

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION**

NATIONAL REPUBLICAN SENATORIAL
COMMITTEE, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendant.

No. 1:22-cv-639
Hon. Douglas R. Cole

PLAINTIFFS' BRIEF CONCERNING PROPOSED FINDINGS OF FACT

INTRODUCTION

Plaintiffs’ Proposed Findings Of Fact In Support Of Certification (Doc. 44, PageID##5245-5280) properly lay out the “‘adjudicative’ facts” of this case, *Rufer v. FEC*, 64 F. Supp. 3d 195, 205 (D.D.C. 2014); Certification Order, Dkt. 51 at 3, *Wagner v. FEC*, No. 11-cv-1841 (D.D.C. June 5, 2013) (*Wagner* Order); describe the undisputed contents of the discovery record, *Mariani v. United States*, 212 F.3d 761, 765 (3d Cir. 2000) (en banc); and otherwise provide facts confirming that Plaintiffs’ First Amendment challenge to the coordinated party expenditure limits under the Federal Election Campaign Act (FECA) is not “obviously frivolous” and, thus, that the Court should certify it, *Holmes v. FEC*, 823 F.3d 69, 72-74 (D.C. Cir. 2016).

By contrast, the FEC—as in prior cases—has attempted to “lard” the record with “voluminous documentation” and other materials, largely “without any attention to elementary evidentiary requirements [or] limitations, such as the rule against hearsay.” *FEC v. Colo. Rep. Fed. Campaign Comm.*, 41 F. Supp. 2d 1197, 1200 (D. Colo. 1999), *aff’d*, 213 F.3d 1221 (10th Cir. 2000), *rev’d on other grounds*, 533 U.S. 431 (2001). In particular, the FEC’s Proposed Findings Of Fact (Doc. 43, PageID##5111-5244) rehash legislative facts inappropriate for the Court to consider, much less find, at this juncture, *see Rufer*, 64 F. Supp. 3d at 205, rest on volumes of inadmissible materials that are not properly included in the record in this case, and wade into irrelevant issues unrelated to the constitutional question presented here, *see Colo. Rep. Fed. Campaign Comm.*, 41 F. Supp. 2d at 1200.

As explained more fully below, the Court should make factual findings consistent with Plaintiffs’ Proposed Findings Of Fact, strike or disregard the overwhelming portion of the FEC’s Proposed Findings Of Fact, and “immediately” certify the question presented. 52 U.S.C. § 30110.¹

¹ During the most recent status conference, the Court requested that the parties not submit paragraph-by-paragraph responses to each other’s proposed findings of fact. Plaintiffs have

ARGUMENT

I. THIS COURT SHOULD LIMIT ITS FINDINGS TO ADJUDICATIVE FACTS.

Section 30110 is silent regarding the factual findings a district court must make in determining whether to certify a constitutional challenge to FECA. 52 U.S.C. § 30110. Nonetheless, because resolving such challenges may “require[] a fully developed factual record,” *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 192 n.14 (1981), the district court must “ma[k]e findings of fact” as part of its § 30110 certification, *Bread Pol. Action Comm. v. FEC*, 455 U.S. 577, 580 (1982). District courts considering § 30110 certification motions ordinarily have “limited their findings to ‘adjudicative’ facts” and declined to make findings regarding “legislative facts relevant to the parties’ legal positions.” *Rufer*, 64 F. Supp. 3d at 205 (collecting cases); see *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) (explaining that “adjudicative facts” are “the facts of the particular case,” whereas “legislative facts” are those “which have relevance to legal reasoning” (cleaned up)); Fed. R. Evid. 201 adv. comm. notes, 56 F.R.D. 183, 201-206 (1972) (addressing distinction).

Thus, the facts that district courts generally find as part of the § 30110 inquiry include:

- Facts “concerning the plaintiffs’ particular circumstances and basic background information” related to the plaintiff’s political and campaign-finance activities and the challenged FECA provision, *Rufer*, 64 F. Supp. 3d at 205;
- Facts regarding the plaintiffs’ “plans” to engage in political speech and funding activities and “how ... the challenged provisions affect” those “plans,” *Spechnow.org v. FEC*, No. 08-cv-248, 2009 WL 3101036, at *1 (D.D.C. Sept. 28, 2009);
- Facts regarding the state of any record properly assembled by the parties, including whether the record is devoid of evidence on crucial issues, see, e.g., *Wagner Order 5* (finding that “[t]here is no evidence in the record that the President, the Vice President, any Member of Congress, or any official of any political party or political committee

complied with that request, but reserve the right to submit a paragraph-by-paragraph response if the Court requests or the FEC submits such a response to Plaintiffs’ Proposed Findings Of Fact.

had any role in the negotiation, approval, or implementation of the contracts under which Plaintiffs are performing personal services for their federal agencies”); and

- Facts bearing on jurisdictional issues, such as whether the plaintiffs have standing and the constitutional challenge is ripe, *see Martin Tractor Co. v. FEC*, 627 F.2d 375, 378 (D.C. Cir. 1980); *Sykes v. FEC*, 335 F. Supp. 2d 84, 88-94 (D.D.C. 2004); *Mott v. FEC*, 494 F. Supp. 131, 135 (D.D.C. 1980).

District courts make findings in these categories because they present “the kinds of facts ... that are typically resolved in a judicial forum.” *Speechnow.org*, 2009 WL 3101036, at *1.

By contrast, district courts proceeding under § 30110 do not make findings regarding other matters because they “go beyond appropriate fact finding.” *Mariani*, 212 F.3d at 767. That stems from two fundamental principles.

