UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN PARTY OF LOUISIANA, *et al.*,	)	
Plaintiffs,	)	Civ. No. 15-1241 (CRC-SS-TSC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISSOLVE THREE-JUDGE COURT WITH INSTRUCTIONS TO DISMISS OR, ALTERNATIVELY, TO DISMISS ACTION

This Court lacks jurisdiction to hear plaintiffs' claims. In its opening brief, the Federal Election Commission ("FEC" or "Commission") demonstrated that the Republican Party of Louisiana ("LAGOP"), the Jefferson Parish Republican Parish Executive Committee ("JPGOP"), and the Orleans Parish Republican Executive Committee ("OPGOP") lack injury. They have no standing to complain about not being able to use individual contributions on any "Federal election activity" ("FEA") — communications and other activities affecting federal elections — because they have not shown that they have any such contributions that they cannot currently spend on FEA. Nor do they claim that they reasonably expect to receive such contributions. Plaintiffs do not dispute this critical point, because the record on this score is indisputable. This absence of injury means that the Court cannot award plaintiffs any relief as applied to their use of individual contributions on FEA. Thus, even if the Court were to find some sliver of jurisdiction with respect to plaintiffs' other supposed sources of money for FEA, the Court must

at least limit the scope of any as-applied relief to those sources of funds that plaintiffs are actually prevented by federal law from using on FEA.

Instead of attempting to show injury vis-à-vis individual contributions, plaintiffs oppose the Commission's motion with more new changes to their purported plans in a manner akin to a game of jurisdictional Whac-A-Mole. Refashioning their case on the eve of merits resolution, plaintiffs now identify sources of funds they would like to use on FEA that they previously asserted were not at issue. Plaintiffs thus attempt to take back through briefing the local plaintiffs' sworn interrogatory answers and unequivocal deposition testimony disclaiming JPGOP's and OPGOP's desire to use Louisiana's "qualifying fees" on FEA. Plaintiffs should plainly be held to their sworn statements saying that the case is not about qualifying fees. Even if qualifying fees were at issue, however, plaintiffs have not shown that these are nonfederal funds, and they have thereby failed to carry their burden to show standing. The local plaintiffs have additionally failed to allege any FEA that they wish to *pay for* with qualifying fees — the challenged provision regulates expenditures and disbursements for FEA. And plaintiffs do not dispute that the local plaintiffs are not subject to the regulatory reporting requirements they previously identified. Accordingly, the local plaintiffs have no injury and no standing. Their claims must be dismissed.

Plaintiffs attempt to resuscitate LAGOP's claims by focusing on the corporate and union contributions it now says it wishes to use on FEA. Although plaintiffs previously had been coy about whether LAGOP intended to comply with the Federal Election Campaign Act's ("FECA") ban on using corporate or union contributions in connection with federal elections, *see* 52 U.S.C. § 30118(a), they now explicitly state that such contributions were included in the scope of relief sought. Even if this oblique claim would entail some constitutional injury to LAGOP, it runs

headlong into a familiar redressability problem. Unlike FECA's $10,000 base contribution limit, *see* 52 U.S.C. § 30116(a), which the single-judge Court found could be circumvented without being invalidated in this lawsuit, the Act's corporate contribution ban independently bars plaintiffs' desire to use corporate contributions on FEA, as plaintiffs' own complaint and brief show. Because that ban must be targeted — or not complied with — in order to obtain the relief plaintiffs now say LAGOP wants, this Court lacks jurisdiction to hear that claim. This three-judge Court is only empowered to hear claims against provisions of, or amendments made by, the Bipartisan Campaign Reform Act of 2002 ("BCRA"). It does not have the power to invalidate other FECA provisions. For this reason, this three-judge Court cannot hear plaintiffs' claims even if LAGOP could establish injury with respect to corporate or union contributions. Accordingly, the three-judge Court must be dissolved.

I. THE COURT MUST HAVE JURISDICTION TO HEAR PLAINTIFFS' CLAIMS

Plaintiffs do not dispute that the Court's standing analysis should be "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). The Court must "put aside the natural urge to proceed directly to the merits of this important dispute" and instead "carefully inquire as to whether [plaintiffs] have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.*

Plaintiffs preliminarily contend that the FEC did not "move to dismiss under Rule 12(b)(1) in lieu of an answer" and rely on the FEC's recital that the merits should be decided on cross-motions for summary judgment. (Pls.' Mem. Opposing FEC's Mot. to Dissolve Three-Judge Ct. or Dismiss at 3 (Docket No. 54) ("Opp'n").) These arguments are meritless. The facts

demonstrating an absence of subject matter jurisdiction that formed the basis for the FEC's motion were uncovered primarily in discovery. The Commission filed its motion as soon as it could after discovery was completed. One reason that it did not move sooner was the motion practice necessitated by plaintiffs' proposed burdensome deposition of the agency. (*See* Docket Nos. 30, 32, 36, 37, 39, 53.) In any event, "[i]f the court determines at any time that it lacks subject-matter jurisdiction," as is the case here, the Federal Rules provide that it "must dismiss the action." Fed. R. Civ. P. 12(h)(3); Opp'n at 3.

