No. 25-10830

United States Court of Appeals for the Fifth Circuit

TONY MCDONALD,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
(Dist. Ct. No. 4:25-CV-153-P)

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The statutory required disclosure of McDonald's past small dollar contributions, ongoing public disclosure of that information via the FEC's donor database, and the chilling effect this has on McDonald's future contributions, are all First Amendment injuries that provide him standing to bring this case.

The Court should state its expectations that upon remand an answer should be filed, and the relevant issue and facts certified to this court *en banc* as required by 52 U.S.C. § 30110.

ARGUMENT

McDonald pointed to political free speech, campaign finance, and donor disclosure decisions—cases akin to this one—to establish his injury-in-fact. The FEC avoids these most relevant precedents to attempt to paint injury-in-fact requirements from other areas of the law onto this case. However, First Amendment standing rules apply. All McDonald has to establish is a risk that his speech will be chilled. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 618-619 (2021) ("*AFPF*").

The concrete injuries-in-fact McDonald suffered include: 1) the mandated prior disclosure of his past small-dollar campaign

contributions to the FEC and the FEC's public disclosure of the same; 2) the FEC maintaining McDonald's information in a public database, subjecting McDonald to further injury each time that information in returned in a query and revealed to a new person; 3) the chilling effect to his intended desire to make additional small-dollar donations in future election cycles. These are all recognized First Amendment injuries.

An anonymous speaker suffers an injury-in-fact when the government violates the constitutionally protected right to remain unknown. *NAACP v. Alabama,* 357 U.S. 449 (1958). "The disclosure requirement creates an unnecessary risk of chilling in violation of the First Amendment." *AFPF*, 594 U.S. at 616 (quotation marks omitted). "The deterrent effect … is real and pervasive." *Id.* at 617. "[T]o confer standing, such injury need not measure more than an identifiable trifle." *Young Conservatives of Tex. Found. v. Smatresk,* 73 F.4th 304, 309 (5th Cir. 2023) (quotations and citation omitted). Accordingly, the District Court erred when it dismissed McDonald's complaint.

I. CHILLED SPEECH AND UNWARRANTED DONOR DISCLOSURE ARE FIRST AMENDMENT INJURIES

The FEC wrongly insists that McDonald isn't injured by the disclosures until he suffers downstream consequences. This ignores the Supreme Court's pronouncements in *AFPF*.

The FEC attempts to distinguish *AFPF* on grounds that the disclosure of donor information there was only to the government, while here, the FEC further discloses the information to the public. This "distinction" is to no avail. First, McDonald challenges the initial disclosure to the government. Second, the further disclosure to the public by the FEC does not erase the injury of the disclosure to the government, it creates an additional injury.

AFPF explained the injuries donors experience. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *AFPF,* 594 U.S. at 606. Here the right to associate with candidates and candidate committees is at issue. This right, which goes to the core right to vote and participate in our democratic republic, is at least as important at the right to associate with an advocacy group. "[B]road and sweeping

state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *Id.* at 610.

In *AFPF* and here, "the disclosure requirement creates an unnecessary risk of chilling in violation of the First Amendment." *Id.* at 616 (cleaned up). McDonald has standing to seek prospective relief because "each governmental demand for disclosure brings with it an additional risk of chill." *Id.* at 618. "When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive." *Id.* at 618-619 (cleaned up). Thus, while the FEC is correct that *AFPF* did not address the standing of donors to sue, its discussion of the injuries the donors suffer show that the chilling effect is objective and constitutes an injury-in-fact.

The FEC also contends that McDonald cannot bring this challenge because donors are not subject to the reporting requirement. "Where a plaintiff is himself an object of the [law] at issue[,] there is ordinarily little question that the [law] has caused him injury… ." *Lujan v. Defs. of*

Wildlife, 504 U.S. 555, 561-62 (1992). Contributions by "a person" are required to be reported to the FEC. 52 U.S.C. § 30116(a)(8). As such, the donor is an "indirect object" of the reporting requirement because the donor's information is being reported. Being the "indirect object" of a statute "is enough to establish traceability." *Young Conservatives*, 73 F.4th at 310. The donor is the person most concerned with the disclosure of his donation. "It would be perverse indeed to hold that the very object of the law[] … could not challenge the [mandate]." *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995).

II. McDonald Has Pre-Enforcement Standing

The FEC does not deny that it will enforce § 30116(a)(8). It requires conduit committees to report small-dollar donors, and then posts the information in the donor database. As a small-dollar donor, McDonald is an indirect object of that enforcement. "[O]nce the donor information is disclosed, the First Amendment injury could not be undone… ." *X Corp. v. Media Matters for Am.*, 120 F.4th 190, 196 (10th Cir. 2024). Pre-enforcement challenges are allowed in chilled speech cases because they prevent a First Amendment violation.