First, district courts do not make findings regarding “legislative facts relevant to the parties’ legal positions.” *Rufer*, 64 F. Supp. 3d at 205 (cleaned up). Rather, “legislative” facts “are as easily presented to the court of appeals en banc as to the district court,” *Athens Lumber Co. v. FEC*, 689 F.2d 1006, 1015 (11th Cir. 1982), *on reh’g*, 718 F.2d 363 (11th Cir. 1983), as the FEC itself has recognized, *see* FEC’s Mem. in Supp. of Reply Regarding Proposed Findings of Fact at 12 n.6, *Speechnow.org*, No. 08-cv-248, Doc. 63 (D.D.C. Dec. 12, 2008) (“Legislative facts are often not introduced in a case until the appellate level.”). The reasons district courts resolving § 30110 motions do not engage in legislative factfinding are plain.

For one thing, such factfinding would serve little purpose, as appellate courts review “findings” of legislative facts *de novo* and are free to depart from them—especially when First Amendment challenges are raised. *See Lockhart v. McCree*, 476 U.S. 162, 170 n.3 (1986) (explaining why a “‘clearly erroneous’ standard” should not apply to “‘legislative facts’” found by lower courts, especially in constitutional challenges); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995) (when the First Amendment is involved, “the nature of protected speech carries with it a constitutional duty” imposed on appellate courts “to conduct an

independent examination of the record as a whole, without deference to the trial court”). Indeed, a finding of “a ‘legislative fact’” in a constitutional challenge is “subject to *de novo* review” to ensure it is “decided uniformly,” *United States v. Miller*, 982 F.3d 412, 430 (6th Cir. 2020), and thereby to avoid an outcome where “the same law would be constitutional in one state, and unconstitutional in another, depending on a district judge’s resolution of factual disputes,” *Hope Clinic v. Ryan*, 195 F.3d 857, 873 (7th Cir. 1999) (en banc), *vacated*, 530 U.S. 1271 (2000).

For another thing, avoiding legislative factfinding “heeds [§ 30110’s] command that the district court certify all constitutional questions ‘immediately.’” *Rufer*, 64 F. Supp. 3d at 205. Requiring a district court to trawl through “thousands of pages of studies, reports, articles, and expert declarations,” *Speechnow.org*, 2009 WL 3101036, at *1, merely to make findings of “legislative” facts that will be reviewed *de novo* on appeal “would serve only to delay proceedings” without providing any benefit, *Athens Lumber*, 689 F.2d at 105.

Second, district courts considering § 30110 certification motions do not make findings that “are unsupported by proper evidence[] or go beyond appropriate fact finding into legal conclusion.” *Mariani*, 212 F.3d at 767. They therefore do not make findings such as a “finding that Americans have become more cynical about government as a result of the role of soft money in the political system” based on “an opinion expressed by the New York Times Editorial page.” *Id.* They also do not find facts about alleged historical instances of “corruption” by officeholders, candidates, campaign donors, or political parties based on “legislative history, reported cases, legal treatises, congressional testimony, and media reports.” *Wagner* Order 3. Even if such facts are “needed to answer” whether a campaign-finance restriction is “necessary to” address *quid pro quo* “corruption,” they are “not the kind of facts that can be determined in a judicial forum on the basis of a cold paper record full of hearsay and opinion.” *Speechnow.org*, 2009 WL 3101036, at *1.

II. THE COURT SHOULD FIND FACTS AS PRESENTED IN PLAINTIFFS' PROPOSED FINDINGS.

Plaintiffs' Proposed Findings Of Fact In Support Of Certification (Doc. 44, PageID##5245-5280) appropriately lay out “adjudicative facts,” *Rufer*, 64 F. Supp. 3d at 205, describe the undisputed contents of the discovery record, *Mariani*, 212 F.3d at 765, and otherwise provide facts confirming that the Court should “immediately” certify the question presented, 52 U.S.C. § 30110. Plaintiffs' Proposed Findings, moreover, comport with the Court's order to “submit any additional facts” unearthed during discovery that Plaintiffs “want the Court to consider including in the record” for the *en banc* Sixth Circuit. 8/1/23 Notation Order.

Accordingly, the Court should:

1. Adopt Plaintiffs' Proposed Findings ¶¶ 1-55, *see infra* Part II.A;
2. Make findings of fact that are established in the discovery record and undisputed by the parties, *see infra* Part II.B; and
3. Make findings of fact regarding the costs to Plaintiffs NRSC and NRCC of creating and maintaining independent expenditure units (IE units) used to ensure compliance with the coordinated party expenditure limits, *see infra* Part II.C.

Moreover, in all events, to the extent that the Court narrows the scope of its factual findings (by, for example, adopting only Plaintiffs' Proposed Findings ¶¶ 1-55), the remainder of Plaintiffs' Proposed Findings and the accompanying supporting materials—such as discovery responses, expert reports, and deposition transcripts—are all properly “includ[ed] in the record” for the *en banc* Sixth Circuit. 8/1/23 Notation Order; *see Rufer*, 64 F. Supp. 3d at 205.

A. The Court Should Adopt Plaintiffs' Proposed Findings ¶¶ 1-55.

The Court should adopt Plaintiffs' Proposed Findings ¶¶ 1-55 (Doc. 44, PageID##5245-5555). Plaintiffs originally proposed these findings before discovery (Prop. Undisputed Facts, Doc. 21-1) and explained that discovery was unnecessary to aid the court in discharging its obligations under § 30110, *see Reply In Support of Plaintiffs' Mot. to Certify Question to the En Banc Court*

of Appeals at 4-11 (Doc. 27, PageID##333-340). In any event, for the convenience of the Court, Plaintiffs “have added to several of [these] paragraphs, in bold font, supplemental citations to record evidence adduced during discovery.” Proposed Findings at 1 (Doc. 44, PageID#5245).

