UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INGA L. PARSONS, *et al*.,	)	
Plaintiffs,	)	Civ. No. 14-1265 (JEB)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION
Defendant.	)	

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR CERTIFICATION ORDER PURSUANT TO 2 U.S.C. § 437h

Plaintiffs' motion to certify constitutional issues in this case challenging the prohibition on contributions by federal contractors should be denied because it is plainly premature. Filing their motion on the same day as their complaint, plaintiffs seek to rush this case to the *en banc* Court of Appeals, bypassing this Court's well-established role under 2 U.S.C. § 437h of making threshold determinations and building a record sufficient for appellate review. In particular, granting the motion now would deny the Federal Election Commission ("FEC" or "Commission") a fair opportunity to consider whether to file a motion to dismiss or develop evidence regarding the novel question of whether the contribution ban in 2 U.S.C. § 441c *even applies* to Criminal Justice Act ("CJA") attorneys, as well as to conduct discovery into the nature of plaintiffs' financial relationships with the government.

The Commission may move to dismiss on the grounds that plaintiffs lack standing. The Commission has not directly addressed the extent to which 2 U.S.C. § 441c applies to CJA panel lawyers like the plaintiffs, who do not appear to have written contracts with the government. Section 441c thus may not prevent plaintiffs from making contributions, in which case plaintiffs

would not have standing to bring this lawsuit. Before certifying any questions under section 437h to a court of appeals, district courts have an obligation to determine whether the plaintiffs "have [Article III] standing to raise the constitutional claim." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) (citations omitted); *see also id.* ("Furthermore, § 437h cannot properly be used to compel federal courts to decide constitutional challenges in cases where the resolution of unsettled questions of statutory interpretation may remove the need for constitutional adjudication.") The Federal Rules of Civil Procedure explicitly grant agencies of the United States 60 days following service to file responsive pleadings. Fed. R. Civ. P. 12 (a)(2). The Commission requires that period to evaluate and determine whether to file a motion to dismiss due to lack of jurisdiction, including whether there is currently an adequate factual basis to assess plaintiffs' standing or whether jurisdictional discovery is necessary.

If the Commission chooses not to file a motion to dismiss, discovery into plaintiffs' particular circumstances will be necessary before the Court addresses certification and just as critical as it was in *Wagner v. FEC*, Civ. No. 11-1841 (D.D.C.), the case that plaintiffs claim is a "companion" of this one. (Mem. in Support of Mot. for Certification Order Pursuant to 2 U.S.C. § 437h ("Pls.' Mem.") at 1 (Doc. No. 2-1).) The Supreme Court has made clear that certification should occur only after the district court has compiled a "fully developed factual record" to allow for proper adjudication in the court of appeals. *See Cal. Med. Ass'n.*, 453 U.S. at 192 n.14. Plaintiffs argue that there is no need for record development here because "[t]his Court's Certification Order of June 5, 2013, in *Wagner v. FEC* contains most of the facts that bear on the constitutional claims at issue in this case." (Pls.' Mem. at 2.) But this Court in *Wagner*, at the request of the plaintiffs in that case, specifically limited its findings to "facts about Plaintiffs, their particular circumstances, and some background about the federal contracting process." *See*

Wagner, 11-cv-1841 (D.D.C.), Certification Order (Doc. No. 51) at 4. Few broadly applicable facts about the history of and potential for corruption in federal contracting generally were included. As a result, virtually none of the specific findings of fact in *Wagner* are applicable to this case, which has different plaintiffs with different types of economic arrangements with the government and no apparent connection to the federal contracting processes considered in *Wagner*. Indeed, the party-specific *Wagner* findings actually underline the need for similar factual development here regarding the current case plaintiffs. Moreover, the potential that *Wagner* may become moot is no reason to rush this case to the *en banc* court. On the contrary, because plaintiffs may some day be the only ones challenging 2 U.S.C. § 441c, building a factual record about them is just as critical as if they were the only current challengers.

Plaintiffs' motion to certify questions should therefore be denied without prejudice to re-filing after the Commission has been given the time it is allowed under the Federal Rules to determine whether to file a motion to dismiss, and if it does not, after an adequate opportunity for discovery and the creation of a record sufficient for any appellate review.

