question being certified for lack of standing or, in the alternative, for mootness. Chabot has confirmed that he will not run for federal office in the future, and so he will suffer no injury from the challenged restrictions that could be redressed by this Court. Plaintiffs' November 2022 complaint alleges that the limits on expenditures that political parties may make in coordination with their federal candidates are unconstitutional. (Pls.' Compl. for Declaratory and Injunctive Relief ("Compl.") ¶ 2, ECF No. 1 at PageID 2.) However, Chabot's 2022 campaign for the U.S. House of Representatives is now over, and he did not prevail. In addition, although plaintiffs' complaint alleged that Chabot plans to run for federal office in the future, he publicly announced in December 2022 and confirmed in response to FEC discovery requests in this litigation that he will not do so and will instead retire. Chabot was even omitted from the list of plaintiffs in plaintiffs' Proposed Findings of Fact. (*See* Pls.' Prop. Undisputed Facts ¶¶ 2-3, ECF. No. 21-1 at PageID 264.) Because there is no basis to believe that Chabot will run for federal office again, there is no chance that he will suffer any injury that could be redressed by the Court, and he therefore lacks Article III standing. And even if Chabot could show that he had standing at some point in the past, his claims would still be moot now in light of more recent events, for the reasons above.

Second, plaintiffs' motion to certify should be denied to the extent that it raises their claim challenging an FEC regulation, which lies outside the express scope of FECA's judicial review provision, 52 U.S.C. § 30110. By its clear terms, FECA's judicial review provision applies only to challenges to FECA itself, not to regulations promulgated to implement it. Plaintiffs' Count II presents a challenge that hinges on the Commission's "public coordinated communication" regulation rather than the text of FECA. (*See* Compl. ¶¶ 100-103, ECF No. 1 at PageID 26.) This Court should follow the precedent established by the Supreme Court and lower courts and decline to certify the following portion of plaintiffs' proposed certified question: "*or as applied to 'party coordinated communications'* as defined in 11 C.F.R. § 109.37. (*See* Pls.' Mem. of Law in Support of Its Mot. to Certify Question to the En Banc Ct. of Appeals ("Pls.' Mem.") at 4, ECF No. 21 at PageID 227.) Plaintiffs' Count II can only be pursued through ordinary court procedures and may not be brought subject to a judicial review provision for which it is clearly omitted.

Third, plaintiffs' proposed constitutional question should be revised to properly limit its scope to Sixth Circuit law by inserting "as a matter of Sixth Circuit law" in the question plaintiffs seek to certify. Not only does Supreme Court jurisprudence heavily favor the development of thorny constitutional questions by numerous jurisdictions, the Fifth Circuit has already weighed in on the constitutional issue, and comity dictates that the district court (and the Sixth Circuit) decline to impose its view on another circuit.

Each of these alterations to plaintiffs' proposal for certification will appropriately streamline the issues before the Court of Appeals and further this Court's mandate to expedite constitutional review of federal campaign finance law. Plaintiffs' motion to certify should be partially denied.

BACKGROUND

A. The Parties

Plaintiffs seek declaratory and injunctive relief pursuant to the First Amendment. (*See* Compl. at 26-27, ECF No. 1 at PageID 26-27.) Plaintiffs NRSC and NRCC are "national committee[s]" pursuant to 52 U.S.C. § 30101(14). (*Id.* ¶¶ 13-14, PageID 5-6.) They serve as the Republican Party's campaign committees dedicating to elect candidates to the U.S. Senate and House, respectively. (*Id.*) Plaintiff J.D. Vance was the 2022 Republican nominee for the U.S. Senate in Ohio, and he is currently a U.S. Senator for that state. (*Id.* ¶ 15, PageID 6.)

Plaintiff Steven Joseph Chabot was the 2022 Republican nominee for the U.S. House of Representatives from Ohio's First Congressional District, and he was the sitting U.S. Congressman in that District at that time, although he did not prevail in the general election. (*Id.* ¶ 16, PageID 6.) Although Chabot was a sitting U.S. Congressman and a federal candidate at the time of plaintiffs filed their complaint, Chabot did not prevail in the general election, and thereafter he publicly announced and admitted in this litigation that he would retire and not run for federal public office again. *See, e.g.*, Taylor Popielarz, *Rep. Steve Chabot Reflects on 26 Years in Congress*, Spectrum News 1, https://spectrumnews1.com /oh/columbus/politics/2022/12/05/steve-chabot-reflects-26-years-congress (last visited Dec 10, 2023) (last visited Dec. 13, 2023) (Chabot stating, "I have no intention on running again. I plan on retiring."); *see also* Pl. Steven Joseph Chabot's First Objections and Responses to Def.'s First Set of Discovery Requests at 11, ECF No. 36-31, FEC Exh. 31 at PageID 1541) (admitting that he does not intend to run for federal office again in the future, and noting that he has "filed 'termination papers'" with the FEC, "seeking to terminate his campaign committee, which has raised no funds toward any future election").

Defendant Federal Election Commission is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of FECA, 52 U.S.C. §§ 30101-46. *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52 U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts. *Id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 3019(a)(6).