Plaintiffs’ Proposed Findings ¶¶ 1-55 are “adjudicative facts” of the type that district courts routinely find in granting certification under § 30110. *Wagner* Order 3-4; *Rufer*, 64 F. Supp. 3d at 205. Plaintiffs’ Proposed Findings ¶¶ 1-55 address “Plaintiffs, their particular circumstances, and some background.” *Wagner* Order 4; Proposed Findings ¶¶ 1-10, 26, 32-33, 37-39, 44-55 (Doc. 44 PageID##5245-5555). These proposed findings encompass facts regarding Plaintiffs’ “plans” to engage in political speech through coordinated party expenditures and how FECA’s limits on such expenditures “affect” those “plans.” *Speechnow.org*, 2009 WL 3101036, at *1; see Proposed Findings ¶¶ 26, 32-33, 37-39, 44-50 (Doc. 44 PageID##5250-5254). Moreover, Plaintiffs’ Proposed Findings ¶¶ 1-55 lay out the “legal rule[s] ... offered to establish the factual context of the case,” *Toth*, 306 F.3d at 349, and “basic background information” regarding the challenged legal regime and the FEC’s enforcement of it, *Rufer*, 64 F. Supp. 3d at 205; see *Speechnow.org*, 2009 WL 3101036, at *7-10; Proposed Findings ¶¶ 11-25, 27-31, 34-36, 40-43 (Doc. 44 PageID##5247-5253). Thus, Proposed Findings ¶¶ 1-55 demonstrate that Plaintiffs have standing to challenge FECA’s coordinated party expenditure limits and that their challenge is ripe. See *Martin Tractor Co.*, 627 F.2d at 378; *Sykes*, 335 F. Supp. 2d at 88-94; *Mott*, 494 F. Supp. at 135.

The FEC has also proposed findings that purport to address these topics. See FEC Proposed Findings ¶¶ 1-7, 142-144, 236-239, 241-242, 244-245, 249, 252-258, 262, 265-268, 290-294, 296-300, 302-303, 307-314, 326 (Doc. 43, PageID##5116-5118, 5172-5173, 5204-5216, 5224-5232, 5237). The Court should not adopt the FEC’s proposed findings on these topics to the extent they

are inconsistent with Plaintiffs' Proposed Findings ¶¶ 1-55 or are misleading, argumentative, or otherwise improper.

For example, some of the FEC's proposed findings misleadingly assert that the "NRSC is directly governed by Republican U.S. Senators." FEC Proposed Findings ¶¶ 3, 142, 144 (Doc. 43, PageID##5116-5117, 5172-5173). It is true that NRSC's Chairman must be a sitting U.S. Senator (currently Senator Daines of Montana), but the FEC's proposed findings make no mention of the fact that NRSC's day-to-day operations are governed by an Executive Director (presently Mr. Jason Thielman) and other employees. NRSC's corporate bylaws referenced by the FEC provide that "[t]he Executive Director [is] considered the 'president'" of NRSC, and thus has the power to "supervise and control all of the affairs of the [NRSC] and oversee the management of the [NRSC] in accordance with policies and directives approved by the Board of Directors, including appointing assistants and hiring employees as necessary to ensure orderly operations." FEC Ex. 165 (Doc. 40-5, PageID#3880). NRSC's Executive Director thus has "ultimate responsibility for the administration and interpretation of [NRSC personnel] policies," while various staff "Division Directors are responsible for the daily management of the employees within their division." FEC Ex. 172 (Doc. 40-12, PageID#3936). Moreover, under those personnel policies, no one other than the Executive Director and other authorized employees have authority to enter into contracts on behalf of NRSC. *Id.* (Doc. 40-12, PageID#3951). Any findings of fact relating to the governance of the NRSC should reflect these facts.

The same goes for any findings about the NRCC's governance. The FEC's proposed findings make similar misleading assertions about NRCC operations. FEC Proposed Findings ¶¶ 5, 144 (Doc. 43, PageID##5117, 5172-5173). While NRCC's Chairman must be a sitting U.S. House member (currently Representative Hudson of North Carolina) and its Executive Committee

consists of House members, the FEC again omits that NRCC’s day-to-day affairs are governed and carried out by staff. It is NRCC’s Executive Director (presently Mr. Christopher Winkelman), an employee, who “is responsible for the successful leadership and management of the organization” on a day-to-day basis. FEC Ex. 163 (Doc. 40-3, PageID#3862). The FEC’s proposed findings cite NRCC’s corporate bylaws but never mention that the bylaws specifically provide that NRCC’s “Executive Director shall: (a) act as a professional advisor to the Board of Directors on all aspects of the organization’s activities; (b) oversee the day-to-day operations of the organization including managing staff and independent contractors; [and] (c) oversee the planning, implementation and evaluation of the organization’s activities.” *Id.*

B. The Court Should Make Findings On Undisputed Facts.

Paragraphs 56-136 of Plaintiffs’ Proposed Findings Of Fact (Doc. 44, PageID##5255-5278) likewise present “adjudicative facts”—the “facts of the particular case” as developed in discovery. *Toth*, 306 F.3d at 349. Unlike the FEC’s proposed findings of fact, *see infra* Part III, Plaintiffs’ Proposed Findings Of Fact ¶¶ 56-136 are cabined to the record of *this* case, including as developed by the parties’ discovery responses and the expert reports and depositions here, not in other cases (*see* Doc. 44 PageID 5255-78). They therefore are of the type of “adjudicative facts” that the Court may find now. *See Toth*, 306 F.3d at 349; *Mariani*, 212 F.3d at 765.