Plaintiffs' contention that the FEC made this motion in order to obtain "extra summary-judgment briefing" (Opp'n at 3) is likewise meritless. Initially, plaintiffs plainly have not been prejudiced; their opposition to the Commission's motion is roughly the same length as the combined number of pages of the FEC's opening memorandum and this reply. Moreover, the FEC's jurisdictional arguments (that plaintiffs are lacking injury and the Court jurisdiction) are distinct from its merits arguments (that the challenged provisions satisfy the requisite levels of constitutional scrutiny). While the FEC's merits position is strong (*contra* Opp'n at 43 (absurdly suggesting that the FEC "recogni[zes] . . . the weakness of its defense on the merits")), the Court nevertheless has serious Article III and statutory BCRA obligations to ensure that it is empowered to hear the controversy before it. And regardless of the outcome of the FEC's motion, it has already served to clarify the nature of plaintiffs' challenges, for example, by confirming that plaintiffs have no injuries relating to individual contributions and by prompting plaintiffs to clarify that LAGOP wants to use corporate and union contributions on FEA.[1]

[1] Plaintiffs' complaints about the FEC's supposedly "inconsistent" positions are not appropriately laid at the FEC's door. (*E.g.*, Opp'n at 12.) The Court has already identified plaintiffs' desire to render meaningless FECA's contribution limits, particularly for other parties capable of raising extra-limit contributions, despite plaintiffs' claims that their goals are so modest that this case is about spending a single dollar on FEA. It is plaintiffs who seek to undo a

II. PLAINTIFFS LACK STANDING TO OBTAIN ANY RELIEF REGARDING SPENDING INDIVIDUAL CONTRIBUTIONS ON FEA

The record conclusively establishes that there are no individual contributions that plaintiffs have shown they cannot use on FEA. Other than $1 an individual contributed to JPGOP at the end of 2015, neither of the local plaintiffs has received any contributions in years. (Def. FEC's Mem. in Supp. of Mot. to Dissolve Three-Judge Ct. With Instructions to Dismiss or, Alternatively, to Dismiss Action at 10-13 (Docket No. 40) ("Mem.").) The $1 contributed to JPGOP can be used on FEA. (*Id.* at 10 n.1.)[2] And LAGOP has represented that it is unaware of any individual contributor wishing to give it more than $10,000. (*Id.* at 15-16.)

The apparent absence of individual contributions that plaintiffs cannot use on any FEA they wish — including from their funds on hand — confirms that the Court lacks the power to award plaintiffs any relief relating to individual contributions on their as-applied claims. Plaintiffs' as-applied claims seek to show the invalidity of section 30125(b)(1) with respect to their particular circumstances and proposed conduct. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court . . . ."). However, to the extent plaintiffs ask the Court to allow them to fund FEA with individual contributions, it lacks the power to do so, regardless of whether the funds are to be used on "*independent, non-individualized communications* that *exhort registering/voting*" or on other FEA "*by Internet*," other "*non-individualized, independent*

---

keystone legislative reform that took years for Congress to pass, conducting the litigation in a manner that rendered the intangibility of plaintiffs' supposed injuries difficult to detect through opaque, shorthand-filled descriptions of their claims. The FEC is entitled to defend itself both on the thinness of plaintiffs' supposed injuries and the vast harm their proposal would accomplish on the merits, especially by state parties not before the Court.

[2] JPGOP's annual report to the state of Louisiana in fact states that it received $0 in contributions in all of 2015. Louisiana Ethics Administration, *Committee's Report (JPGOP)* at 2, http://ethics.la.gov/CampaignFinanceSearch/LA-57544.pdf.

communications," on FEA communications funded from "an *independent-communications-only account*," or on generically "*independent*" FEA. (Verified Compl. for Declaratory and Injunctive Relief ¶¶ 118, 119, 131 (footnote omitted), 132, 140 (Docket No. 1) ("Compl.").) The Court need not do anything in order for plaintiffs to be able to do any of this activity with any of the individual contributions they have or any they reasonably anticipate receiving in the future. Thus, for example, LAGOP's alternative request to set up an "independent-communications account," which plaintiffs say "would only receive contributions from *individuals*" (Opp'n at 13 n.13), is not a claim that the Court can consider because LAGOP has failed to show that there are any individual contributions it cannot already use on FEA.

Plaintiffs' response that the FEC is making a "just-do-something-else argument" (*e.g.*, Opp'n at 2) is unavailing. Contrary to plaintiffs' notion, the FEC is not judging plaintiffs' preference to use their federal funds on things other than FEA or telling them to do something other than what they want to do. (*Id.* at 22.) The point is simply that plaintiffs are restricted only by their *preference* in choosing not to spend the FECA-compliant money they have on the FEA they wish to do. Since money compliant with federal contribution limits is perfectly fungible, that is not "chill" (*e.g.*, *id.* at 4) but a self-imposed choice. This is not like *FEC v. Wisconsin Right to Life*, where different means of communication, or the possibility of using entirely different sources of money (contributions from individuals to the corporation's "PAC" rather than corporate treasury funds), were rejected by the Court as constitutionally insufficient alternatives. 551 U.S. 449, 477 n.9 (2007). Nor is it like *McCutcheon v. FEC*, where alternative means of expression were rejected as impractical in the particular context of the challenged provision. 134 S. Ct. 1434, 1449 (2014). Plaintiffs cannot escape the jurisdictionally-dispositive reality that they have identified no individual contributions that they are prevented from using on

any FEA they wish under FECA. Accordingly, plaintiffs' choice is unquestionably a self-inflicted injury that plaintiffs do not need a federal judgment to remedy. (Mem. at 19.)