B. Plaintiffs' Challenge to the Coordinated Party Expenditure Limit

More than two decades ago, the Supreme Court upheld the limits that Congress placed on expenditures political parties may make in coordination with each of their federal candidates, under the provision now set forth in 52 U.S.C. § 30116. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado II*"). The *Colorado II* Court reaffirmed that the longstanding distinction established in *Buckley* between coordinated and independent expenditures, with limits permissible on the former, applied to spending by political parties. *See Colorado II*, 533 U.S. at 464. Despite this established precedent, plaintiffs seek to have these longstanding limits stricken from FECA and if necessary, to have *Colorado II* itself overruled. They 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. Invoking FECA's special judicial review provision at 52

U.S.C. § 30110, plaintiffs seek to certify a question as to whether these limits are constitutional to the en banc Court of Appeals.

Plaintiffs' Complaint makes two distinct "CLAIMS FOR RELIEF[,]" divided into two subheadings. (Compl. at 24-26, ECF No. 1 at PageID 24-26).) The first of these claims challenges the coordinated party expenditure limits expressed in 52 U.S.C. § 30116(d) (*id.* ¶¶ 90-99, PageID 24-25) ("Count I"), and the second challenges these limits "As Applied to Expenditures on Party Coordinated Communications[.]" (*Id.* ¶¶ 100-103, PageID 26) ("Count II"). This second claim defines "party coordinated communication[s]" by reference to the FEC regulation limiting such expenditures, 11 C.F.R. § 109.37. The second claim is identical in all respects to the first, with the sole exception being that it narrowly targets the FEC's "party coordinated communication[s]" regulation rather than FECA's limitations on party coordinated expenditures more broadly. (*Id.*) The Complaint charges, *inter alia*, that "party coordinated communication[s] . . . captures party communications that may lack express advocacy[.]" (*Id.* ¶ 66, PageID 16-17) (citing 11. C.F.R. § 100.26).) In light of these alleged defects, plaintiffs charge that "more appropriately tailored alternatives to coordinated party expenditure limits exist[.]" (*Id.* ¶ 102, PageID 26.)

C. Plaintiffs' Motion to Certify

On May 17, 2023, prior to any establishment of a briefing schedule or development of a factual record, plaintiffs filed a motion to certify a question as to whether the party coordinated expenditure limits are constitutional to the en banc Court of Appeals under FECA's special judicial review provision at 52 U.S.C. § 30110. (*See* Pls.' Mem. at 3-4, ECF No. 21 at PageID 226-27).)

The certification motion's proposed question reflects both of the distinct claims in the Complaint:

> 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 coordinated communications' as defined in 11 C.F.R. § 109.37."

(*Id.* at 4, PageID 227.) The "or as applied to 'party coordinated communications' as defined in 11 C.F.R. § 109.37" clause reflects the Count II. (*Id.*) In addition, plaintiffs' certification motion expands upon its regulatory challenge in Count II of the Complaint, making multiple arguments that focus on the burden imposed by the regulation yet do not rely on or reference the statutory authority under which they were promulgated. Plaintiffs charge that "regulations defining what 'conduct' makes a party communication 'coordinated' are expansive and ill-defined[.]" (*Id.* at 13, PageID 236) (citing 11 C.F.R. §§ 109.37(a)(3); 109.21(d)(1)-(6).) Plaintiffs also allege that "the limits are unconstitutional as applied to party spending in connection with 'party coordinated communications' as defined in 11 C.F.R. § 109.37—i.e., core political advertising." (*Id.* at 33, PageID 256.) They further allege that "party coordinated communication[s] . . . also captures party communications that may lack express advocacy[.]" (*Id.* at 10-11, PageID 233-34 (citing 11. C.F.R. 109.37(a)(2)(i), (iii).) This regulatory challenge takes the form of a fallback argument, with plaintiffs arguing that, if their statutory challenge is denied, they should nonetheless prevail in overturning the underlying regulations. (*See id.* at 33, PageID 256 ("Thus, at a bare minimum, the limits are unconstitutional as applied to party spending in connection with 'party coordinated communications . . . .'").)

On June 8, 2023, the FEC filed its opposition to plaintiffs' motion. The opposition took the position that, consistent with applicable precedent, certification was premature absent the development of a factual record for appellate response, a reasonable discovery period, and a

determination by this Court that any proposed question merited certification through the special judicial review procedure plaintiffs invoke. (*See* FEC's Opp'n to Pls.' Mot. to Certify Questions to En Banc Ct. of Appeals, ECF No. 26 at PageID 304-25.)

On August 1, 2023, the Court entered a Notation Order setting discovery deadlines and requiring that any additional proposed factual findings be filed by November 17, 2023. (*See* Aug. 1 Notation Order.)

On November 17, 2023, following the conclusion of the discovery period, the parties filed their proposed factual findings. On November 30, 2023, this Court held a status conference and subsequently entered a Minute Order directing the Commission to file "any response" to plaintiffs' motion to certify by December 15, 2023. (Nov. 30 Minute Entry.)

