UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 25-10830

TONY MCDONALD,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRCT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

DIST. CT. NO. 4:25-CV-153-P

MEMORANDUM OPPOSING MOTION FOR SUMMARY AFFIRMANCE

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INTRODUCTION

Unwarranted disclosure of a donor's identity is a First Amendment injury. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) ("*AFPF*"). "Disclosure requirements can chill association 'even if there [is] no disclosure to the general public." *Id*. at 616 (citation omitted). "The disclosure requirement creates an unnecessary risk of chilling in violation of the First Amendment." *Id*. (quotation marks omitted). "The deterrent effect … is real and pervasive." *Id.* at 617. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *X Corp. v. Media Matters for America*, 120 F.4th 190, 196 (5th Cir. 2024) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam)). "[I]n cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id*. at 197. "Compelled disclosure of affiliation … may constitute as effective a restraint on freedom of association as other forms of governmental action." *Id.* at 197 (quoting *AFPF* at 606).

Both *AFPF* and *X Corp* stand for the proposition that the disclosure of the identity of donors is an actionable injury. *AFPF* says disclosure to the government is sufficiently chilling to constitute an injury even absent further disclosure to the

general public. Here the additional disclosure to the general public is even more chilling. *X Corp* involved disclosure of donors to opposing counsel in litigation. There, this court issued a stay even though a protective order would have limited the disclosure to counsel. Thus, the disclosures that occur under 52 U.S.C. § 30116(a)(8) are more offensive to the constitution than the disclosures in *AFPF* and *X Corp*.

McDonald's identity as a donor has been disclosed to the FEC at least twice under § 30116(a)(8). The FEC maintains entries on McDonald's small dollar contributions on its website. McDonald was harmed by the disclosure to the FEC, and is harmed every time his information is returned as the results of a search query of the FEC contribution database. Additionally, McDonald's past pattern of contributing evidences his desire to make additional small-dollar contributions in the future. However, he is chilled from doing so out of fear that the contributions will be disclosed to the FEC and that the FEC will disclose the contributions to the public at large.

BACKGROUND

This is a rare case, with a unique procedure: A constitutional challenge to a provision of the Federal Elections Campaign Act ("FECA"). In these cases, "[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". 52 U.S.C. § 30110

(emphasis added). The role of the District Court is limited. The District Court merely kicks the tires to ensure the case is not frivolous. *Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 192 n.14 (1981). Once that low bar is cleared, the District Court oversees whatever discovery may be necessary, compiles any necessary factual record, and then immediately certifies the constitutional questions to the Court of Appeals. *Id*. In this case, no discovery is warranted, making certification to this Court upon the FEC answering appropriate. *Nat'l Republican Senatorial Comm. v. FEC*, 712 F. Supp. 3d 1017, 1033 (S.D. Ohio 2024) ("the Court finds itself in the unenviable position of concluding, as explained further below, that the expedited discovery period the FEC requested was largely for naught").

There simply are no disputed adjudicative facts to be discovered. *Id.* at 1034. The relevant facts here are all "legislative facts" that are presented to the adjudicating court via briefs. *Id*. It makes no sense for this court to spend time and resources building a record of legislative facts, when this Court will be free to disregard them all, and determine the appropriate set of legislative facts itself. *Id*. at 1035. ("[A]ny so-called findings of legislative facts that the Court could make here would be reviewed de novo by the en banc court of appeals because it is integral to the legal analysis of the constitutional issues raised").

The adjudicative facts here are minimal and uncontested. Plaintiff has made donations to federal candidates in amounts of $200 or less. *See* Complaint (Doc 1) at PageID 8-9. At least two of these donations were processed through conduits, and as such were required to be reported to the FEC under 52 U.S.C. § 30116(a)(8), the challenged statute. *Id*. The FEC maintains a database that lists these donations under Plaintiff's name and associated address and employer. *Id.* at 6, n. 1-5; *see also* Motion to Dismiss (Doc 21) at PageID 115-116. Plaintiff desires to make additional small dollar donations in the future. McDonald requests relief in the form of a declaration that the challenged reporting requirement is unconstitutional. *Id.* at 9. He requests mitigation of the past wrong. Specifically, he requests an order removing record of his past small-dollar donations from the FEC database because every time his information in returned in a search of the FEC database, he is injured again. *Id.* at 8, 12. Finally, he requests an injunction against the prospective collection of the small-dollar contribution data to prevent future injury. *Id.* at 12.