The single-judge Court has already implicitly recognized that plaintiffs have no injury resulting from section 30125. As the FEC explained in its opening memorandum, the injury the Court identified is "exclusively a *disclosure*-based injury." (Mem. at 20 (citing Mem. Op. at 11 (Docket No. 24)).) For all plaintiffs' arguments about not being able to spend "funds *from their state account*, even *at the level of $1*, for FEA" (*e.g.*, Opp'n at 2 (internal quotation marks omitted)), the Court's opinion did not agree that plaintiffs were in fact barred from engaging in such spending. It found that, despite the lack of clarity in plaintiffs' complaint, their injury, if any, "is being 'forced to maintain a federal account and to comply with the regulations and reporting requirements that accompany such an account'" when doing such spending. (Mem. at 20 (quoting Mem. Op. at 11).) This type of injury is not like the one pled in *McCutcheon*, where the plaintiff wanted to make contributions that were prohibited by the Act's aggregate contribution limit, 134 S. Ct. at 1443, or in the portion of *SpeechNow.org v. FEC*, in which the Court of Appeals invalidated FECA's base limits on contributions to independent-expenditure-only political committees, 599 F.3d 686, 692-96 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1003 (2010). The injury the Court identified is like the injury in the other part of *SpeechNow.org*, in which the Court rejected the committee's request not to comply with FECA's less burdensome organizational and reporting requirements for political committees. 599 F.3d at 696-98; *id.* at 696 (such requirements "do not prevent anyone from speaking" (internal quotation marks omitted)). The notion that federal law is preventing plaintiffs from raising contributions above federal limits is "a specious interpretation of the facts before" the Court. *Id.* at 697.

Plaintiffs allude to Cohen's jacket (Opp'n at 25) as if showing that Mr. Cohen's speech was restricted demonstrates that plaintiffs' apparent bank account preference constitutes *the same type* of expressive injury Mr. Cohen suffered. *Cohen v. California*, 403 U.S. 15, 26 (1971). But federal campaign finance law is not a monolith. There is a jurisdictional difference between not being able to spend $1 on FEA that an individual contributed because that individual already gave the maximum base limit contribution, on one hand, and choosing, on the other hand, not to spend a FECA-compliant $1 on FEA in the face of supposedly burdensome requirements about the account that the $1 must come from and how it must be reported. The former is generally barred by section 30125(b)(1) (setting aside Levin funds), but the latter has nothing to do with section 30125(b)(1). The Court has no jurisdiction to invalidate section 30125(b)(1) as to an individual's FECA-compliant $1 contribution because section 30125(b)(1) does not bar spending that $1 on FEA, and plaintiffs have identified no individual contribution dollars they believe are so barred, either from their funds on hand or with respect to anticipated contributions. *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.").

Plaintiffs' goal of "effectively eviscerat[ing]" (Mem. Op. at 7) FECA's individual contribution limit, 52 U.S.C. § 30116(a)(1)(D), thus fails on jurisdictional grounds because plaintiffs have no cognizable injury with respect to individual contributions. Based on the record before the Court, they are effectively seeking to litigate the rights of third parties who have contributors willing to give above federal limits — national and other state and local party committees — and a bedrock rule of standing is that they cannot do so. *Warth v. Seldin*, 422

U.S. 490, 499 (1975) (explaining that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

III. THE LOCAL PARTY PLAINTIFFS HAVE NO INJURY THAT CAN BE REMEDIED BY THIS COURT

A. Plaintiffs' Regulatory Challenge to Account Requirements May Not Be Pursued Here

The Court lacks jurisdiction to consider plaintiffs' challenge to any requirement that they fund their activity from a federal account — even in the absence of any federally impermissible funds — because that claim amounts to a challenge to the FEC's *regulatory implementation* of the statute, rather than the statute itself. This Court lacks authority to hear challenges to anything but BCRA's provisions or amendments. Mem. at 15 (citing cases); *see also Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[s]tanding is not dispensed in gross" (internal quotation marks omitted)). The D.C. Circuit just confirmed the limited nature of special judicial review procedures in the analogous context of a challenge pursuant to 52 U.S.C. § 30110 (providing for en banc review in the Court of Appeals for constitutional challenges to FECA brought by certain plaintiffs). *Holmes v. FEC*, ___ F.3d ___, 2016 WL 1639680, at *5-6 (D.C. Cir. Apr. 26, 2016) (finding that plaintiffs claiming to challenge a provision of FECA were actually challenging an FEC regulation, which the Court of Appeals lacks the power to hear in a section 30110 case). Section 30125(b)(1) contains only requirements related to sources and amounts of contributions and does not itself require any particular kind of account. If plaintiffs want to challenge 11 C.F.R. § 102.5(b)(2) or § 300.30 (discussing accounting methods and account types), or § 300.36 (requiring recordkeeping but not reporting for local entities that are not federal committees), or any other regulatory nuance, they must do so in another proceeding. *McConnell v. FEC*, 540 U.S. 93, 223 (2003), *overruled in part by Citizens United*, 558 U.S. 310; *Holmes*, 2016 WL

1639680, at *5 (explaining that plaintiffs "miss[] the point that a regulation may be unconstitutional even if the statute it implements is not. . . . That one such implementing regulation may be unconstitutional does not render the statute itself unconstitutional"). The Court should refuse plaintiffs' request to bootstrap regulatory challenges into this Court.