ARGUMENT

I. SECTION 30110 PROCEDURE

52 U.S.C. § 30110 provides that "[t]he [Federal Election] Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act." 52 U.S.C. § 30110. Section 30110 further provides that "[t]he district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." *Id.* Importantly, however, the Supreme Court has held that use of section 30110 is subject to certain restrictions and should be construed narrowly, in part because it creates "a class of cases that command the immediate attention of . . . the courts of appeals sitting en banc, displacing existing caseloads and calling court of appeals judges away from their

normal duties." *Bread Pol. Action Comm. v. FEC*, 455 U.S. 577, 580 (1982).[1] First, of course, a "party seeking to invoke [section 30110] must have standing to raise the constitutional claim." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). In addition, even if a plaintiff falls within one of the classes of parties specified in the statute, and the legal challenge falls within the scope of the provision, the district court should perform three functions. First, the court must develop a record sufficient to support appellate review by making findings of fact. *Cal. Med.*, 453 U.S. at 192 n.14. Second, it must determine whether the constitutional challenges are frivolous or insubstantial. *Id.* Only then, after performing these two functions initially, should the district court certify the record and all non-frivolous constitutional questions to the en banc court of appeals. *Id.*; *Mariani v. United States,* 212 F.3d 761, 769 (3d Cir. 2000) (en banc); *Buckley v. Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in part and rev'd in part on other grounds*, 424 U.S. 1 (1976); *see* also 52 U.S.C. § 30110. Where proposed certified questions are overbroad, single-judge district courts may reframe them to present "valid, narrower" questions. *Libertarian Nat'l Comm. v. FEC*, 930 F. Supp. 2d 154, 171 (D.D.C. 2013), *aff'd in part*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014).

II. ADDITIONAL STANDARDS OF REVIEW

"As a threshold issue, the Court must consider whether it has subject-matter jurisdiction over *each claim* in this case." *Shelly & Sands, Inc. v. Dement*, Civ. No. 2:22-4144, 2023 WL 6172122, at *2 (S.D. Ohio Sept. 22, 2023) (emphasis added). "Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction generally come in two varieties: a facial attack or a factual

[1] Part of the Supreme Court's concern in *Bread Political Action Committee* was the requirement in the statute at that time that section 30110 proceedings be expedited. 455 U.S. at 580. Though the specific expedition provision has been repealed, section 30110 continues to speed consideration by omitting review by district courts and panels of courts of appeals, thereby continuing to pose a danger of docket disruption.

attack. A facial attack . . . questions merely the sufficiency of the pleading." *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (citations omitted). If a jurisdictional challenge "raises a factual controversy, the district court must weigh the conflicting evidence to arrive at the factual predicate that subject-matter [jurisdiction] does or does not exist." *Id.* The plaintiff bears the burden of establishing a court's subject matter jurisdiction over a claim. *Shea v. State Farm Ins. Cos.*, 2 F. App'x 478, 479 (6th Cir. 2001) (citing *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir.1993)).

Standing must be determined as a threshold jurisdictional matter. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998). "Because standing involves the federal court's subject matter jurisdiction, it can be raised sua sponte." *In re Foreclosure Cases*, 521 F. Supp. 2d 650, 653 (S.D. Ohio 2007). The party invoking federal jurisdiction bears the burden of demonstrating that it is proper. *Daubenmire v. City of Columbus*, 507 F.3d 383, 388 (6th Cir. 2007) (quoting *Coyne v. Am. Tobacco Co*., 183 F.3d 488, 494 (6th Cir. 1999)); *see also Phillips v. DeWine*, 841 F.3d 405, 414 (6th Cir. 2016) ("'[A] plaintiff must demonstrate standing for each claim he seeks to press.'" (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). If a plaintiff cannot do so, its claims must be dismissed for lack of subject matter jurisdiction. *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 606-07 (6th Cir. 2007).

To have Article III standing, a plaintiff must establish: (1) that she has "suffered an 'injury in fact[,]" which the Supreme Court defines as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not [merely] conjectural or hypothetical," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted); (2) that there is a "causal connection between the injury and the conduct complained of[,]" which requires the injury to be "fairly traceable to the challenged

action of the defendant, and not the result of the independent action of some third party not before the court," *id.* (internal quotation marks and alterations omitted); and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks omitted). These three components of the Article III "case or controversy" requirement are designed to ensure that the "plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal court jurisdiction and to justify [the] exercise of the court's remedial powers on his behalf." *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 37-38 (1976) (internal quotation marks omitted). Moreover, "standing is not dispensed in gross" and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis*, 554 U.S. at 734 (internal quotation marks and alterations omitted).

III. THE COURT LACKS ARTICLE III JURISDICTION OVER PLAINTIFF CHABOT BECAUSE HE DOES NOT HAVE STANDING

A. Plaintiff Chabot Cannot Establish Article III Standing Because He Cannot Establish Injury That is Actual or Imminent

Plaintiff Chabot lacks standing because he will not run for federal office again and therefore will not be subject to the challenged campaign finance restrictions. Plaintiffs' complaint alleges that Chabot "has participated in coordinated party expenditures, and he wants to do so to the maximum extent permissible under the U.S. Constitution," specifying that "in addition to his 2022 candidacy, Candidate Chabot intends to run for federal office again in the future." (Compl. ¶¶ 16, 45, ECF No. 1 at PageID 6-7, 12). However, the 2022 election is over, Chabot did not prevail, and nothing in the record indicates he will ever be a federal candidate in the future. On the contrary, Chabot has stately publicly and responded under oath in this litigation that he will retire and not run in a federal election again. *See supra* pp. 1, 3.