FACTS

Tony McDonald, an elector and small-dollar donor, challenges the constitutionality of the statute that requires differing disclosure of small dollar donations ($200 and below) to federal candidates based on how the candidate elects to process donations received in response to the candidate's solicitations.

Doc 1 at 1-3. Identifying information of small-dollar donors whose donations are deposited directly into a candidate's account is not required to be disclosed to the FEC. 52 U.S.C. § 30104(b)(3). But this same information is required to be disclosed to the FEC if the candidate has the donation processed through a conduit, such as ActBlue or WinRed. 52 U.S.C. § 30116(a)(8); Doc 1 at 5-7.

McDonald alleges the conduit disclosure requirement infringes his rights to free speech and association. Doc 1 at 11. The FEC has recognized this reporting anomaly and difficulties it has caused, and has twice requested Congress amend the FECA to no longer require the reporting of small-dollar conduit donations. *Id.* and n. 9, 11.

Quite simply, mandating the disclosure of small-dollar conduit donations cannot be narrowly tailored to serve a compelling government interest in preventing quid pro quo corruption when an equal, direct, small-dollar donation is subject to less disclosure. *Id.* at 11. Nor can the FEC argue it has a completing need for the information when the FEC has repeatedly told Congress it doesn't want the data. *Id.* at 10-11.

ARGUMENT

The District Court found that McDonald did not adequately allege an injury in fact, because he did not allege an injury beyond the disclosures themselves. This is puzzling because the injury-in-fact requirement is not a high hurdle in First

Amendment cases and is obviously met here. The injuries-in-fact that McDonald alleges are the past disclosures of his constitutionally protected information to the FEC, the FEC's inclusion of his information in a searchable public database, and the certainty that absent repeal of the law, or a court order, the FEC will continue to require similar disclosures to it in the future and it will continue to further disclose the reported small-dollar contributor data to the public at large.

I. The Injury-in-Fact Requirement is Easy to Meet in Donor Disclosure Cases

"[The injury-in-fact requirement [] helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.* "To establish standing at the motion to dismiss stage, the plaintiff must state a plausible claim that she has suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits." *Cruz v. FEC*, No. 19-cv-908, 2019 U.S. Dist. LEXIS 229454, at *14 (D.D.C. Dec. 24, 2019) (cleaned up).

Standing is not difficult to achieve in this First Amendment challenge, where injury requirements are relaxed, *AFPF*, 594 U.S. at 618-19 ("The risk of a chilling effect on association is enough"). Moreso here, where the statute under which this

case is brought, 52 U.S.C. § 30110, expressly affords declaratory relief. *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (per curiam) ("It is clear that Congress, in enacting [52 U.S.C. § 30110] intended to provide judicial review to the extent permitted by Art. III").

McDonald contends that it is unconstitutional for the FECA to have required the disclosure of his small-dollar donor information to the FEC. Plaintiff seeks, *inter alia*, declaratory relief that requiring the disclosure of small-dollar donations made via conduits is unconstitutional, as is the FEC's further disclose of this constitutionally protected information to the public at large. To remediate McDonald's injury from the past wrongly reported information, McDonald seeks an order that the FEC remove his past donations from the database. Doc 1 at 12. Because Plaintiff desires to make similar donations again and is currently chilled from doing so, he also seeks a prospective injunction prohibiting the FEC from requiring small-dollar disclosures going forward. *Id*.

II. McDonald has Standing to Seek Declaratory Judgment

To have standing for a declaratory judgment claim under § 30110, a plaintiff must merely have a "personal stake" in the issue and "present a real and substantial controversy admitting of specific relief through a decree of a conclusive character," and not be based on "a hypothetical state of facts." *Id.* at 12. McDonald has an obvious personal stake in whether his name, address, employment, and political

donations are reported to the government and exposed to the public at large. *X Corp.*, 120 F.4th at 196 ("once the donor information is disclosed, the First Amendment injury could not be undone"). "Chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." *Hou. Chron. Publ'g Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007); *Nat'l Rifle Ass'n of Am. v. Magaw,* 132 F.3d 272, 279 (6th Cir. 1997) (holding that an injury sufficient to maintain an action for declaratory relief exists "when a statute … chills protected First Amendment activity") (cleaned up). Thus, standing for declaratory relief is established.