B. Plaintiffs' Contentions Regarding Qualifying Fees Fail to Show Injury

The FEC's opening memorandum showed why JPGOP and OPGOP have no standing with respect to any sources of funds. In order to be injured by not being able to spend funds in the requested manner, these plaintiffs need to have at least a reasonable expectation of receiving the funds they wish to use in the first place. The facts show that they do not have such an expectation. What they instead show is that the local plaintiffs' budgets consist of qualifying fees that candidates pay to various Louisiana entities to get on ballots; these entities then remit a portion of the fees to party committees such as plaintiffs. Because plaintiffs previously made clear that they do not intend to use such fees on FEA, they lack standing. (Mem. at 10-13.)

Plaintiffs now say that the local plaintiffs *do* wish to fund FEA using these qualifying fees. (Opp'n at 33.) This assertion is in conflict with the complaint, which does not discuss or even mention such fees — and certainly failed to put the FEC on notice that, as concerns the local plaintiffs, plaintiffs believe the case is *exclusively about* the narrow question of using qualifying fees on FEA. *See* Fed. R. Civ. P. 8(a). Plaintiffs' new assertion is also in conflict with their responses to the FEC's explicit interrogatories asking whether plaintiffs would use qualifying fees on FEA if they obtained the relief they request. (Exh. 2, JPGOP's Disc. Responses at 18-19 (Interrogatory #7); Exh. 3, OPGOP's Disc. Responses at 18-19

(Interrogatory #7).)[3] And in depositions, plaintiffs' representatives again confirmed that qualifying fees are not at issue in this case. OPGOP's representative bluntly testified that there is nothing the committee would like to do but cannot. (Mem. at 11-12.) JPGOP's representative similarly testified that the committee does not seek to use qualifying fees on FEA. (*Id.* at 12.)

In response to these points, plaintiffs do not dispute that their verified complaint failed to mention qualifying fees. (Opp'n at 33.) They nevertheless contend that their references to "nonfederal funds" sufficed to indicate their desire to use qualifying fees. (*Id.*) But qualifying fees, as the FEC has shown and LAGOP's actions have confirmed (Mem. at 6), are not necessarily nonfederal funds. *See also infra* pp. 12-15. As for their sworn interrogatory answers, plaintiffs now contend that their assertions of irrelevancy were not meant to refer to their wish to use "'qualifying fees'" but to the "*interrogatory*" itself. (Opp'n at 33-34.) This contention makes no sense. The interrogatory asked plaintiffs to state whether the relief sought "if granted, would permit a state political party like YOU to use 'qualifying fees' . . . on FEA." (*E.g.*, Exh. 2, JPGOP's Disc. Responses at 18.) If plaintiffs sought to use qualifying fees on FEA, surely they would have simply said that that is what they seek, instead of stating, under oath, that whether plaintiffs' seek to use qualifying fees is "not relevant to any cognizable claim." *Id.*; *see Huthnance v. D.C.*, 255 F.R.D. 297, 300 (D.D.C. 2008) ("plaintiff is bound by the answers given in her responses to defendants' interrogatories").

Plaintiffs do not even attempt to explain the OPGOP representative's testimony that the committee is not being prevented from doing anything it desires. They do contend, however, that the JPGOP representative's answer about not intending to use qualifying fees resulted from the FEC's "sleight-of-hand" questioning. (Opp'n at 34.) This is untrue. Ms. Thomas's

[3] Exhibits 1-6 were attached to the FEC's opening brief. Exhibits 7-8, containing additional excerpts from the depositions of JPGOP and OPGOP, are attached here.

testimony clearly shows that, in contrast to the technical discussion of the meaning of "support" in plaintiffs' litigation brief (*id.*), Ms. Thomas considers FEA to be supportive of federal candidates, *accord McConnell*, 540 U.S. at 168 (explaining that FEA such as "voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates"). (*See* Exh. 7, JPGOP 30(b)(6) Dep. at 51:11-53:22.) In the context of the testimony, it is clear that asking whether JPGOP intended to use the $22,000 or so it has received in qualifying fees to support federal candidates was keeping the record clear by reflecting *the witness's* (and the Supreme Court's) understanding of FEA. Lest there be any doubt, when asked what monies JPGOP would be using in the desired way, the answer was: "Well, we don't have that." (*Id.* at 53:18.) Plaintiffs should be held to their repeated sworn statements, responding to questions squarely within the topics properly noticed under Rule 30(b)(6),[4] that they are not seeking to use qualifying fees on FEA. *See, e.g.*, *U.S. ex rel. Fago v. M & T Mort. Corp.*, 235 F.R.D. 11, 24 (D.D.C. 2006) ("Rule 30(b)(6) testimony is a sworn corporate admission that is binding on the corporation."); *cf. Moore v. Volpe*, ___ F. Supp. 3d. ___, 2016 WL 1301049, at *5 (D.D.C. Apr. 1, 2016) (relying on sham affidavit rule in explaining that "[p]laintiff cannot create a genuine issue of material fact by changing his story in his summary judgment pleadings" and disregarding "new allegation" in favor of the "prior undisputed record" (citing *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999))).