Because Chabot will never again be subject to the limits that plaintiffs challenge, his alleged injury is not "actual or imminent" as opposed to merely "conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). And even if Chabot were to now suggest that he *might* run in the future, such inchoate "'some day' intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require." *Id*. at 564 (emphasis in original). Courts have found a lack of Article III injury where comparable claims related to future elections were too remote and speculative. In *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 983 (6th Cir. 2020), for example, the Sixth Circuit found that claims by two candidates who alleged that errors from voting machines would cause future harm were too hypothetical to satisfy standing requirements. In addition, in a situation much like the one in the current case, in *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013), a presidential candidate challenged the dismissal of an administrative complaint he had filed with the Commission. The court concluded that, even though the candidate had stated that he "may" run for the office again, that was not sufficient to demonstrate the actual or imminent injury required for standing, because it was too speculative that he would in fact do so and thus would again be subjected to allegedly unlawful actions. *Nader*, 725 F.3d at 229 ("[E]ven though Nader has not ruled out another foray into electoral politics, his statements on the matter are too speculative to provide the basis for an injury to his competitive interests.") (citing *Lujan*, 504 U.S. at 564); *see also Liberty Legal Found. v. Nat'l Democratic Party of the USA, Inc.*, 875 F. Supp. 2d 791, 801 (W.D. Tenn. 2012) (concluding that "[i] n the absence of some plausible factual allegations of 'concrete and actual or imminent' injury," political candidates who failed to allege that they were campaigning in the state could not establish injury in fact sufficient to establish standing

(quoting *Nader v. Blackwell*, 545 F.3d 459, 471 (6th Cir. 2008)). Here, plaintiff Chabot actually *has* ruled out running for office again, and therefore he is even less able to establish any actual or imminent injury.

B. Plaintiff Chabot Cannot Establish Article III Standing Because He Will Suffer No Injury That Could Be Redressed by a Decision of The Courts Here

Chabot also cannot establish that it is "likely, as opposed to merely speculative, that [his alleged] injury will be redressed by a favorable decision." *See Lujan*, 504 U.S. at 560. Indeed, courts have dismissed similarly insufficient election-related claims on that basis as well. For example, in *La Botz v. FEC*, 61 F. Supp. 3d 21 (D.D.C. 2014), an unsuccessful candidate to represent Ohio in the United States Senate brought suit against the FEC, alleging that its dismissal of his administrative complaint asserting that a consortium of newspapers had violated FECA by excluding him from televised debates was contrary to law. However, the candidate had moved out of Ohio, with no intention to return or run for office there. *See id*. at 29. In granting the FEC's motion to dismiss, the Court determined that "La Botz's standing problem . . . is with redressability." *Id*. As the Court explained, given that La Botz "will not be running for office again in Ohio, a favorable decision by this Court will not redress his injuries, as the [debate] selection criteria will no longer affect his campaigning." *Id.* The same principles apply even more strongly here. Once again, plaintiff Chabot has actually admitted that he will not run for any federal office again, *see supra* pp. 1, 3, so he will not suffer any injury that a favorable decision by this or any Court could redress, as the challenged expenditure limits will simply no longer affect him. *See La Botz*, 61 F. Supp. 3d at 29.

Because no decision of this Court could redress any alleged injury Chabot may suffer in the future as a result of FECA's party coordinated expenditure restrictions, he cannot satisfy the requirements of Article III standing.

C. Even If Plaintiffs Could Show That Chabot Had Standing At Some Time In The Past, His Claims Are Now Moot

Even if Chabot could have satisfied the requirements for standing at some past time, the doctrine of mootness would nevertheless prevent this Court from having Article III jurisdiction over his claims now. The mootness doctrine is a logical corollary to the case-or-controversy requirement: if subsequent events have made it impossible for the court to grant effectual relief to the complaining party, "any opinion as to the legality of the challenged action would be advisory." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Federal courts are prohibited from rendering decisions that "do not affect the rights of the litigants." *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004) (citing *Sw. Williamson Cnty. Cmty. Ass'n v. Slater*, 243 F.3d 270, 276 (6th Cir. 2001)). Thus, a case becomes moot "'when the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome.'" *See Cleveland Branch, N.A.A.C.P. v. City of Parma,* 263 F.3d 513, 530 (6th Cir. 2001) (quoting *Cnty. of L.A. v. Davis,* 440 U.S. 625, 631, (1979)).

The Supreme Court has dismissed candidate claims of future harm as moot where it was too speculative that a former candidate would run for office again. In *Golden v. Zwickler*, 394 U.S. 103, 109 (1969), the Court found no jurisdiction due to mootness because a former candidate's "assertion in his brief that the former Congressman can be 'a candidate for Congress again' is hardly a substitute for evidence that this is a prospect of 'immediacy and reality.'"