I. CERTIFICATION IS PREMATURE UNTIL THE COMMISSION HAS BEEN GIVEN AN OPPORTUNITY TO FILE A MOTION TO DISMISS FOR LACK OF JURISDICTION, AND POTENTIALLY PROVIDE THE COURT WITH A RECORD FOR ITS THRESHOLD DETERMINATIONS

Plaintiffs may lack standing to bring their claims, and if they do, those claims should be dismissed and no certification of questions should occur. *See Cal. Med. Ass'n*, 453 U.S. at 192 n.14. The Commission appears not to have directly addressed the extent to which CJA attorneys may be prohibited from making campaign contributions pursuant to 2 U.S.C. § 441c in previous matters. The statute bars a person "who enters into any contract with the United States or any department or agency thereof" from making contributions only from the time contract negotiations start until performance is complete or the negotiations end. 2 U.S.C. § 441c. The

Commission has, however, addressed the scope of section 441c on several occasions. The Commission is considering whether to file a motion to dismiss on the grounds that section 441c does not apply to plaintiffs, and whether to take some limited discovery about plaintiffs' particular situations for the Court's consideration during the factfinding phase should the Commission not file a motion to dismiss.

Plaintiffs allege that they have been appointed to panels of attorneys who represent federal criminal defendants pursuant to CJA, 18 U.S.C. § 3006A, and that they have received federal funds to perform that work. (Pls.' Mem. at 2.) However, neither of the plaintiffs' declarations indicates that that plaintiff has a written contract with the government. The plaintiffs have also not made clear whether they consider themselves to be negotiating or performing a contract with the government simply by accepting an appointment and having the status of a panel attorney, or if they believe that they are subject to the contribution prohibition only during the specific periods of time in which they are representing a defendant. The information provided by plaintiffs does indicate that CJA attorneys are not compensated merely for being on a panel. *See* Decl. of Inga L. Parsons ¶ 5; (Doc. No. 2-2) Decl. of Stephen C. Leckar ¶ 4 (Doc. No. 2-3); 18 U.S.C. § 3006A(d). The Commission is considering whether further information is needed regarding plaintiffs' specific arrangements to determine the reach of section 441c.

There have been prior FEC determinations regarding the scope of 2 U.S.C. § 441c. The lack of a written contract does not rule out the possibility that plaintiffs are subject to section 441c; the circumstances of the particular arrangement must be examined to determine whether it is "otherwise authorized." FEC Advisory Op. 1999-32 (Tohono O'odham Nation), http://saos.fec.gov/aodocs/1999-32.pdf (quoting 11 C.F.R. § 115.1(c)(2)). Not every recipient of

government funds is deemed to have entered into a contract that triggers the prohibition in 2 U.S.C. § 441c. For example, the Commission has determined that a law firm partner who served as an appointed member of a government council, and received compensation for doing so, was not a federal contractor under section 441c. *See* FEC Advisory Op. 1987-33 (Lawyers For Better Government Fund - Federal), http://saos.fec.gov/aodocs/1987-33.pdf. The Commission has also determined that private physicians who are compensated for services rendered to patients enrolled in programs such as Medicare and Medicaid are not considered federal contractors under section 441c. *See* FEC Advisory Op. 2012-13 (Physician Hospitals of America), http://saos.fec.gov/saos/searchao?AONUMBER=2012-13. These advisory opinions have relied on careful analyses of the factual circumstances presented, including whether the individual in question negotiated a contract or was merely subject to the terms of a statutory appointment, and whether the nature of the person's relationship with the government was more akin to a grant with a public purpose rather than a contractual one with a more private commercial purpose. Indeed, rather than filing suit, the plaintiffs here could have first asked the Commission for an advisory opinion about the extent to which they were prohibited from making contributions, as one of the *Wagner* plaintiffs did. *See* FEC Advisory Op. 2008-11 (Lawrence Brown), http://saos.fec.gov/saos/searchao?AONUMBER=2008-11. The Commission must issue an advisory opinion within 60 days of receiving a complete request, absent an extension from the person requesting the opinion. 2 U.S.C. § 437f(a)(1).

Given this background authority and the fact that plaintiffs just filed their complaint, the Commission is now considering whether a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss is appropriate on the grounds that the plaintiffs in this case are not prohibited from making contributions due to section 441c. The agency needs the reasonable time to make that

determination explicitly called for by Rule 12(a)(2). Moreover, the agency is relying upon the factual information provided by plaintiffs in their declarations. If the Commission determines that some additional information is needed to aid in the Court's assessment of the jurisdictional determination, the Commission may choose to file an answer as its responsive pleading, take some limited discovery for that information during this Court's factfinding phase, and provide it to the Court during the post-factfinding certification/summary judgment briefing. The Commission's responsive pleading is not due until September 23, 2014, and the procedures of section 437h provide no reason to disturb the carefully delineated deadlines in the Federal Rules.