The local party plaintiffs lack standing for the additional reason that they have failed to show that the qualifying fees they have received cannot be used on FEA because they are, in fact, "nonfederal funds." (Opp'n at 33.) This Court should decline plaintiffs' invitation to

[4] Examination Matter No. 7 of each of the FEC's notices of deposition of JPGOP and OPGOP asked these plaintiffs to testify about: "YOUR claims in this case, including as set forth in YOUR COMPLAINT, and what YOU hope to achieve in this case." (Def. FEC's Mot. For Protective Order and to Quash Dep., Exh. 6 at ECF pp. 12, 19 (Docket No. 30-6).)

determine what Louisiana state law allows. *See, e.g.*, *Harris Cty. Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975) (discussing *Pullman* abstention where "a federal constitutional claim is premised on an unsettled question of state law"); *contra* Opp'n at 32 (purporting to interpret state statute). But in any event, some qualifying fees *can* be used on FEA under federal law. The FECA provision plaintiffs challenge, 52 U.S.C. § 30125(b)(1), does not prohibit the use of qualifying fees for FEA. As the FEC explained in its opening brief, the Commission has exercised its delegated authority and concluded in an advisory opinion that ballot access fees established by Florida law can in certain instances be used on federal activities, and LAGOP itself has done just this. (Mem. at 6 (citing Advisory Op. 1988-33, 1988 WL 170426 (Oct. 11, 1988).) The Commission has also explained that "'[a]s a general rule, if the funds in question are from permissible sources (*e.g.*, individuals) rather than from persons prohibited from making contributions under federal law (*e.g.*, corporations, labor organizations, foreign nationals),'" they may be used on federal activity. (*Id.* (quoting FEC, *Political Party Committees* at 18 (Aug. 2013), http://www.fec.gov/pdf/partygui.pdf).)

The Commission has not yet determined whether qualifying fees paid for ballot access and remitted to party committees such as plaintiffs under Louisiana's particular statutory regime may be used on federal activities such as FEA. Nevertheless, using the facts the FEC was able to obtain in discovery and the agency's past approach of making the regulatory determination by tracing the source of the funds (consistent with the text of section 30125(b)(1)), it appears that federal law may not prevent some or all of the funds JPGOP and OPGOP collect as qualifying fees from being used on FEA. JPGOP's representative testified that Louisiana's scheme requires qualifying fees to be paid by *individuals* seeking to become members of a local parish executive committee. (Exh. 5, JPGOP 30(b)(6) Dep. at 23:15-24:4 (Docket No. 40-5) ("Q. So am I

understanding correctly that if someone wanted to become a member of [JPGOP] they would have to pay a qualifying fee? A. That's correct. Q. And a portion of that would be remitted to [JPGOP's] funds? A. That's correct.").) In order to become a member of a parish executive committee such as JPGOP or OPGOP, Louisiana currently requires candidates to pay a $75 fee, in addition to which the local committees can add a fee of $37.50. Louisiana Secretary of State, *Fees/Nominating Petitions to Qualify for Office* at 18-19 (original pagination), http://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/CandidateQualifyingFees.pdf. Thus, since each of JPGOP's nearly three-dozen members (*see* Exh. 7, JPGOP 30(b)(6) Dep. at 15:4-10 (JPGOP has 35 members)) paid these fees, at least $1,312.50 ($37.50 x 35) of the funds JPGOP receives per elected term appears to be from federally-permissible sources.

Whether any portion of the fees in the local party plaintiffs' accounts ultimately comes from a prohibited source such as a corporation is something plaintiffs have not even attempted to show. Accordingly, even if plaintiffs want to make a federal case out of whether qualifying fees can be used on FEA, they have failed to carry their burden of "establishing the three elements that make up the 'irreducible constitutional minimum' of Article III standing: injury-in-fact, causation, and redressability." *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1362 (D.C. Cir. 2012) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Where courts "lack a sufficiently specific record, [they] have declined to issue as-applied remedies" and have found jurisdiction lacking. *E.g.*, *Justice v. Hosemann*, 771 F.3d 285, 294 (5th Cir. 2014), *cert. denied*, No. 15-682, 2016 WL 1278657 (2016). Had plaintiffs made clear that the local plaintiffs' claims revolve entirely around such fees at an earlier point in this litigation, the Commission could have learned the necessary facts to determine whether such fees could qualify as federal funds.

The Court also lacks jurisdiction because the local parties' claims amount to a challenge to the FEC's regulatory implementation of the statute, rather than the statute itself. *See supra* pp. 9-10. Plaintiffs have failed to connect the potential use or non-use of qualifying fees on FEA with the statutory provision they challenge, 52 U.S.C. § 30125(b)(1). Section 30125(b)(1) does not directly address qualifying fees, so even if plaintiffs had a ripe constitutional challenge here, any alleged constitutional infirmities would be found in the FEC's implementation of section 30125(b)(1), "rather than the statute itself." *McConnell*, 540 U.S. at 223; *Bluman v. FEC*, 766 F. Supp. 2d 1, 4 (D.D.C. 2011) ("[I]ssues concerning the [FEC's] regulations are not appropriately raised in [a] facial challenge to BCRA, but must be pursued in a separate proceeding . . . ." (internal quotation marks omitted)).