The central error in the District Court's decision (and the FEC's motion for summary affirmance) is the failure to acknowledge that disclosure of donor information is a constitutional injury in and of itself. *Id*. Thus, the bulk of this response simply highlights that repeated error.

III. McDonald has Standing to Seek Remedy for Past Harms

The District Court reasoned that McDonald did not suffer an injury in fact from the past disclosures of his small donor donations because he did not allege that specific ramifications resulted. Doc 21 at PageID 122. However, the mandated disclosure of McDonald's contributions to the FEC was an injury itself. The FEC's further disclosure of McDonald's contributions to the public at large was an additional constitutional injury.

McDonald suffered a First Amendment injury when his donor information was disclosed to the FCC. *AFPF,* 594 U.S. at 617. He was further injured by the FEC placing that information in a public database. He is injured anew every time his small-dollar donation information appears in query results on the FEC website. The FEC demonstrated its ability and willingness to reinjure McDonald when it included URLs in its Motion for FEC database entries that publicly disclose McDonald's contributions that should not have been disclosed. See Doc. 21 at PageID 115-116. Ironically, the FEC's argument that McDonald wasn't injured by the disclosure contributes to the very injury the FEC denies by pointing to URLs that publicly reveal the information that should be private. This further harm will end only when these results cannot be returned from the FEC website.

IV. McDonald has Standing to Seek Prospective Relief

The FEC next argues that McDonald has not alleged an adequate injury-in-fact to obtain prospective relief. To obtain prospective relief, "[a] plaintiff has suffered an injury in fact if he (1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) his intended future conduct is arguably proscribed by the policy in question, and (3) the threat of future enforcement of the challenged policies is substantial." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020). Here, McDonald has stated his intention to make small-dollar

contributions in the future to federal candidates who will utilize conduit platforms, such as ActBlue and WinRed, to accept contributions. Doc 1 at 8-9.

Campaign donations are unquestionably constitutionally protected speech and association. *Driehaus*, 573 U.S. at 162 ("Because petitioners' intended future conduct concerns political speech, it is certainly affected with a constitutional interest"). The conduit donations are subject to mandatory reporting. 52 U.S.C. § 30116(a)(8). Even though the FEC is seeking a legislative fix, the FEC does not dispute that it will enforce § 30116(a)(8). The disclosure of McDonald's information to the FEC is a cognizable First Amendment injury itself. *X Corp*, 120 F.4th at 196. "The pre-enforcement nature of the suit [is] not troubling because the plaintiff[has] alleged an actual and well-founded fear that the law will be enforced against them." *Driehaus*, 573 U.S. at 160 (cleaned up); *see also Hou. Chron. Publ'g Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007) ("Chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement"). Therefore, McDonald has established a First Amendment injury for prospective enforcement.

The FEC argues the McDonald's future harm is speculative because he cannot precisely identify a candidate to which he will make a small-dollar donation using a conduit platform. However, this level of specificity is not required here. McDonald's allegations show that he has made small-dollar donations to federal

candidates in 2019, 2023 and 2024,[1] at least two of whom used conduit platforms to accept donations. McDonald indicated his desire to continue making similar donations in the future, and candidates routinely accept conduit platform donations. This is all that is required for standing. *Id*. He need not be prescient. McDonald is not required to know which candidate or candidates in the current election cycle will earn his financial support. His desire to remain an active small-dollar donor suffices. *Id*.

The FEC argues that McDonald's chill is merely subjective. Not so. The Supreme Court has explained that forcing the disclosure of anonymous donors objectively chills. "The disclosure requirement creates an unnecessary risk of chilling in violation of the First Amendment, indiscriminately sweeping up the information of every [small dollar] donor with reason to remain anonymous." *AFPF,* 594 U.S. at 616-617. "Such risks are heightened in the 21st Century and

[1] The FEC argues that the Court should "disregard" the 2024 donation because it wasn't reported to the FEC. Hardly. The 2024 donation is significant because it is part of McDonald's pattern as a small-dollar donor. The donation is relevant to showing that McDonald is likely to donate again. Beyond this, the donation should not be discounted simply because it does not appear in the FEC database under McDonald's name. It is possible the donation was inadvertently misreported to the FEC, and thus does not appear as it should. It is also possible the intermediary failed to report the donation even though it intended to do so.
If the candidate accepted the donation directly, and thus was not required to report it, the donation is still relevant to show McDonald's small-dollar donor history and as a demonstration of the absurdity of requiring conduit donor disclosures when the direct donation was not reportable.