The FEC also argues that McDonald lacks standing because he hasn't identified a specific candidate to whom he wants to donate or a specified date. But the case presents two pre-enforcement challenges. First, McDonald wants to keep contributing to federal candidates. His past activities show this isn't hypothetical or speculative. Because of the relatively short duration of some campaigns and the fact that the timing of contributions can be extremely important, requiring a donor to wait until being on the verge of making a particular contribution before challenging the law that chills that contribution isn't necessary. Bringing the challenge earlier prevents burdening the courts with an expedited case, which, even then, might not be resolved in time to make the contribution at an effective time if at all.

This court recently observed that the Supreme Court found standing in an election related speech case where "plaintiffs alleged that they 'intend[ed] to make' [statutorily prohibited] statements in future elections, even though they did not name any specific candidates against whom they would make such statements." *Inst. for Free Speech v. Johnson*, 148 F.4th 318, __, 2025 LX 200456, 19 (5th Cir. 2025) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 151, 161-62

(2014)). It then found a statement of "inten[t] to engage in the political process and in activities prohibited under Texas election law soon" to be sufficient to obtain standing. *Id*. at 20. Here, McDonald has expressed an intent to soon make small-dollar donations consistent with his past giving. This is sufficient to obtain standing to challenge the disclosure requirement.

Second, every search-result the FEC returns containing McDonald's past small-dollar contributions injures him anew. McDonald's request to remove his small-dollar contributions from the FEC donor database is a pre-enforcement challenge to future search returns. The inclusion of McDonald's small-dollar contributions in query returns is likely. The information is on the database and will be returned in relevant queries. These additional disclosures will injure McDonald by further disseminating information about McDonald that should not be in the database. The FEC does not suggest its ongoing disclosure of McDonald's information in the donor database is not sufficiently imminent to afford standing.

III. UPON REMAND, THE CASE SHOULD BE CERTIFIED TO THE *EN BANC* COURT

The FEC has requested that on remand, time should be allowed to build a factual record. This case presents a facial challenge to a statute that creates different reporting thresholds for similar donors based upon the routing of the donation. Factual development is not necessary to analyze the statutes. Section 30110 creates "a mechanism for the rapid resolution of constitutional challenges to [FECA]." *California Med. Ass'n v. FEC*, 453 U.S. 182, 191 (1981). "Congress's objective when it enacted [§ 30110]… was, and is, speed." *Wagner v. FEC*, 717 F.3d 1007, 1013 n.6 (D.C. Cir. 2013) (per curiam). When the D.C. Circuit remanded *Wagner* back to the district court, upon resolving an appeal from the disposition of a preliminary injunction motion, it ordered the district court "to certify those [necessary] facts and the constitutional questions to the *en banc* court of appeals within five days of the date of this opinion." *Id*. *Wagner* did not afford time for discovery. This case, too, should move quickly to the *en banc* stage.

A district court should only "make findings of fact sufficient to allow the *en banc* court to decide the constitutional issues." *Khachaturian v. FEC*, 980 F.2d 330, 331 (5th Cir. 1992). While "immediate adjudication

of constitutional claims through a [§ 30110] proceeding would be improper in cases where the resolution of such questions required a fully developed factual record," *California Med. Ass'n,* 453 U.S. at 192 n. 14, this case, like *California Medical* does not require much factual development. *California Medical* was filed in the district court "[i]n early May, 1979," and certified to the court of appeals "[o]n May 17, 1979," a mere 17 days later. *Id*. at 186. The record certified there proved robust enough for the Ninth Circuit and the Supreme Court to answer the constitutional questions.

Other than facts supporting standing, which should be uncontested, McDonald does not envision any pertinent adjudicative facts that would impact the resolution of this case. The constitutional question to be certified to this court *en banc* will be determined based on the text of the statutes and the disparate treatment afforded to different donors. Therefore, certification should occur in short order after the FEC answers the complaint.

CONCLUSION

The judgment dismissing the case should reversed.

Dated: November 13, 2025

Respectfully submitted,

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I hereby certify on this 13th day of November, 2025 that:

1. This document complies with the length limit of Fed. R. App. P. 32(a)(7)(A), because the brief is 9 pages long.
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/s/ *Charles Miller*
Charles M. Miller

CERTIFICATE OF SERVICE

I hereby certify on this 13th Day of November that I electronically filed this document with the Fifth Circuit using its ECF system, which automatically served this document on counsel of record.

_/s/ *Charles Miller*
Charles M. Miller