C. The Local Plaintiffs Also Lack Standing Because They Have Failed to Show That They Want to Spend Money on FEA

The local party plaintiffs' standing arguments also fail because they have not shown that any of their planned activities would actually cost money or otherwise entail a real injury. Their claim that they have been injured because they have been barred from emailing "the nonpartisan 'Get Registered'" article (Opp'n at 9-11) is incorrect. Section 30125(b)(1) regulates the "expend[ing]" or "disburs[ing]" of "amount[s]" for FEA. 52 U.S.C. § 30125(b)(1). Plaintiffs euphemistically characterize the email as "inexpensive" (Opp'n at 9), but as JPGOP's representative testified, the local plaintiffs would have incurred a cost of $0 in creating and sending the "Get Registered" email:

> Q. Are there any expenses that [JPGOP] incurs in connection with emails that it sends?
> A. Do you get charged for emails?
> Q. Well, I'm asking you.
> A. When I send an email it comes from my personal account.

> Q. Maybe I can give you an example that might show you what I'm asking about, or might help clarify. Does [JPGOP] purchase, for instance, a list of email address to which it then sends email notifications?
> A. No.
> Q. Would [JPGOP] pay a vendor to send out [email]-blasts about a certain activity?
> A. No.

(Exh. 7, JPGOP 30(b)(6) Dep. at 28:3-17; Exh. 8, OPGOP 30(b)(6) Dep. at 46:2-7 (testifying that OPGOP members also use their personal email accounts).) Because the local plaintiffs are volunteer organizations, any time spent deciding to send the email, navigating to LAGOP's website, copying and pasting the "Get Registered" text into the email, populating the "to" field, clicking send, and so on, are not expenses paid by the committee in the form of salary. Exh. 7, JPGOP 30(b)(6) Dep. at 19:7-11 (JPGOP has no employees, only volunteers); Exh. 8, OPGOP 30(b)(6) Dep. at 27:22-28:3 (same for OPGOP); 52 U.S.C. § 30101(8)(B)(i) (uncompensated services of an individual volunteer are not contributions); 11 C.F.R. § 100.94(a)-(c), 100.155(a)-(c) (providing that certain uncompensated Internet activities by an individual are neither contributions nor expenditures, including sending "electronic messages"). Thus, as the Commission explained in its opening brief, plaintiffs' complaint is indeed "devoid of allegations discussing specific FEA [the local plaintiffs] *wish to spend money on*." (Mem. at 12-13 (emphasis added); *contra* Opp'n at 29.)

Nor is there any actual "screening problem" that prevents the local plaintiffs from receiving even a $1 individual contribution on the basis that the contributor may have already "given the base limit amount to LAGOP, which would preclude giving $1 . . . except as non-FECA-complaint funds that could not be used for FEA absent requested relief." (Opp'n at 30.) Plaintiffs raise this supposed "screening problem" with respect to the individual who contributed

$1 to JPGOP. (*See id.*)[5] While the FEC has already shown through LAGOP's own testimony that the screening problem is actually no problem whatsoever (Mem. at 18), plaintiffs' opposition brief further confirms the point. As plaintiffs note, there is only one individual who has contributed the maximum of $10,000 to LAGOP in the current 2015-2016 cycle: "'Mr. Dave Roberts.'" (Opp'n at 20 n.19.) Because Mr. Roberts is the only such maxed-out contributor plaintiffs are aware of (the next-highest contributor to LAGOP gave $5,000), the "screening problem" merely requires the local committees to ask: is Dave Roberts the $1 contributor? If yes, then it is a prohibited contribution. If no, then it is not. (*See also* Exh. 7, JPGOP 30(b)(6) Dep. at 77:9-78:6 (testifying that JPGOP could simply ask LAGOP about a contributor if it is unsure if it may use a contribution on FEA); *id.* at 64:8-13 (testifying that even if the relevant contributor information was available on a regulator's website it would not be "reasonable" to have to use that resource).) Moreover, plaintiffs' willingness to comply with Louisiana's $100,000 contribution limit confirms the pretextual nature of their screening contentions. The litigation-concocted fear of receiving an excess contribution applies whether the limit is $10,000 per year or $100,000 per every four years. Accordingly, these contentions are "'[p]ure applesauce'" (Mem. at 18) and are insufficient to establish standing.

Plaintiffs' arguments about certain FEA JPGOP may have had on its website similarly fail to salvage JPGOP's standing. (Opp'n at 36 n.31.) Plaintiffs failed to make any allegations concerning this supposed injury in their complaint, and this supposed injury was discovered as a result of the litigation (not the other way round). In any case, plaintiffs themselves admit that JPGOP "has no idea how to value the inadvertent FEA on its website." (*Id.*) Clearly, then, JPGOP neither "expended [n]or disbursed" amounts for this activity. 52 U.S.C. § 30125(b)(1);

[5] As noted in the FEC's opening brief, standing must exist at the time a suit is filed. (Mem. at 8, 19.) The alleged $1 contribution was given after the suit was filed.

accord Louisiana Ethics Administration, *Committee's Report (JPGOP)* at 4, http://ethics.la.gov/CampaignFinanceSearch/LA-57544.pdf (reporting no expenditures in connection with JPGOP's website in all of 2015)[6]; 11 C.F.R. § 100.94(a)-(c), 100.155(a)-(c) (providing that certain uncompensated Internet activities by an individual are neither contributions nor expenditures, including creating, maintaining, "or hosting a website").