Here, any claim of future harm is at least as speculative as in the *Golden* case. There is no evidence that plaintiff Chabot will ever run for public office again, and indeed he has said that he has no such plan and will in fact retire. *See supra* pp. 1, 3. Because Chabot will not encounter the expenditure limits plaintiffs challenge in the future, his claims are now moot and thus cannot support a finding of Article III jurisdiction for this reason as well. Given his lack of

standing and failure to present a live claim, Chabot should be dismissed in advance of certification. *Cal. Med.*, 453 U.S. 192 n.14 (noting that a "party seeking to invoke [section 30110] must have standing to raise the constitutional claim").

IV. THE COURT SHOULD STRIKE COUNT II, PLAINTIFFS' REGULATORY CHALLENGE, FROM PLAINTIFFS' PROPOSED QUESTION FOR CERTIFICATION BECAUSE IT IS OUTSIDE THE SCOPE OF FECA'S JUDICIAL REVIEW PROVISION

Plaintiffs here seek to avail themselves of FECA's judicial review provision at 52 U.S.C. § 30110, which provides a special procedure for certain categories of plaintiffs, including eligible voters and national party committees, to bring suits "to construe the constitutionality of any provision of this Act [i.e., FECA]," and for the district court to certify questions of constitutionality to the court of appeals sitting en banc.[2] However, to take advantage of this relatively unique and accelerated provision of judicial review, plaintiffs must meet that provision's explicit requirements. One requirement is that plaintiffs must be among the specifically enumerated categories of persons who may bring such a challenge, such as "the national committee of any political party, or any individual eligible to vote in any election for the office of President[.]" *Id.*; *see, e.g., Int'l Ass'n of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092, 1097 (D.C. Cir. 1982) (per curiam) (union lacked standing to invoke 52 U.S.C. § 30110). A further requirement is that claims brought under section 30110 are limited to those seeking "to construe the constitutionality of any provision of *this Act*." 52 U.S.C. § 30110

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[2] Plaintiffs invoke this provision in their jurisdictional statement (Compl. ¶ 11 (Doc. 21, PageID 5):

> This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 2201, and 2202, as well as 52 U.S.C. § 30110, under which the question of the constitutionality of FECA's coordinated party expenditure limits, including those under 52 U.S.C. § 30116(d), should be immediately certified to the United States Court of Appeals for the Sixth Circuit for consideration en banc.

(emphasis added). By its clear terms, section 30110 may be invoked only to challenge the statutory provisions of FECA itself, not any regulations promulgated by the government to implement it.

In *Holmes v. FEC*, the District of Columbia Circuit Court was called on to address the scope of section 30110, and squarely determined that challenges to FEC regulations sit outside the provision's scope. 823 F.3d 69 (D.C. Cir. 2016). There plaintiffs alleged, *inter alia*, that a provision of FECA applying candidate contribution limits on a "'per-election'" basis violated the Fifth Amendment's equal protection clause by advantaging candidates who faced primary challengers over those who did not. *Id.* at 71. Critically, those plaintiffs alleged that this advantage resulted from FEC regulations "permitting candidates to transfer unused primary contributions to general election campaigns if those contributions were 'made before the primary election.'" *Id.* at 75 (citing 11 C.F.R. § 110.1(b)(5)(ii)(B)(1); 11 C.F.R. § 110.3(c)(3)). However, because the harm alleged by plaintiffs flowed from the regulations themselves, the court determined that "[t]he 'asymmetry' plaintiffs describe is a function of the regulations, not the Act[,]" and held that the district court lacked jurisdiction to hear the regulatory challenge. *Id.* Plaintiffs attempted to characterize their Fifth Amendment claim as a challenge to the "timing" of FECA's contribution limits, and the ability to transfer funds subject to these limits, but the court dismissed this line of reasoning, determining that "the Act is silent on both subjects." *Id.* at 75-76. Because the court determined that plaintiffs' objections were "a consequence of the Commission's regulations[,]" that constitutional claim "'fail[ed] to raise a substantial federal question for jurisdictional purposes.'" *Id.* (quoting *Shapiro v. McManus*, 577 U.S. 39, 45 (2015)). The court also observed that plaintiffs were not without recourse, as there exists a well-

established procedure for the challenging of FEC regulations in federal district court. *Id.* at 75 n.9 (citing *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009)).

Plaintiffs in this matter have explicitly challenged the constitutionality of an FEC regulation, and to the extent they do so, both this Court and the Sixth Circuit Court of Appeals are without jurisdiction to hear their claims under section 30110. In *Holmes*, plaintiffs formally challenged the statutory provisions of FECA itself with respect to each of their constitutional claims. *Id.* at 70-71 (describing plaintiffs' claims, each challenging as unconstitutional "[52 U.S.C.]§ 30116(a)(6) of the Act"). Despite the *Holmes* plaintiffs pleading a challenge to section 30116 of FECA, the D.C. Circuit nevertheless inferred that the harm those plaintiffs alleged was "a function of the regulations, not the Act." *Id.* at 75. Here, plaintiffs have unambiguously challenged the Commission's "party coordinated communication" regulation, 11 C.F.R. § 109.37, in a separate cause of action, and incorporated this separate count into their proposed question for certification to the Sixth Circuit.

