UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TONY MCDONALD, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 25-153 (P) REPLY IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

In this case, plaintiff Tony McDonald alleges that the conduit reporting requirement, 52 U.S.C. § 30116(a)(8), violates the First Amendment as applied to contributions of less than $200. He seeks to have this provision in the Federal Election Campaign Act ("FECA") invalidated and have the entries reflecting his two past, small-dollar conduit contributions he made years ago removed from the public disclosure database.[1] Plaintiff requests that this Court certify this case to a full en banc court of appeals to determine the provision's constitutionality pursuant to 52 U.S.C. § 30110. Yet, prior to proceeding under this special review provision, plaintiff must show the basis to invoke this Court's jurisdiction. He has failed to do so.

In its Motion to Dismiss ("Mot.") (ECF No. 21) the Federal Election Commission ("FEC" or "Commission") explained that plaintiff's complaint should be dismissed because he has failed to show a concrete and particularized injury that is actual or imminent. In response, plaintiff makes no attempt to explain how the disclosure of his two previous conduit contributions (or a third, unnamed contribution that allegedly was not reported) caused him any concrete injury. Instead, plaintiff attempts to skip past this threshold requirement and prematurely move to the merits of his claim, offering a series of arguments on the constitutionality of the provision and his views on the scope of discovery. These arguments do not bear on the standing question before the Court. When plaintiff does address standing, he attempts to create a strawman, arguing the Court should adopt a "relaxed" standard, *see* Plaintiff's Memorandum Opposing Motion to Dismiss at 4-5 ("Resp.")

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[1] Although plaintiff refers to his contributions as a "donor disclosure," (*see, e.g.*, Plaintiff's Memorandum Opposing Motion to Dismiss at 3 ("Resp.")), (ECF No. 24) FECA defines "contribution" as including the provision of "anything of value . . . for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a). "Donation" is not specifically defined in FECA and generally has a broader meaning. Plaintiff's contributions here appear to fit within the statutory definition of contribution in 52 U.S.C. 30101(8).

(ECF No. 24), to avoid the requirement that he allege a concrete and particularized harm to establish standing. Although courts consider pre-enforcement challenges rooted in the First Amendment when faced with a credible threat that the challenged law will be enforced, this is not a pre-enforcement challenge in which a statute is being enforced against plaintiff. There is no basis for this Court to depart from the established standing authority. Plaintiff has not alleged any instance where the disclosure of his contributions caused him concrete harm and only speculates about the chilling of his future speech, which is insufficient to establish injury. The FEC's Motion should be granted.

ARGUMENT

I. PLAINTIFF LACKS STANDING

A. Plaintiff Fails to Show an Injury in Fact

To establish standing, a plaintiff must show it has "suffered an injury in fact," which the Supreme Court defines as an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Mot. at 9-11 (citing *inter alia*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). This injury-in-fact requirement has consistently been applied in campaign finance cases, including those involving disclosure provisions. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 21 (1998) (requiring a concrete and particularized injury in fact in a disclosure case); *Campaign Legal Ctr. v. FEC*, 860 F. App'x. 1, 4 (D.C. Cir. 2021) (per curiam) (a "generic interest in good government that is shared equally by all citizens and does not amount to a concrete or particularized Article III injury."); *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001) ("appellants' failure to assert an injury in fact" is "the logical anterior question in any standing analysis.").

In response, plaintiff does not attempt to show that the Complaint meets this standard; instead he asserts the injury requirement is "relaxed" in the context of a First Amendment challenge. (Resp. 3-5). As the FEC explained in its Motion, courts have held that in the pre-enforcement context, "'[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.'" *See* Mot. at 18 (citing *Hous. Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007)). But plaintiff is not bringing a pre-enforcement challenge in which he risks penalties for violating the challenged law. *Id.* (citing cases). In these cases, the specter of a future enforcement action itself places a chill on speech and can constitute cognizable harm. Here, plaintiff does not allege that he is under the threat of an enforcement action but instead urges essentially an injury-per-se theory — i.e., public disclosure of his past contributions, in and of itself without any claim of concrete harm as a result, is an injury sufficient to invoke this Court's jurisdiction. (Resp. at 6 ("McDonald suffered a First Amendment injury when his donor information was disclosed to the FCC [*sic*]"). This novel standing theory is inconsistent with established injury-in-fact precedent, and as explained below, the two cases plaintiff references offer no support. *See* Resp. at 3-5 (citing *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021) ("*Bonta*") and *X Corp. v. Media Matters for Am.*, 120 F.4th 190 (5th Cir. 2024) (per curiam)).