II. IF THIS CASE IS NOT RESOLVED BY PRELIMINARY MOTION, A FULL FACTUAL RECORD MUST BE DEVELOPED AS TO PLAINTIFFS' SPECIFIC CIRCUMSTANCES TO ENABLE ADJUDICATION OF THIS CONSTITUTIONAL CHALLENGE

Even if this case is not resolved through a Rule 12(b)(1) motion on the grounds that plaintiffs lack standing, an adequate record regarding their specific circumstances is critical to inform any eventual review by the Court of Appeals. A district court in cases brought under 2 U.S.C. § 437h should "perform three functions." *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013). It must "[1] develop a record for appellate review by making findings of fact[;] [2] determine whether the constitutional challenges are frivolous or involve settled legal questions[; and] [3] immediately certify the record and all non-frivolous constitutional questions to the *en banc* court of appeals." *Id.* Plaintiffs supply some factual information in the declarations attached to their motion, but that unilateral submission is clearly inadequate for the constitutional adjudication in this case. Because plaintiffs' motion would deny the Commission any opportunity to test these declarations or to develop further information through discovery regarding the potential for corruption and its appearance in the context of plaintiffs' specific financial relations with the government, the motion should be denied for this independent reason.

The need for the district court to develop a factual record under section 437h has been settled for more than 30 years. *See, e.g., Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982) (district court is required to make findings of fact before certifying constitutional question to *en banc* court of appeals); *Cal. Med. Ass'n*, 453 U.S. at 192 n.14 (certification "would be improper in cases where the resolution of such questions required a fully developed factual record"); *Mariani v. United States*, 212 F.3d 761, 767 (3d Cir. 2000) (*en banc*); *Khachaturian v. FEC*, 980 F.2d 330, 331-32 (5th Cir. 1992) (*en banc*); *Buckley v. Valeo*, 519 F.2d at 901-904 (D.C. Cir. 1975) (Appendix B). In cases construing FECA and its predecessors, federal courts have long recognized the need for a "concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 591 (1957). In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 624-25 (1996), for example, Justice Breyer pointed out the importance of record evidence in reviewing the constitutionality of FECA. On remand, the Tenth Circuit in turn remanded the case to the district court and further explained the need for factual development:

> [T]he issues are too important to be resolved in haste. It seems inevitable that not only this court but the Supreme Court itself will have to address these issues. We will both benefit by the parties fleshing out the record with any evidence they and the district court deem relevant to the issues' resolution and by the district court's resolution of the legal issues in the first instance.

FEC v. Colo. Republican Fed. Campaign Comm., 96 F.3d 471, 473 (10th Cir. 1996). When the case reached the Supreme Court a second time, the Court made ample use of the factual record that had been developed on remand. *See generally FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457-60 (2001).

Here, a full factual record is important both to "sharpen[] the deliberative process," *Int'l*

Union United Auto., 352 U.S. at 591, and to avoid any prejudice to the Commission. The Commission does not disagree with plaintiffs that this case has many factual and legal issues in common with *Wagner*, and therefore the Commission does not seek a discovery period comparable to the nearly eight months of discovery in *Wagner*, which involved substantial factfinding about general issues of government procurement and corruption. Nonetheless, some discovery is needed to explore and build a record regarding the new plaintiffs' two claims.

Plaintiffs' first claim is that they are deprived of their rights under the Equal Protection Clause because they are "not treated equally with individuals and corporations who are similarly situated … ." (Compl. ¶ 14 (Doc. No. 1).) To prevail on the merits of this claim, plaintiffs will have to show that Congress unconstitutionally distinguished among various individuals and groups, and in particular, prohibited federal contributions by these plaintiffs while allowing contributions by others who are similarly situated. The *Wagner* plaintiffs made an identical claim, so the FEC propounded written discovery to those plaintiffs and deposed one of their witnesses to develop information on how those plaintiffs' circumstances compared with other individuals and entities that are permitted to make contributions. Evidence resulting from that discovery ultimately informed most of this Court's Findings of Fact. *See Wagner*, 11-cv-1841 (D.D.C.), Certification Order (Doc. No. 51) ¶¶ 7, 8, 10, 11, 15, 16, 20-28 (relying upon plaintiffs' responses to written discovery and deposition testimony of Professor Steven L. Schooner). The new plaintiffs may believe that the only relevant facts are contained in the short, untested declarations they have attached to their motion, but the Commission is entitled to develop facts to support its own legal arguments and theories, just as it did in *Wagner*.