For example, many of these Paragraphs provide further information on the discovery process, the backgrounds of the experts, and Plaintiffs’ activities and intentions. *See* Proposed Findings ¶¶ 56-60, 75 (Doc. 44, PageID##5255-5256, 5260-5263). Others describe the state of the record. *See id.* ¶¶ 78, 81, 93-96, 100-101, 105(b)(ii), 105(d), 107 (Doc. 44, PageID##5263-5273). And still others identify areas on which the parties’ experts agree. *See id.* ¶¶ 62-63, 65, 68-71, 73(c), 76, 82, 86, 90, 105(c), 108-109, 113, 115 (Doc. 44, PageID ##5256-5259, 5263-5266, 5269-

5270, 5273-5274). These proposed findings, which describe factual information about this particular case and do not require this Court to make legal conclusions, are adjudicative facts this Court can find in the context of a § 30110 certification. *See, e.g., Wagner* Order 5.

To be sure, the Court need not (and should not) find as facts the various quotations from the record, such as from discovery responses, expert witnesses, and deposition transcripts, that Plaintiffs have provided in their Proposed Findings Of Fact. Plaintiffs provided those quotations predominantly to aid the Court in understanding the discovery record undergirding their Proposed Findings, to ensure they would be “includ[ed]” in the record for the *en banc* Sixth Circuit’s consideration, 8/1/23 Notation Order, and to underscore that their First Amendment claim is not “obviously frivolous,” *Holmes*, 823 F.3d at 72-74.

In all events, the parties’ proposed findings establish that there is no dispute regarding three key facts confirmed in the discovery record. Accordingly, the Court should find these facts.

1. FECA’s Coordinated Party Expenditure Limits Burden Political Speech By Political Party Committees And Their Candidates. Plaintiffs have explained that even the FEC’s own expert demonstrated that the coordinated party expenditure limits burden Plaintiffs’ political speech and activities. *See* Plaintiffs’ Proposed Findings ¶¶ 62-76 (Doc. 44, PageID##5256-5263). The FEC does not seriously dispute this point, but instead suggests that any burdens are not “undu[e].” *See* FEC Proposed Finding ¶ 328 (Doc. 43, PageID#5238); *see also id.* ¶¶ 251-339 (Doc. 43, PageID##5210-5242).

2. The Record Contains No Evidence Of Any Instance Of *Quid Pro Quo* Corruption Involving Coordinated Party Expenditures. Plaintiffs have explained that, even after the discovery the FEC insisted upon, the record contains no evidence of any instance of *quid pro quo* corruption occurring through coordinated party expenditures. *See* Plaintiffs’ Proposed

Findings ¶¶ 77-107 (Doc. 44, PageID##5263-5273). The FEC cannot, and does not, dispute this, much less point to any instance of *quid pro quo* corruption occurring through coordinated party expenditures. *See* FEC Proposed Findings ¶¶ 67-235 (Doc. 43 PageID##5138-5204).

3. The Record Shows That Better-Tailored, Less-Intrusive Regulatory Options To Combat Any Potential For *Quid Pro Quo* Corruption Exist And Are In Place Already.

Plaintiffs have explained that both sides' experts agree that donor base contribution limits are sufficient to prevent *quid pro quo* corruption through coordinated party expenditures and could be refined to do so even more effectively if needed. *See* Plaintiffs' Proposed Findings ¶¶ 108-112 (Doc. 44, PageID##5273-74). The FEC offers no response or contrary showing on this point. *See* FEC Proposed Findings (Doc. 43, PageID##5111-5244). In fact, it concedes that “[f]unds raised by candidates from individual donors in excess of base contribution limits are clearly impermissible.” *Id.* ¶ 202 (Doc. 43, PageID#5192). The FEC also never even *mentions* FECA's anti-earmarking rules, which function as a further prophylaxis against *quid pro quo* corruption through coordinated party expenditures. *Compare* Plaintiffs' Proposed Findings Of Fact ¶¶ 110-112 (Doc. 44, PageID##5273-5274), *with* FEC Proposed Findings (Doc. 43, PageID##5111-5244).

C. The Court Should Find Facts Regarding The Costs Of Operating IE Units.

The Court should also make findings of fact, as “adjudicative facts,” concerning costs incurred by NRSC and NRCC in creating and maintaining their “firewalled” IE units to “avoid making unintended party coordinated communications.” Plaintiffs' Proposed Findings ¶ 37 (Doc. 44, PageID#5251). As the FEC acknowledges, to ensure independence, party committee IE units must utilize “separate vendors ... , office space, and staff” from the main party operation. FEC Proposed Findings ¶ 326 (Doc. 43, PageID#5237); *accord* Plaintiffs' Proposed Findings ¶ 38 (“[T]o ensure independence between the IE unit and main operation, the party committee has to use its limited operating funds to retain vendors redundant to the main operation, rent separate

office space, and employ additional staff on behalf of the IE unit.”) (Doc. 44, PageID##5251-5252). Discovery confirmed that maintaining these separate operations has imposed significant costs on NRSC and NRCC. Plaintiffs’ Proposed Findings ¶ 75 (Doc. 44, PageID##5260-5263).