As noted, plaintiffs' Complaint makes two distinct "CLAIMS FOR RELIEF[,]" including a statutory and regulatory challenge. *See supra* pp. 4; Compl. at 24, ECF No. 1 at PageID 24. Count I challenges the coordinated party expenditure limits expressed in 52 U.S.C. § 30116(d), (Compl. ¶¶ 90-99, ECF No.1 at PageID 24-25), and Count II challenges these limits "As Applied to Expenditures on Party Coordinated Communications[,]" referencing 11 C.F.R. § 109.37. (*Id.* ¶¶ 100-103, PageID 26.) Count II thus narrowly targets the FEC's "party coordinated communication" regulation rather than FECA's limitations on party coordinated expenditures more broadly. (*Id.*) Plaintiffs' proposed question for certification to the Sixth Circuit maintains this structure, alleging that 52 U.S.C. § 30116 violates the First Amendment "on [its] face *or as*

applied to 'party coordinated communications' as defined in 11 C.F.R. § 109.37." (Pls.' Mem. at 4, ECF No. 21 at PageID 227 (emphasis added).)

In addition to pleading a regulatory challenge, plaintiffs make multiple arguments that are consistent with a separate regulatory challenge independent of FECA's text. *See supra* pp. 6. *Inter alia*, plaintiffs charge that FEC regulations "are expansive and ill-defined" (Pls.' Mem. at 13, ECF No. 21 at PageID 236 (citing 11 C.F.R. §§ 109.37(a)(3); 109.21(d)(1)-(6),) target "core political advertising[]" (*Id.* at 33, PageID 256), and capture "party communications that may lack express advocacy[.]" (*Id.* at 10-11, PageID 233-34 (citing 11. C.F.R. 109.37(a)(2)(i), (iii)); (Compl. ¶ 66, ECF No. 1 at PageID 16-17) (citing 11. C.F.R. § 100.26).) In light of these alleged defects, plaintiffs charge that "more appropriately tailored alternatives to coordinated party expenditure limits exist[.]" (Compl. ¶ 102, ECF No. 1 at PageID 26.) This regulatory challenge takes the form of a fallback argument, suggesting that this challenge should succeed even if their statutory challenge fails. (*See* Pls.' Mem. at 33, ECF No. 21 at PageID 256 ("Thus, at a bare minimum, the limits are unconstitutional as applied to party spending in connection with 'party coordinated communications' . . . .").) In other contexts, the combination of a facial challenge to a statute and an as-applied challenge to that statute's implementing regulations may be entirely appropriate. However, plaintiffs may not do so here for that latter challenge while availing themselves of FECA's provision for expedited judicial review under section 30110.

The Supreme Court and lower courts have also repeatedly held that regulatory challenges may not be included in the other special judicial review provision for constitutional challenges to FECA, which directs qualified claims to three-judge courts. Note, 52 U.S.C. § 30110 (describing special rules for constitutional challenges to the 2002 amendments to FECA, the Bipartisan Campaign Reform Act ("BCRA")). The Supreme Court has previously held that "issues

concerning the regulations are not appropriately raised" before the three-judge court applicable to that BCRA review provision and instead "must be pursued in a separate proceeding." *McConnell v. FEC*, 540 U.S. 93, 223 (2003). The three-judge district court had concluded in *McConnell* that the proper course for a challenge to a regulation was "a single-judge court" because a three-judge court "lacks the jurisdiction to rule on the regulations." *McConnell v. FEC*, 251 F. Supp. 2d 176, 239 n.72, 261-64 (D.D.C. 2003) (per curiam opinion for Kollar-Kotelly, J. and Leon, J.). The Supreme Court affirmed under the same reasoning. *McConnell*, 540 U.S. at 223 (affirming in relevant part for the reasons detailed by the district court). Another district court in the District of Columbia similarly concluded that "the FEC's regulations are not appropriately challenged in a three-judge court" and denied the application for the BCRA judicial review provision "insofar as it request[ed] that a three-judge court hear its claim that [an FEC regulation wa]s unconstitutional." *Bluman v. FEC*, 766 F. Supp. 2d 1, 4 (D.D.C. 2011). The same outcome is warranted here in the context of plaintiffs' efforts to have a regulatory challenge considered by the en banc Court of Appeals.