In sum, despite plaintiffs' shifting intentions and attempts to obscure the facts on the ground, it is clear that JPGOP and OPGOP do not have standing. They disclaimed their desire to use qualifying fees on FEA. They have failed to establish the facts necessary to show that using qualifying fees would be prohibited under section 30125(b)(1), as opposed to a regulatory implementation of that provision, even if qualifying fees were at issue. They have also failed to identify any FEA that they actually want to spend money on. And they have incorrectly represented the supposed burdens stemming from reporting obligations that would apply to such hypothetical activity, as they do not dispute. (Mem. at 14 (correcting plaintiffs' erroneous contention that the local plaintiffs must comply with reporting requirements).) The Court should look past the counterfactual representations in plaintiffs' briefs and conclude, in accordance with the credible and spontaneous testimony of OPGOP's representative, that there is in fact nothing these committees would like to do but cannot — indeed, they have not "actually sat down and thought about what those things might be." (Exh. 6, OPGOP 30(b)(6) Dep. at 37:19-38:10, 39:4-23.) Because even the single-judge district court would lack jurisdiction over these plaintiffs' claims, they must be dismissed. *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015).

[6] The itemized "telephone line" expenditure is apparently a line JPGOP pays for "[i]n the home of a longtime republican activist." (Exh. 5, JPGOP 30(b)(6) Dep. at 24:5-13.)

IV. LAGOP ALSO LACKS STANDING IN THIS COURT

The FEC's opening brief and the foregoing analysis explain why LAGOP does not have any Article III injury with respect to the individual contributions it is not being prevented from using on FEA, *see supra* pp. 5-9, or with respect to the qualifying fees it previously said were irrelevant, *see supra* pp. 10-15. LAGOP also does not dispute that transfers it receives from the Republican National Committee can be used on FEA. (Mem. at 5, 7.) As for data fees, plaintiffs now state that "data fees have been placed in the LAGOP state account that it wants to use for independent-communication FEA." (Opp'n at 19.) Plaintiffs rely on the LAGOP representative's testimony that LAGOP has placed FECA-compliant data fees that an individual "running for state office . . . paid for with [her or her] personal [credit] card" into LAGOP's nonfederal account. (Exh. 4, LAGOP 30(b)(6) Dep. at 110:1-17; Opp'n at 19 n.18.) But this testimony does not establish an injury. It establishes that LAGOP *chose* not to make these funds available for use on FEA. Plaintiffs have failed to show any injury with respect to these sources of funds, and any injury they might be imagined to have in not being able to transfer funds from a nonfederal to federal account is a regulatory injury having nothing to do with section 30125(b)(1), which on its face permits the use of FECA-compliant funds. *See supra* pp. 9-10.

The jurisdictional issue with respect to corporate and union contributions is different. Having stated in their complaint that they intend to comply with at least some of FECA's ban on using corporate contributions, specifically citing 52 U.S.C. § 30118(a) as a "provision" of "applicable federal law" they would comply with (Compl. ¶ 107), plaintiffs now make clear that LAGOP in fact does not intend to comply with section 30118(a) in its entirety (Opp'n at 17-18). Plaintiffs now say directly that "LAGOP *wants* to use corporate/union donations." (*Id.* at 16; *compare id.* ("FEC's foundation — that LAGOP wants to use donations from *only individuals*

for intended FEA — is erroneous. Nowhere has any Plaintiff said that, and FEC cites no such statement."), *with* Mem. at 16 (quoting plaintiffs' unqualified statement that what is at issue in this case — not just LAGOP's alternative claim in Count II — is "the right of state and local committees to make independent communications . . . with . . . contributions, *from individuals*, that they have and routinely raise" (internal quotation marks omitted)). It now appears that plaintiffs' vague references to nonfederal funds have been a stalking horse for an attempt to obtain a ruling from the Court that would allow corporations and unions to make large contributions to political parties for use on activities affecting federal elections.

Plaintiffs agree that it is "true" that this three-judge BCRA Court lacks jurisdiction to invalidate FECA's ban on corporate contributions in section 30118(a). (Opp'n at 18.) They nevertheless cast this jurisdictional impediment as a "red herring" by analogizing to the single-judge Court's jurisdictional determination that granting plaintiffs the relief they seek could redress their purported injuries without formally invalidating FECA's base contribution limits. (*Id.*; *see also* Mem. Op. at 14.) Not so fast. The Court's determination that issuing a ruling invalidating section 30125(b)(1) would render the limits of 52 U.S.C. § 30116(a)(1)(D) meaningless "without having to invalidate [those] base contribution limits" (Mem. Op. at 14) does not apply to the corporate contribution prohibition in section 30118(a). Plaintiffs are challenging section 30118(a)'s corporate contribution prohibition because plaintiffs have now explicitly clarified that what they pled in paragraph 107 of the complaint is that they do not wish to comply with that element of section 30118(a). (Opp'n at 17-18; Compl. ¶ 107 (listing provisions plaintiffs "want" to comply with).) If plaintiffs are requesting to be permitted to use corporate and union contributions, and they themselves acknowledge that the relief they seek will be consistent with some — but not all — of section 30118(a), that position cannot be