Specifically, Plaintiffs have shown that during the last election cycle, “NRSC spent nearly \$38 million in total to operate its IE unit, including spending over \$34 million on independent expenditures—mostly for television advertising—in support of Republican Senate nominees.” Plaintiffs’ Proposed Findings Of Fact ¶ 75.e (Doc. 44, PageID#5261). Plaintiffs also have shown that NRCC “spent \$92.4 million to operate its IE unit, including spending over \$87 million on independent expenditures—mostly for television advertising—in support of Republican House nominees.” *Id.* ¶ 75.f (Doc. 44, PageID#5261).

The FEC contends that by including the IE units’ advertising costs, NRSC and NRCC “incorrectly” present their costs to “operate” their respective IE units during the 2021-2022 election cycle. FEC Proposed Findings ¶¶ 330, 332 (Doc. 43, PageID##5238, 5539). But the costs of the IE units’ advertising are properly considered among their total operating expenses. As Plaintiffs have explained, if not for FECA’s coordinated party expenditure limits, the resources NRSC and NRCC devoted toward running independent expenditures out of their IE units could have been allocated toward other party activities, primarily more coordinated communications. Plaintiffs’ Proposed Findings Of Fact ¶ 75.g (Doc. 44, PageID#5261). This would have allowed NRSC and NRCC to receive candidate input on how best to utilize party resources to win elections, and thereby avoid the many inefficiencies inherent in independent expenditures. *Id.* ¶ 38 (Doc. 44, PageID##5251-5252); Decl. of Jason Thielman in Support of Mot. to Certify (Thielman Decl.) ¶ 23 (Doc. 19-1, PageID##179-180); Decl. of Christopher Winkelman in Support of Mot. to Certify (Winkelman Decl.) ¶ 23 (Doc. 19-2, PageID##189-190). Moreover, Plaintiffs have shown,

with sworn declarations and interrogatory responses, that making coordinated advertisements instead of independent expenditures would have allowed the party committees to save millions of dollars in advertising fees by qualifying for the lowest-unit advertising rates on television and radio advertisements—which can be many multiples cheaper than standard advertising rates. Plaintiffs’ Proposed Findings Of Fact ¶¶ 39, 75.h (Doc. 44, PageID##5252, 5261); Thielman Decl. ¶ 22 (Doc. 19-1, PageID##179-180) (“During the 2021-2022 cycle, the NRSC’s IE unit incurred millions of dollars in additional costs because its advertisements did not qualify for the lowest-unit charge.”); Winkelman Decl. ¶ 22 (Doc. 19-2, PageID##189-190) (“During the 2021-2022 cycle, the NRCC’s IE unit incurred millions of dollars in additional costs because its advertisements did not qualify for the lowest-unit charge.”); *see, e.g.*, Kimberly Adams, *How Much Did that Political Ad Cost? It Depends on Who’s Paying for It*, Marketplace (Sept. 21, 2023), <http://tinyurl.com/4c55rzsb> (discussing 2023 Kentucky gubernatorial election advertising rates).

In all events, the FEC concedes that Plaintiffs have nonetheless shown that NRSC and NRCC each incurred millions of dollars in other costs directly tied to administering their IE units in connection with the 2021-2022 elections, including costs for separate rent and furnishings, staffing and vendors, and polling and research specific to the IE Unit. FEC Proposed Findings ¶¶ 331, 333 (Doc. 43, PageID##5238-5240). The FEC quibbles that neither NRSC nor NRCC “provided evidence” further showing that these millions of dollars in “other costs” would not have been incurred by the committees had there been no IE units. It is not clear what evidence the FEC would expect NRSC or NRCC to maintain to establish this counterfactual, but it is also beside the point: the record shows that forcing NRSC and NRCC to dedicate scarce party resources toward establishing and maintaining separate IE units results in an inefficient split in the party operations. Plaintiffs’ Proposed Findings of Fact ¶¶ 37-39 (Doc. 44, PageID##5251-5252).

III. THIS COURT SHOULD STRIKE OR DISREGARD LARGE PORTIONS OF THE FEC’S PROPOSED FINDINGS OF FACT AND SUPPORTING MATERIALS.

Plaintiffs’ Proposed Findings Of Fact properly presented adjudicative facts that the Court may find and identified other facts that are confirmed by the discovery record. *See supra* Parts I-II. The FEC, in contrast, has attempted to “lard” the record with “voluminous documentation” and other materials, largely “without any attention to elementary evidentiary requirements [or] limitations, such as the rule against hearsay.” *Colo. Rep. Fed. Campaign Comm.*, 41 F. Supp. 2d at 1200. The Court should strike or disregard the extensive improper materials and proposed findings that the FEC seeks to place in the record.

A. The Court Should Strike Materials From Prior Cases And The FEC’s Proposed Findings That Rely Upon Them.

The FEC’s Proposed Findings Of Fact rest on voluminous materials that are not, and cannot be, properly before the Court. In particular, the FEC relies heavily upon hearsay declarations and documents from prior cases in an attempt to defend FECA’s coordinated party expenditure limits. But *none* of the Plaintiffs was a party in *any* of those prior cases—and the FEC did not disclose that it sought to use any of those materials until weeks *after* the discovery deadline in this case. Plaintiffs therefore have never had any opportunity to cross-examine the declarants or to contest the documents from prior cases, some of which are more than two decades old. These declarations and documents are irrelevant, immaterial, and inadmissible—and the FEC has not even *attempted* to establish otherwise. Accordingly, the Court should strike those materials and the FEC’s proposed findings of fact that rely upon them. The Court also should not accord the materials or the FEC’s proposed findings of fact that rely upon them any weight in deciding any issue in this case, including whether to grant certification under 52 U.S.C. § 30110.