Because plaintiffs' Count II lies outside a 30110 court's subject matter jurisdiction, the problem with that count is categorically different from issues in cases in which courts have evaluated a plaintiff's *standing* to challenge campaign finance regulations, which require a different inquiry into whether the plaintiff was in fact injured and whether that injury is traceable to the challenged law. For instance, in *FEC v. Ted Cruz for Senate*, the Supreme Court held that Senator Ted Cruz had standing to challenge a provision of the BCRA amendments to FECA that limited a candidate's use of post-election contributions to repay the candidate's personal loan to his campaign, noting that "[t]he present inability of the Committee to repay and Cruz to recover the final $10,000 Cruz loaned his campaign is, even if brought about by the agency's threatened

enforcement of its regulation, traceable to the operation of Section 304 [of BCRA] itself." 596 U.S. 289, 301 (2022). On this basis, the court rejected the FEC's contention that Cruz's threatened injury was traceable only to the Commission's regulations, not BCRA. *Id.* at 301-02. That case thus stands for the uncontroversial proposition that agency regulations are traceable to the statutory provision that authorizes them for purposes of determining whether a party may bring a challenge under a special judicial review provision *to the statute itself*.

Cruz is inapposite. In that case the Court determined only whether the plaintiff had standing to challenge the statute and then proceeded to examine the validity of the statute itself, not the implementing regulation. *Id.* at 301-02. There is no dispute that three of the plaintiffs here have constitutional standing to challenge the statute at issue. The FEC instead challenges subject matter jurisdiction – when the courts here act under section 30110 – as to one Count of the complaint and a portion of the proposed certified question based on the plain language of the judicial-review authorizing provision. The jurisdiction to take that portion of plaintiffs' case up to the en banc Court of Appeals turns on whether this language authorizes a separate and independent challenge to FEC regulations, *not* whether plaintiffs' alleged injuries are "traceable" to the operation of FECA or "redressable" by decision of this court.[3]

Subject matter jurisdiction to proceed under section 30110, like standing, "is not dispensed in gross;" rather, plaintiffs must demonstrate that this court has jurisdiction "for each claim that they press and for each form of relief that they seek[.]" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (citing *Davis*, 554 U.S., at 734; *Friends of the Earth, Inc. v.*

[3] While the Commission does not challenge plaintiffs' constitutional standing with respect to Count II, to date plaintiffs have pursued this regulatory claim only in the Court's capacity as a section 30110 forum, a context in which the Court lacks subject matter jurisdiction and accordingly lacks authority to redress any injury. *See supra* pp. 1 n.3.

Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)). Plaintiffs' claim challenging the FEC's "public coordinated communication" regulation may be brought under section 30110 only if it independently fits within the parameters of that provision and raises a substantial question of federal law, regardless of whether it is in any sense "traceable" to FECA itself. Because it does not fit within section 30110, the Court should decline to include it in the certified question and accordingly omit it from the special review provision, just as the courts in *Holmes, McConnell*, and *Bluman* previously did with comparable claims.

V. THE COURT SHOULD LIMIT THE CONSTITUTIONAL QUESTION AT ISSUE TO SIXTH CIRCUIT LAW

To comport with the Supreme Court's policy of permitting agency litigation of constitutional questions to develop across circuits, and because failing to do so encroaches on the judicial integrity of the Fifth Circuit, plaintiffs' question should be limited in its application to the Sixth Circuit. As such, should the Court choose to certify the question, and notwithstanding other modifications the Court may consider pursuant to Parts III-IV, *supra*, the Commission proposes that "as a matter of Sixth Circuit law" or similar language be inserted into the text of the certified question.

A. The Certified Question Should be Limited to Sixth Circuit Law to Permit Further Legal Development in Other Circuit Courts.

Plaintiffs are clear in their briefing: they seek to overturn Supreme Court precedent. (*See* Pls.' Mem. at 4, ECF No. 21, PageID 226 ("This Court should grant certification—and the Sixth Circuit should hold that FECA's coordinated party expenditure limits are unconstitutional—even though a 5-4 Supreme Court upheld the limits as they stood in 2001 . . . .").) In light of the far-reaching effect of this goal, if the Court chooses to certify plaintiffs' question, it should narrow it to address only Sixth Circuit law to permit other circuits to weigh in on this important constitutional question. As narrowed, the question would thus read:

> Whether as a matter of Sixth Circuit law the limits on coordinated party expenditures in 52 U.S.C. § 30116 violate the First Amendment on their face.

The Supreme Court has been emphatic that, in the case of government litigation of constitutional issues, it prizes "thorough development of legal doctrine by allowing litigation in multiple forums." *United States v. Mendoza*, 464 U.S. 154, 163 (1984); *see McCray v. N.Y.*, 461 U.S. 961, 962 (1983) (voting to deny certiorari of a constitutional question because "further consideration of the substantive and procedural ramifications of the problem by other courts will enable [the Supreme Court] to deal with the issue more wisely at a later date"); *United States v. Texas*, 599 U.S. 670, 694 (2023) (Gorsuch, J., concurring) (stating that nationwide injunctions "deprive other lower courts of the chance to weigh in on important questions before this Court has to decide them"); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring) (doubting the authority of district courts to enter "universal injunctions" against an Executive Branch law or policy). The Court derives significant benefit from "permitting several courts of appeal to explore . . . difficult question[s]," including the kinds of constitutional questions that arise "only in the context of litigation to which the government is a party." *Mendoza*, 464 U.S. at 160. It is "standard practice" for agencies like the FEC "to litigate the same issue in more than one circuit and to seek to enforce the agency's interpretation . . . in those jurisdictions where its interpretation has not been judicially repudiated." *Ry. Lab. Execs.' Ass'n v. ICC*, 784 F.2d 959, 964 (9th Cir. 1986).