construed as anything but a challenge to the portion of section 30118(a) that plaintiffs do not wish to comply with. Put another way, if plaintiffs could obtain the relief of using corporate and union contributions without invalidating a portion of section 30118(a), they could have stated in their complaint that they would comply with all of section 30118(a). They did not. This Court does not have the power to grant plaintiffs' wish not to comply with section 30118(a). Plaintiffs' complaint and opposition brief necessarily reveal what plaintiffs have attempted to obfuscate: if corporate or union funds are at issue, this case necessarily challenges section 30118(a).

Moreover, section 30118(a) is distinct from section 30116(a)(1)(D) for jurisdictional purposes because the corporate contribution ban on federal activity is directly implicated in plaintiffs' challenge to section 30118(a). For one thing, the restrictions of section 30118(a) apply even to the first dollar plaintiffs wish to spend on FEA. Plaintiffs cannot avoid that limitation provision in the same way they have sought to avoid section 30116(a)(1)(D)'s — by alleging that the case is about a potentially compliant $1 contribution. There is also a textual difference between section 30116(a)(1)(D) and section 30118(a). Section 30118(a) provides in part that "[i]t is *unlawful* . . . for any corporation whatever, or any labor organization, to make a contribution . . . in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for." 52 U.S.C. § 30118(a) (emphasis added). Far from being a new provision or amendment of BCRA, as is required for jurisdiction in this Court, this was substantially the text Congress first passed in the Tillman Act of 1907. Tillman Act, Chap. 420, 34 Stat. 864-65. Plaintiffs themselves contend that section 30118(a)'s "in connection with" language encompasses "payments for [FEA]" (Opp'n at 18 n.16 (internal quotation marks omitted)). It is thus undisputed here that section 30118(a) itself prohibits plaintiffs' proposed conduct as to

corporate and union contributions. Unlike in *McConnell* and *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010), *aff'd*, 561 U.S. 1040 (2010), where the state plaintiffs' BCRA claims asserted in part that the definition of FEA itself improperly reached purportedly non-federal activities, plaintiffs in this case concede the federal nature of their desired FEA, and they place an increased focus on independence as the reason they should not have to comply with Congress's regulation of soft money.[7] The animating theory behind plaintiffs' lawsuit is that "[i]ndependence eliminates corruption," *e.g.*, Pls.' Mem. Supporting Their Mot. for Summ. J. at 27 (Docket No. 33), not that the FEA they wish to do is not actually "federal" activity. So even if plaintiffs were to prevail on their challenge to section 30125(b)(1), their proposed conduct would still be prohibited by section 30118(a).

Plaintiffs' wistful notion that striking section 30125(b)(1) as requested "should return [the law] to the way [things] were before BCRA's FEA provisions" (Opp'n at 42 n.33) is wrong on its face. In this challenge, the federal nature of FEA is conceded and plaintiffs therefore cannot escape section 30118(a)'s more-than-century-old text because neither this Court nor the FEC is free to interpret section 30118(a) as inapplicable to plaintiffs' FEA on the basis that contributions for FEA — *Federal* election activity — are not "in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for." 52 U.S.C. § 30118(a).

Accordingly, while LAGOP may actually receive contributions covered by section 30125(b)(1)'s and 30118(a)'s regulation of corporate and union contributions for FEA, plaintiffs cannot proceed on a challenge to those provisions in this Court because this Court is "unable to

[7] Indeed, they even cancelled plans to air advertisements supporting Governor Bobby Jindal without expressly advocating his election because he was no longer a candidate for federal office. (Opp'n at 6-7.)

provide Plaintiffs the relief" of invalidating the portion of section 30118(a) they challenge (Mem. Op. at 14), which independently bars plaintiffs' claims. *Rufer v. FEC*, 64 F. Supp. 3d 195, 203-04 (D.D.C. 2014); *McConnell*, 540 U.S. at 229 (explaining that striking BCRA's increases and indexes of FECA's base contribution limits would not redress certain plaintiffs' claimed injuries because such action would not invalidate the FECA base limits themselves).

CONCLUSION

For the foregoing reasons, and for those set out in the FEC's opening memorandum, the Court should dissolve this three-judge Court with instructions to the single-judge Court to dismiss or, alternatively, dismiss the case for lack of jurisdiction. If the Court concludes that LAGOP has a cognizable challenge with respect to its desired use of corporate and union contributions on FEA, despite the absence of such pleading in plaintiffs' complaint, this Court should be dissolved and LAGOP's claim remanded for determination by the single-judge Court.

Respectfully submitted,

Daniel A. Petalas (D.C. Bar No. 467908)
Acting General Counsel
dpetalas@fec.gov

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel — Law
lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

Seth Nesin
Attorney
snesin@fec.gov

Greg J. Mueller (D.C. Bar No. 462840)
Attorney
gmueller@fec.gov

/s/ Charles Kitcher
Charles Kitcher (D.C. Bar No. 986226)
Attorney
ckitcher@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

April 29, 2016