Plaintiffs initiated this case by filing a complaint on November 4, 2022. (Doc. 1). On May 17, 2023, only eight days after the Court denied the FEC’s motion to dismiss (Doc. 18), Plaintiffs

moved for certification to the *en banc* court of appeals under § 30110 (Doc. 20). Plaintiffs appended to that motion declarations from Jason Thielman, Executive Director of Plaintiff NRSC; Christopher Winkelman, Executive Direction of Plaintiff NRCC; and Plaintiff James David Vance, U.S. Senator. (Doc. 19). In response, the FEC argued that Plaintiffs’ motion to certify was “premature” on the grounds that the FEC had “not had the opportunity to seek written discovery or depose plaintiffs’ witnesses” or “to compile a record of broader, more general facts about other parties.” (Opp. to Mot. to Certify Question, Doc. 26, PageID##321-322). The Court subsequently issued a notation order allowing the parties to conduct discovery as requested by the FEC, setting a discovery period of August 1, 2023 through October 31, 2023. *See* 8/1/23 Notation Order.

Even though it insisted upon an opportunity to take discovery in this case, the FEC never sought to depose Mr. Thielman, Mr. Winkelman, or Mr. Vance. Nor did the FEC take any third-party discovery. The FEC also never disclosed that it would seek to introduce into the record any declarations or documents from prior cases. *See* Fed. R. Civ. P. 26(a)(1)(A). Instead, on November 16, 2023—weeks after the close of discovery—the FEC first disclosed voluminous materials from prior cases as exhibits to its Proposed Findings. *See, e.g.*, Docs. 36-40 (Notices of Filing Exhibits).

In particular, the FEC’s exhibits included materials from five prior cases—some dating back over two decades—in which no Plaintiff was a party: (i) *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*); (ii) *Cao v. FEC*, No. 08-cv-4887 (E.D. La. 2008); (iii) *McConnell v. FEC*, 540 U.S. 93 (2003); (iv) *RNC & Rufer v. FEC*, No. 14-cv-853 (D.D.C. 2014); and (v) *RNC & Duncan v. FEC*, No. 08-cv-1953 (D.D.C. 2008).

Colorado II Materials

- Expert Report of Frank J. Sorauf & Jonathan S. Krasno (FEC Ex. 2) (cited at FEC Proposed Findings ¶ 67 (Doc. 43, PageID#5138))

- Declaration of Robert Hickmott (FEC Ex. 11) (cited at FEC Proposed Findings ¶¶ 105, 106, 108, 212, 318 (Doc. 43, PageID##5152-5155, 5196, 5233))
- Declaration of Hon. Paul Simon (FEC Ex. 89) (cited at FEC Proposed Findings ¶¶ 99, 106, 108 (Doc. 43, PageID##5150, 5153-5155))
- Declaration of Leon G. Billings (FEC Ex. 90) (cited at FEC Proposed Findings ¶¶ 105, 108, 212, 233 (Doc. 43, PageID##5152-5153, 5196, 5203))
- Declaration of Timothy E. Wirth (FEC Ex. 116) (cited at FEC Proposed Findings ¶¶ 105, 106, 212, 226 (Doc. 43, PageID##5152-5153, 5196, 5201))
- Declaration of R. William Johnstone (FEC Ex. 117) (cited at FEC Proposed Findings ¶¶ 107, 214 (Doc. 43, PageID##5154, 5196))

Cao Materials

- Expert Report of Jonathan Krasno (FEC Ex. 3) (cited at FEC Proposed Findings ¶¶ 67, 104, 145, 149, 153, 178, 181, 182, 184, 190, 210, 211, 216, 220, 221, 225, 228, 232, 234, 240, 246, 247, 248, 251, 270, 271, 276, 316, 317 (Doc. 43, PageID##5138, 5151, 5173, 5175-5176, 5184-5186, 5188-5189, 5195, 5197-5203, 5206, 5208, 5210, 5217, 5219, 5233))
- FRCP 30(b)(6) Deposition of RNC witness Thomas J. Josefiak (FEC Ex. 8) (cited at FEC Proposed Findings ¶¶ 104, 153, 155, 184, 189, 193, 211, 225, 301, 315, 327 (Doc. 43, PageID##5152, 5176-5177, 5186, 5188-5189, 5196, 5200, 5228, 5232-5233, 5237-5238))
- Declaration of Martin Meehan (FEC Ex. 85) (cited at FEC Proposed Findings ¶¶ 175, 179, 186, 190, 213, 214, 221, 223, 226 (Doc. 43, PageID##5183, 5185, 5187-5189, 5196, 5199, 5201))
- Deposition of Republican Party of Louisiana witness Charles Lee Buckels (FEC Ex. 91) (cited at FEC Proposed Findings ¶¶ 186, 225, 301 (Doc. 43, PageID##5187, 5200, 5228))
- Deposition of then-Congressman Anh “Joseph” Cao (FEC Ex. 135) (cited at FEC Proposed Findings ¶ 225 (Doc. 43, PageID#5200))

McConnell Materials

- Expert Report of Jonathan S. Krasno and Frank J. Sorauf (FEC Ex. 4) (cited at FEC Proposed Findings ¶¶ 147, 218, 263 (Doc. 43, PageID##5174, 5197, 5215))
- Expert Report of Donald P. Green (FEC Ex. 5) (cited at FEC Proposed Findings ¶¶ 147, 148, 149, 150, 151, 264 (Doc. 43, PageID 5174-76, 5215))