Plaintiffs here are relitigating settled Supreme Court precedent, *see Colorado II*, 533 U.S. at 437, against the backdrop of another circuit court decision rejecting a similar challenge. *See In re Cao*, 619 F.3d 410, 422-430 (5th Cir. 2010). Given the weight of this authority, it is important that the Court narrow the constitutional question and "allow the FEC, if it chooses, to

press its position in those circuits that have not yet ruled on the constitutionality" of FECA's coordinated expenditure provisions. *See Va. Soc'y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 393–94 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012). Indeed, given the history of litigation on this provision, if a challenge to it reaches the Supreme Court again, this approach might help ensure a more enduring final pronouncement.

Limiting the question certified to the Sixth Circuit would also be consistent with the Court's conclusion that "[t]he relevant facts alleged here concern Ohio," where two of the plaintiffs lived and campaigned and "any First Amendment chilling, again if such chilling occurred, likewise happened." (Opin. and Order at 14 (May 9, 2023), ECF No. 18 at PageID 151.) In making that finding, the Court accepted plaintiffs' position "that the relevant 'business' *for this case* occurs in Ohio, where Plaintiffs seek to engage in campaign-related speech." (Pls.' Mem. in Opp. to Defs.' Mot to Dismiss for Improper Venue or, in the Alternative, Transfer at 10, ECF No. 11 at PageID 10.)

Where district courts have taken steps to make one circuit court's ruling on constitutional issues binding on others, circuit courts have course corrected. *See Va. Soc'y for Hum. Life, Inc. v. FEC*, 263 F.3d at 393. For example, in another FECA challenge case, *Virginia Society for Human Life, Inc. v. FEC*, a district court in the Fourth Circuit issued a nation-wide injunction preventing the FEC from enforcing a regulation it concluded was unconstitutional. *See id.* at 381. Though the Fourth Circuit agreed that the regulation was unconstitutional, it nevertheless overturned a nationwide injunction preventing the FEC enforcing the law because, *inter alia*, the "broad scope of the injunction has the effect of precluding other circuits from ruling" on the

regulation's constitutionality. *See id.* at 393. Following these principles, which favor the development of circuit caselaw, the district court should narrow the constitutional question.

B. Failing to Limit the Certified Question Impermissibly Interferes with the Settled Law of Another Circuit.

The Court should also narrow the question for a separate, but related purpose: because failing to do so could violate notions of comity underpinning the judicial system by intruding on the Fifth Circuit's power within its jurisdiction.

As a general matter, the courts of one circuit should avoid answering a question for another circuit that has already answered the question for itself. *See Mendoza* , 464 U.S. at 160; *cf. Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 319 (6th Cir. 2001) (declining to subject a party's operations in one jurisdiction to an injunction deriving from a tort claim that was unavailable, and had in fact been explicitly repudiated, as a matter of state law in that jurisdiction). Under comity principles governing the judiciary, courts must be mindful of the decisions of sister circuits when they make decisions in cases affecting litigants' legal rights and remedies in the geographical boundaries of those sister circuits. *See Va. Soc'y for Hum. Life, Inc.*, 263 F.3d at 393 ("[A] federal court of appeals' decision is only binding within its circuit."). An en banc pronouncement of a circuit court is expected to be the final word within that circuit's geographical reach, subject only to Supreme Court review. Failing to cabin consideration of constitutional questions to a particular circuit may interfere with a circuit's pronouncement and also raises the specter of forum shopping. *See Texas*, 599 U.S. at 694 (2023) (Gorsuch, J., concurring).

Here, plaintiffs challenge the constitutionality of 52 U.S.C. § 30116(d)(1)-(3), the provisions limiting coordinated expenditures, which necessarily means they seek to overturn *Colorado II*. (*See* Compl. ¶¶ 2-3, 7-10, ECF No.1 at PageID 2-3, 4-5) ("*Colorado II* was

wrongly decided . . . .").) The Fifth Circuit in *In re Cao* was faced with similar questions and arguments regarding coordinated party expenditure limits as the appellate court will face here. *See* 619 F.3d 410, 424-430 (5th Cir. 2010) (analyzing an as-applied challenge to coordinated expenditure limits); *see id.* at 422 (concluding that the question whether political parties should be subject to the same contribution limits as PACs is foreclosed by *Colorado II*). Because the Fifth Circuit has already addressed these questions, the question certified here should be limited such that, in case any disagreements arise, the Sixth Circuit does not impinge on the Fifth Circuit's authority and disagreements would be properly addressed by the Supreme Court.

CONCLUSION

For all the foregoing reasons, plaintiffs' motion to certify should be denied in part and only a question that is valid and narrower should be certified. The Court should (1) dismiss plaintiff Chabot from this litigation for lack of standing; (2) decline to certify plaintiffs' proposed question insofar as it relates to the challenge in Count II to the FEC's regulations; and (3) narrow the certification question to the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2023, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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