Plaintiff's reliance on *Bonta* fails. That case did not involve the public disclosure of information; rather, it arose in the context of a California law that required all 501(c)(3) nonprofit organizations to confidentially report their donors to the state Attorney General each year, in case that information could become relevant in a future investigation. *Bonta*, 594 U.S. at 600-02. When the plaintiffs, two non-profits that solicited contributions in the state, refused to comply with the disclosure requirements, the Attorney General "threatened to suspend their registrations and fine their directors and officers." *Id.* at 603. The Supreme Court held that the "Attorney General's

disclosure requirement impose[d] a widespread burden on donors' associational rights" and thus was "facially unconstitutional." *Id*. at 618. The *Bonta* majority does not even address standing, and neither the majority nor the dissent suggests standing does not require harm. *Id.* at 628. Plaintiff cites the *Bonta* dissent's First Amendment analysis where Justice Sotomayor suggests the majority, in its merits analysis, "presumes (contrary to the evidence, precedent, and common sense) that all disclosure requirements impose associational burdens." *Id.* at 629. There is nothing to suggest that the majority agreed with this conclusion, let alone it would import the conclusion into its analysis of an injury in fact.

Likewise, *X Corp.* (Resp. at 5,7), is not a disclosure case at all and does not address standing or the injury-in-fact requirement. In *X Corp.*, the plaintiff sought discovery regarding certain information about the identity of defendant's financial donors. In resolving whether to stay the district court's order granting the plaintiff's motion to compel this information, the court balanced harm to the parties. That balancing framework is distinct from the injury-in-fact context, where the plaintiff must allege a concrete and particularized injury and where balancing relative harms is not part of the consideration. There is no reason to abandon the well-established case law on standing and chart the new path the plaintiff urges here.

B. Plaintiff's Alleged Past Harm is Insufficient to Establish Standing

Plaintiff has failed to allege an injury from his two past contributions (a single $50 contribution in 2023 and a single $1 contribution in 2019). (Mot. at 14-16 (citing Pl.'s Compl. for Declaratory and Injunctive Relief ("Compl.") ¶¶ 19-20, 22) (ECF No. 1).) Plaintiff speculates that he might suffer an injury if he had to "explain or justify" those contributions. However, he does not allege that he has ever actually had to explain or justify his contributions to anyone or how these explanations result in concrete harm. Plaintiff points to "ramifications to his role with the

[Tarrant County] party" (Resp. at 5), but that sort of amorphous undefined injury similarly does not support standing. *James v. Hegar*, 86 F.4th 1076, 1081 (5th Cir. 2023), cert. denied, 144 S. Ct. 1461 (2024) (requiring injury be "certainly impending" and rejecting vague allegations of injury).

Plaintiff also cites *McIntyre v. Ohio Elections Comm'n*., 514 U.S. 334 (1995), for the proposition that losing anonymity can be an injury. (Resp. at 5-6.) But the Court's opinion in *McIntyre* is limited to the leafleting provision at issue in that case and has no application here. The opinion did not address standing. It addressed a state law prohibiting the distribution of anonymous leaflets (i.e. campaign literature that did not contain the name and address of the person or campaign official issuing the literature). To the extent the analysis in *McIntyre* has any relevance, it supports the FEC's position here because the opinion distinguishes the impact of face-to-face leafletting, at issue in that case, from the after-the-fact financial disclosures required by FECA. *McIntyre*, 514 U.S. at 353-55 (distinguishing *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), which concerned the "mandatory disclosure of campaign-related expenditures," rather than "a prohibition of anonymous campaign literature."). Subsequent opinions have observed the same distinction between an injury from the mandatory in-person identification at issue in *McIntyre* from other allowable provisions requiring after-the-fact filings with a government agency. *See, e.g.*, *Buckley v. Am. Const. Law Found*., 525 U.S. 182, 198-99 (1999) (striking down statute requiring petition-circulators to wear name badges but upholding statute requiring them to file affidavits identifying themselves); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1247 (11th Cir. 2013) (distinguishing *McIntyre*, and contrasting "the impact of disclosure rules requiring a name on a handbill with those requiring disclosure of an "expenditure" (internal quotations removed)); *Majors v. Abell*, 361 F.3d 349, 353-54 (7th Cir. 2004) (same).