- Rebuttal Expert Report of Donald P. Green (FEC Ex. 6) (cited at FEC Proposed Findings ¶ 140 (Doc. 43, PageID#5171))
- Declaration of Robert Hickmott (FEC Ex. 12) (cited at FEC Proposed Findings ¶ 318 (Doc. 43, PageID#5233))
- Responses and Objections of the Republican National Committee to Defendant Federal Election Commission’s First Request for Admissions (FEC Ex. 39) (cited at FEC Proposed Findings ¶ 147 (Doc. 43, PageID#5174))
- Declaration of Rocky Pennington (FEC Ex. 41) (cited at FEC Proposed Findings ¶¶ 148-151 (Doc. 43, PageID#5174-5176))
- Declaration of Linda W. Chapin (FEC Ex. 42) (cited at FEC Proposed Findings ¶¶ 148-151 (Doc. 43, PageID##5175-5176))
- Declaration of Terry S. Beckett (FEC Ex. 43) (cited at FEC Proposed Findings ¶¶ 148-151 (Doc. 43, PageID##5175-5176))
- Declaration of Senator Warren Rudman (FEC Ex. 86) (cited at FEC Proposed Findings ¶¶ 98, 110, 181 (Doc. 43, PageID##5150, 5155, 5185))
- Declaration of Alan K. Simpson (FEC Ex. 87) (cited at FEC Proposed Findings ¶¶ 110, 181, 193 (Doc. 43, PageID##5155, 5185, 5189-5190))
- Declaration of Gerald Greenwald (FEC Ex. 88) (cited at FEC Proposed Findings ¶¶ 110, 181 (Doc. 43, PageID 5155, 5185))
- Declaration of CEO Wade Randlett (FEC Ex. 98) (cited at FEC Proposed Findings ¶ 193 (Doc. 43, PageID##5189-5190))
- Declaration of Senator Dale Bumpers (FEC Ex. 99) (cited at FEC Proposed Findings ¶ 193 (Doc. 43, PageID##5189-5190))
- Declaration of Senator John McCain (FEC Ex. 100) (cited at FEC Proposed Findings ¶¶ 97, 193 (Doc. 43, PageID##5149, 5189-5190))
- Declaration of Senator David Boren (FEC Ex. 101) (cited at FEC Proposed Findings ¶ 193 (Doc. 43, PageID##5189-5190))
- Expert Report of David B. Magleby (FEC Ex. 103) (cited at FEC Proposed Findings ¶ 240 (Doc. 43, PageID##5205-5206))

RNC & Rufer Materials

- Plaintiff Republican National Committee’s Responses and Objections to Defendant Federal Election Commission’s Second Set of Discovery Requests (FEC Ex. 40) (cited at FEC Proposed Findings ¶ 147 (Doc. 43, PageID#5174))

RNC & Duncan Materials

- Declaration of Robert Rozen (FEC Ex. 97) (cited at FEC Proposed Findings ¶¶ 109, 191 (Doc. 43, PageID##5155, 5189))

These declarations and documents consist of hearsay—in many cases, multiple levels of hearsay—that the FEC seeks to offer for the truth of the matter asserted. *See* Fed. R. Evid. 801. The FEC has not even attempted to establish that any of these materials are admissible in this case. Nor could it establish admissibility, if it tried: these materials do not qualify for any exception to the hearsay rule. *See id.* 801(b), 802-807. And Plaintiffs had no opportunity to cross-examine any of the declarants, or to contest any of these documents, from prior cases in which they were not parties and which were not disclosed in this case until weeks after the close of discovery. Thus, the Court should strike these materials—and the FEC’s proposed findings of fact that rely upon them—and not “include[]” them in the record for the *en banc* Sixth Circuit. 8/1/23 Notation Order.

B. The Court Should Strike Factual Findings From Prior Cases And The FEC’s Proposed Findings That Rely Upon Them.

The FEC relies upon, and seeks to include in the record, not only *materials* from prior cases, but also factual *findings* from those cases. Plaintiffs, however, were not parties to those cases, and the FEC *never* disclosed that it would seek to rely upon and admit these factual findings here. *See supra* Part III.A. In all events, district courts in § 30110 cases do not import findings from prior “cases,” *Wagner* Order 3, and “[f]indings of fact by a judge are hearsay not subject to any exception enumerated by the Federal Rules of Evidence,” *Athridge v. Aetna Cas. & Sur. Co.*, 474 F. Supp. 2d 102, 110 (D.D.C. 2007).

The FEC has not even attempted to explain why these judicial findings from cases in which Plaintiffs were not involved—and which in some cases date back decades—are admissible to prove the truth of the matter asserted here. Nor could it establish admissibility. *See* Fed. R. Evid. 801. Accordingly, the Court should strike these extra-record factual findings and the FEC’s proposed findings that rely upon them and not “includ[e]” them in the record. 8/1/2023 Notation Order.

The FEC’s proposed findings of fact are replete with quotations and references to factual findings from prior cases. In particular, the FEC points to the findings of fact in five prior cases to try to establish in this case the truth of the matters asserted in those findings of fact on such issues as the functioning and operations of political parties and campaigns, the composition of national party committees (including entities such as the Republican National Committee (RNC), which is not a party to this litigation), and the alleged effect of donor contributions on officeholders.