seem to grow with each passing year, as anyone with access to a computer can compile a wealth of information about anyone else, including such sensitive details as a person's home address or the school attended by his children." *Id* at 617. Chill is presumed because "[w]hen it comes to a person's beliefs and associations, broad and sweeping state inquiries into these protected areas discourage citizens from exercising rights protected by the Constitution." *Id* at 610. Thus, disclosing donor information objectively chills donations, which are protected political speech and association. *Id*. Even the *AFPF* dissenters noted the conclusive nature of this holding. *Id* at 629 (Sotomayor, J., dissenting) (As a result of the *AFPF* holding, "all disclosure requirements *ipso facto* impose cognizable First Amendment burdens"). The District Court erred in finding otherwise.

The complaint alleges that due to his involvement in party politics, McDonald has various reasons for wanting to keep his small dollar donations private. Doc 1 at 9. As General Counsel for the Tarrant County Republican Party, McDonald does not want his contributions reviewed because he does not want people to know that he sometimes supports candidates in primary contests.[2] *Id*. Additionally, he does not want people to know about and thereby potentially misconstrue the intent and

[2] The FEC discounts McDonald's role with the county party because the party is not listed as his employer—his eponymous law firm is. The FEC misses the point. Anyone searching the FEC donor database for Tony McDonald from Tarrant County will likely already know his affiliation with the Tarrant County Republican Party—or quickly be able to figure it out through a few quick keyboard strokes.

implications of McDonald's donations. *Id* at 10. The FEC indicated in its motion that it does not view McDonald's reasons sufficient under its rules for his identity to be shielded. But, under *AFPF*, the sufficiency of individual motivations chilling a plaintiff's donations is not for the government to decide. *AFPF*, 594 U.S. at 616 The demand for an explanation of why someone is chilled is itself chilling. The objective chill of the disclosure requirement is enough to constitute an injury and afford standing. "Exacting scrutiny is triggered by state action which may have the effect of curtailing the freedom to associate, and by the possible deterrent effect of disclosure." *Id.* (quotation marks removed).

To the extent the FEC argues McDonald could avoid future injury by mailing a payment to a candidate instead of using an online donation portal, this argument fails because "[n]one of the cases the FEC cites supports the notion that to avoid causing her own injury a plaintiff must do the very thing she claims she has a right not to do." *Cruz v. FEC*, 2019 U.S. Dist. LEXIS 229454, at *20. McDonald wants to use the donation portals candidates have chosen to process donations. Doing so is quick, easy and convenient. Mailing a check or credit card number is laborious and induces a "pocketbook injury" of paying for postage. Plus, the FEC presumes that upon receiving the contribution, the candidate will process it directly and not through a conduit. There is no reason for the Court to make this same assumption.

The First Amendment has long been recognized to permit anonymous association and donation for any of multiple reasons, or for no reason whatsoever. *AFPF*, 594 U.S. at 617. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." An important part of championing anonymity is *not* requiring an explanation of why an individual seeks anonymity, because explaining one's reasons for being anonymous often destroys the benefit of anonymity and thus chills the anonymous speech one would make.

The conduit reporting requirement, 52 U.S.C. § 30116(a)(8), is unconstitutional as applied to donations of up to $200. So applied, this provision requires conduit committees to report the identity of each donor who donated via the conduit committee starting at a $0 threshold. This is an unconstitutionally low threshold under the First Amendment especially when contrasted with the fact that identical direct contributions are not required to be disclosed. Indeed, if "summary disposition is proper [in] those cases where time is truly of the essence, or where the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," *United States v. Holy Land Found. for Relief & Dev*., 445 F.3d 771, 781 (5th Cir. 2006) (internal

quotation marks omitted), the only summary disposition available here would be a summary reversal.

CONCLUSION

The government has not come close to carrying its burden in seeking a summary disposition. To the contrary, the complaint alleges facts that would clearly establish standing. The Motion for Summary Affirmance should be denied.

Dated: August 20, 2025

Respectfully submitted,

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I hereby certify on this 20th day of August, 2025 that:

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

CERTIFICATE OF SERVICE

I hereby certify on this 20th Day of August 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