C. Plaintiff's Alleged Future Harm is Insufficient to Establish Standing

Plaintiff's allegation of future harm is also inadequate. Mot. at 16 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). Any injury because of the conduit disclosure provision is speculative on multiple levels: plaintiff is not clear on when he will contribute, the context of that contribution, or the injury he would suffer. *Id.* (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 544 (5th Cir. 2016)). Plaintiff attempts to show a future injury by arguing that he has "indicated his desire to continue making similar donations" and that is all that is required of him. (Resp at 7.) Here again, plaintiff relies on only his generalized and speculative discomfort in the disclosure of any future conduit contributions.[2] However, as the FEC explained, a plaintiff must show more than a "subjective chill" and it must not be wholly speculative. (Mot. at 19; *see also supra* at 4-5.)

II. PLAINTIFF'S REMAINING MERITS AND REMEDIES BASED ARGUMENTS ARE UNAVAILING

Plaintiff raises several arguments that are both irrelevant to the pending Motion and fail to support plaintiff's Section 30110 cause of action. (*See* Resp. at 1-7, 7 n.1.)

First, plaintiff prematurely requests that this Court certify this case to the Fifth Circuit and asserts that "no discovery is warranted." (*Id.* at 1-2.) The scope of discovery is not before the Court in this pre-answer motion to dismiss, where the Court must first evaluate its jurisdiction. However, plaintiff's argument that the Court needs no discovery at all is also misplaced. (*Id.* at

[2] Plaintiff asserts that if he were to mail a check directly to a candidate, the Commission "presumes the candidate will process the contribution directly and not through a conduit" and that "[t]here is no reason for the Court to make this same assumption." (Resp. at 9) But plaintiff misunderstands the process. FECA requires disclosure for contributions that are in anyway earmarked or otherwise made through an intermediary or conduit. 52 U.S.C. § 30116(a)(8). Commission regulations further provide for reporting of those earmarked contributions by conduits and intermediaries. 11 C.F.R. § 110.6(b)(2). 52 U.S.C. § 30104 separately provides for contributions made *directly* to a political committee, e.g., mailing a check.

1.) In section 30110 cases, it is well-established that district courts must allow the parties to participate in developing the factual record. The Fifth Circuit relied on deposition testimony to determine that the district court had "abid[ed] by its proper role" in a case brought under section 30110. *In re Cao*, 619 F.3d 410, 414, 433 & n.32 (5th Cir. 2010) (en banc). Over the past decade, courts have maintained that section 30110 necessitates multiple months of discovery prior to a certification decision. *See, e.g.*, *Libertarian Nat'l Comm. v. FEC*, 930 F. Supp. 2d 154, 156-57 (D.D.C. 2013) (seven-month period); *see also Oliver v. FEC*, No. 3:24-cv 1166, Case Management Conference Order (ECF No. 14) (S.D. Ohio Oct. 17, 2024) (order setting seven-month period); *Stop Hillary PAC v. FEC*, No. 1:15-cv-1208, Scheduling Order (ECF No. 35) (E.D. Va. Dec. 16, 2015) (four-month period).[3]

In the case plaintiff cites, *Nat'l Republican Senatorial Comm. v. FEC*, the parties conducted months of discovery, "establishing a factual record and concluding that the plaintiffs raised a non-frivolous question[.]" 117 F.4th 389, 392 (6th Cir. 2024). Only then did the district court certify the Section 30110 question to the en banc circuit court. *Id.* For its part, the Sixth Circuit cited to the evidence throughout the concurring opinions including that "the FEC ha[d] adduced evidence" showing that the limits at issue "serve their anti-circumvention goal." *Id.* at 434 (Stranch, J., concurring). And, as noted above, courts consistently recognize the importance of discovery in Section 30110 cases as well as in constitutional cases generally; for instance, the case that ultimately led to the *Bonta* decision included more than six months of discovery. *See Thomas More Law Ctr. v. Harris*, No. 2:15-cv-03048, (ECF No. 37) (C.D. Cal. Oct. 22, 2015) (Order

[3] Even if plaintiff were able to establish standing, whether the evidence deduced in discovery satisfies this Court that any question plaintiff presents is worthy of the time and consideration by the en banc Fifth Circuit, goes to the heart of why a full factual record developed at the district court is necessary. (*See* Mot. at 6 (explaining that prior to certification, the district court must determine whether the constitutional challenge is frivolous or insubstantial).)

setting pre-trial & trial dates). The Supreme Court in *Bonta* relied on a record developed in the district court that showed specific threats and harassment to the plaintiff. *See* 594 U.S. at 604, 617. Regardless, the parties' positions on discovery are fully set forth in the Joint Report Regarding Contents of Scheduling Report. (ECF No. 23) ("Joint Report"), and have no bearing on whether there is an adequately alleged an injury sufficient to invoke this Court's jurisdiction.