- *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 630 (1996) (*Colorado I*) (cited at FEC Proposed Findings ¶¶ 140, 201, 222, 308, 309) (Doc. 43, PageID##5171, 5192, 5199, 5230-5231)
- *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*) (cited at FEC Proposed Findings ¶¶ 99, 103-105, 108, 111, 140, 201, 210, 212, 220, 222-225, 232-234, 308-309, 318) (Doc. 43, PageID##5150-5152, 5154, 5156, 5171, 5192, 5195-5196, 5198, 5199-5200, 5203, 5230-5231, 5233)
- *McConnell v. FEC*, 251 F. Supp. 2d 481-512 (D.D.C.) and 540 U.S. 93 (2003) (cited at FEC Proposed Findings ¶¶ 87, 96-98, 99, 101, 103, 110, 111, 140, 145, 154, 155, 156, 180, 192, 193, 218, 219, 229, 247, 259) (Doc. 43, PageID##5144, 5149-5151, 5155-5156, 5171, 5173, 5177, 5185, 5189, 5197-5198, 5201, 5208, 5213)
- *Cao v. FEC*, 688 F. Supp. 2d 498 (E.D. La. 2010) & *In re Cao*, 619 F.3d 410 (5th Cir. 2010) (cited at FEC Proposed Findings ¶¶ 67, 100, 104, 110, 147, 149-151, 153, 179, 182, 186, 189, 194, 219, 225, 301) (Doc. 43, PageID##5138, 5150-5152, 5155, 5174-5176, 5185-5188, 5190, 5198, 5200, 5228)
- *RNC v. FEC Certification Order* (FEC Ex. 7) (cited at FEC Proposed Findings ¶¶ 104, 147, 148, 149, 150, 151, 153, 155, 156, 186, 225, 263, 269, 279, 301) (Doc. 43, PageID##5152, 5174-5177, 5187, 5200, 5214-5215, 5217, 5219, 5228)).

All of these findings of fact are inadmissible hearsay in this case. *See, e.g., Athridge*, 474 F. Supp. 2d at 110. The Court therefore should strike them—and the FEC’s proposed findings of fact that rely upon them—and not “includ[e]” them in the record. 8/1/2023 Notation Order.

C. The Court Should Disregard The FEC’s Materials And Proposed Findings In Part I & Part II.

The Court should also disregard the FEC’s proposed findings and materials in Part I and Part II of its submission. (Doc. 43, PageID##5118-5171).

First, Part I of the FEC’s submission, which purports to relate to “The Founding Era” (Doc. 43, PageID#5118), at best presents “legislative facts” inappropriate for the Court to find in this case, *Rufer*, 64 F. Supp. 3d at 205. Moreover, the materials and “facts” the FEC proposes in Part I are irrelevant because *none* addresses coordinated party expenditures or alleged *quid pro quo* corruption occurring through such expenditures. *See* FEC Proposed Findings Of Fact ¶¶ 8-66 (Doc. 43, PageID##5118-5138). Indeed, if anything, the FEC’s materials and proposed findings establish that the Founders resolved their concerns about “faction” by drafting several clauses into the Constitution and, thus, that the coordinated party expenditure limits have nothing to do with those concerns. *See, e.g.*, FEC Proposed Findings ¶¶ 24-66 (Doc. 43, PageID##5124-5138).

Second, Part II, which purports to address “Political Parties [And] Apparent Quid Pro Quo Exchanges,” *see* (Doc. 43 PageID#5138), again at best presents “legislative facts” inappropriate for the Court to find here, *Rufer*, 64 F. Supp. 3d at 205. Again, moreover, the FEC’s materials and proposed findings in Part II are irrelevant because *none* addresses coordinated party expenditures or any instance of *quid pro quo* corruption occurring through such expenditures. *See* FEC Proposed Findings ¶¶ 67-139 (Doc. 43, PageID##5138-5171). And many of the FEC’s proposed findings in Part II improperly rely upon inadmissible materials or factual findings from prior cases, *see supra* Part III.A-B, or other forms of inadmissible hearsay such as “legislative history,” “congressional

testimony,” “media reports,” journal articles, books, plea agreements, or even indictments, *Wagner* Order 3; *Mariani*, 212 F.3d at 767; *see, e.g.*, FEC Proposed Findings ¶¶ 70, 72, 79-80, 82-85, 89-90, 92-95, 112-139 (Doc. 43, PageID##5139-5143, 5145-5148, 5156-5171).

The Court should disregard and not make any findings based upon the materials or proposed findings in Part I or Part II of the FEC’s Proposed Findings Of Fact.

CONCLUSION

The Court should make factual findings consistent with Plaintiffs’ Proposed Findings Of Fact, strike or disregard the overwhelming majority of the FEC’s Proposed Findings Of Fact, and “immediately ... certify” the question presented to the *en banc* Sixth Circuit. 52 U.S.C. § 30110.

December 15, 2023

Respectfully submitted,

/s/ Thomas Conerty

Noel J. Francisco*
Donald F. McGahn II*
John M. Gore*
E. Stewart Crosland*
Brinton Lucas*
Charles E.T. Roberts*
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700
njfrancisco@jonesday.com
dmcgahn@jonesday.com
jmgore@jonesday.com
scrosland@jonesday.com
blucas@jonesday.com
cetroberts@jonesday.com

Jessica Furst Johnson*
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK PLLC
2300 N Street, N.W.
Suite 643A
Washington, DC 20037
Phone: (202) 737-8808
Fax: (540) 341-8809
jessica@holtzmanvogel.com

*Counsel for National Republican
Senatorial Committee & National
Republican Congressional Committee*

Thomas Conerty
Bar No. 101619
JONES DAY
325 John H. McConnell Boulevard
Suite 600
Columbus, OH 43215
Phone: (614) 469-3939
Fax: (614) 461-4198
tconerty@jonesday.com

Counsel for Plaintiffs

*Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to all counsel of record.

/s/ Thomas Conerty
Thomas Conerty

Counsel for Plaintiffs