Second, plaintiff erroneously conflates FEC Commissioners' past recommendations to Congress regarding the conduit disclosure provision with an examination of its constitutionality. (Resp. at 3.) While the FEC recommended that Congress "establish an itemization threshold consistent with other FECA reporting requirements" as a way to counterbalance increases in the number of transactions reported by conduits, the Commissioners did not contend that the conduit disclosure provision is unconstitutional or that it does not serve important government interests.[4] *See Federal Election Commission Legislative Recommendations 2024*, FEC.GOV, (Dec. 12, 2024), https://www.fec.gov/resources/cms-content/documents/legrec2024.pdf (last visited May 23, 2025); *Federal Election Commission Legislative Recommendations 2023*, FEC.GOV (Dec. 14, 2023), https://www.fec.gov/resources/cms-content/documents/legrec2023.pdf (last visited May 23, 2025). And in any event, these legislative recommendations are unrelated to the jurisdiction question before the Court.

[4] The Supreme Court has repeatedly concluded that important governmental interests sufficient to uphold disclosure laws include "providing the electorate with information, deterring actual corruption and avoiding any appearance, and gathering data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 103 (2003) (discussing *Buckley*). Disclosure provisions further First Amendment interests by providing information as to where political money comes from, and aids voters in evaluating candidates in more precise ways than solely based on party labels or campaign speeches, and prevents circumvention of FECA's contribution limits and source prohibitions, including the corporate and foreign national restrictions. (Mot. at 4-5.)

Third, plaintiff alludes to disclosure of his contributions exposing him to "harassment and threats of reprisal." (Resp. at 6.) As an initial matter, plaintiff did not allege this theory in his Complaint, (*see generally* Compl.), and therefore this new argument is not properly before the Court. *See Cutera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) (a "claim which is not raised in the complaint but, rather, is raised only in response to a motion" cannot be considered by the court); *see also Dixon v. Transp. Am.*, No. 3:22-CV-325-L, 2023 WL 11822192, at *3 n.3 (N.D. Tex. Feb. 17, 2023) ("As a general rule, claims and allegations that are not raised in the complaint, but raised for the first time in response to a motion to dismiss, are not properly before the court.") (collecting cases). Moreover, plaintiff fails to describe the kind of systematic threats of harassment and reprisals that is required for this narrow exception to generally applicable disclosure rules. (Mot. at 20-22.) And even if plaintiff was able to make this showing, that would at most support an as-applied exception to the disclosure similar to that received by the Socialist Workers party or the NAACP. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982) (explaining narrow carveout for minor political party with history of harassment by government officials). It would not, however, support the facial relief plaintiff apparently seeks that would invalidate the provision entirely.

Lastly, plaintiff is ambiguous as to the nature of his constitutional claim, and even assuming that he could establish standing, the precise question that should be certified to the en banc court. In the Complaint, plaintiff asserts he is raising an as-applied challenge. (*See* Resp. at 10; *see also* Compl. ¶¶ 41-43.) Yet plaintiff also appears to seek the facial, declaratory relief that disclosure of contributor names under § 30116(a)(8) violates the First Amendment. (Compl. at 12 (asking for a "Declaration that disclosure of contributor names and addresses pursuant to 52 U.S.C. § 30116(a)(8) of conduit donations not exceeding $200 violates the First Amendment");

Resp. at 2, 4-5 ("Plaintiff . . . requests relief in the form of a declaration that the challenged reporting requirement is unconstitutional.") This is relevant both for the scope of the remedy plaintiff seeks, *see Citizens United v. FEC*, 558 U.S. 310, 331 (2010), as well as the development of a factual record should the Court deny the Motion. An "essential" component of an as-applied challenge is a factual record so that a court may "issue a narrowly tailored and circumscribed remedy." *See Justice v. Hosemann*, 771 F.3d 285, 292 (5th Cir. 2014). However, this Court need not resolve this issue prior to determining whether plaintiff has standing. Mot. at 9 n. 5 (citing *Barilla v. City of Houston*, 13 F.4th 427, 432 n.4 (5th Cir. 2021)).

CONCLUSION

Plaintiff's failure to allege harm from his past conduit contributions and speculation about possible future harm do not establish an Article III injury. Furthermore, plaintiff misinterprets the standards applicable to the standing requirement and disclosure regimes. Accordingly, the Commission respectfully requests that the Court dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Respectfully submitted,

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