One example of a factual issue related to the equal protection analysis that is absent from the record in this case is whether CJA attorneys are permitted to receive payment from the

government through an LLC or other corporate entity. The plaintiffs in *Wagner* have argued that the contractor contribution ban is not rational as applied to them because they could avoid it merely by incorporating as an LLC and having that corporate entity contract with the government. *See, e.g.*, *Wagner v. FEC*, 854 F. Supp. 2d 83, 99 (D.D.C. 2012) ("Plaintiffs complain that the ban on contributions by individual federal contractors violates equal protection because 'individuals who establish a single-person corporation and contract with the government through that entity' are permitted to make financial contributions in connection with federal elections."), *vacated on other grounds*, 717 F.3d 1007 (D.C. Cir. 2013). As a result, this Court in *Wagner* made findings of fact about whether it was difficult for plaintiffs to set up an LLC and whether the federal agencies involved in that case were willing to contract with LLCs. *Wagner*, 11-cv-1841 (JEB), Certification Order (Doc. No. 51) ¶¶ 19-20. But there is no evidence about whether the plaintiffs in this new case can receive payment for their CJA representation through a corporate form.

Plaintiffs' second claim is that 2 U.S.C. § 441c infringes on the First Amendment rights of either (i) all individual government contractors, because FECA's general limits on contributions by individuals are allegedly sufficient to achieve the statute's anti-corruption goals; or (ii) some subset of government contractors, because the statute is allegedly not narrowly tailored as to them. (Compl. ¶¶ 15-17 (Doc. No. 1).) To prevail on their First Amendment claim, plaintiffs must show that applying section 441c to them does not sufficiently advance the government's interests.[1]

[1] The plaintiffs' assertion that the law must be "narrowly tailored" misstates the applicable standard for reviewing restrictions on campaign contributions. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1444-45 (2014) (plurality) (confirming that such laws are subject to the more deferential standard of "closely drawn" to match "a sufficiently important interest").

An example of a factual issue related to the First Amendment analysis that is insufficiently developed at this time is precisely how CJA lawyers are chosen for appointments to panels and how they are later selected to represent specific defendants and thus to receive government funding. The plaintiffs in *Wagner* have argued that the contractor contribution ban violates the First Amendment because federal procurement processes, including the reliance on specially trained contracting officers, have been designed to insulate contracting decisions from politics. *See, e.g.*, *Wagner v. FEC*, 13-5162 (D.C. Cir.), Br. For Pls. at 44-45 (Doc. No. 1445083) ("[T]he established procedures for awarding contracts preclude improper interference . . . . Thus, the plaintiffs each explained how their contracts were awarded in a non-political way. . . . [T]he special qualifications and the independence of the contracting officers at all agencies are vital parts of the contracting process."). This Court therefore included findings of fact about the possibility of political influence in the federal procurement process, the role of contracting officers, and different types of competitive bidding procedures. *Wagner*, 11-cv-1841 (D.D.C.), Certification Order (Doc. No. 51) ¶¶ 23-25. The Court also included detailed information about the positions and political nature of the specific agency personnel that one of the *Wagner* plaintiffs interacted with in the course of obtaining her contract. *See id.* ¶ 6. But the declarations of the plaintiffs in this case suggest that their interactions with the government have not involved any of the procurement processes discussed in *Wagner* and that contracting officers have played no role in their appointments. The Commission must therefore explore how *these* plaintiffs were appointed to the CJA attorney panels, how they are selected to represent defendants, and how that representation proceeds, including which government officials are involved and the nature of their involvement, just as the Commission was able to do in *Wagner*.

Federal contractors have been prohibited from making political contributions for more than 74 years and individual voters have had the ability to bring cases pursuant to 2 U.S.C. § 437h for 40 years. *See* Hatch Act Amendments of 1940, 54 Stat. 767, 772 § 5(a) (July 19, 1940); FECA Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1285-1286 (1974). Both plaintiffs in this case allege that they have been prohibited by 2 U.S.C. § 441c from making contributions for several years. (*See* Decl. of Inga L. Parsons ¶ 20, at p. 11 (Doc. No. 2-2) (indicating panel appointment for the past five years in 2012 Panel Application); Decl. of Stephen C. Leckar ¶ 3 (Doc. No. 2-3) (twenty years). There exists no urgency in this case, other than plaintiffs' attempt to save the *Wagner v. FEC* case from being mooted or delayed. Plaintiffs in the two cases do have the same counsel, but this is a separate case, not merely a "supplement to *Wagner*" ([Plaintiffs' Proposed] Certification Order at 2 (Doc. No. 2-4)) or a "companion case" to *Wagner* (Pls.' Mem. at 1). The new case must stand or fall on its own merits. Whether the *Wagner* case becomes moot and this case becomes the sole remaining challenge to section 441c is beside the point.

Thus, in accord with the well-established procedures of 2 U.S.C. § 437h, the proper course is not to rush constitutional adjudication on a sparse record but to allow the development of a full factual record prior to any certification to the *en banc* Court of Appeals.

III. CONCLUSION

Because plaintiffs' request to certify questions under 2 U.S.C. § 437h is premature, this Court should deny plaintiffs' motion, subject to reconsideration at the proper time. First, the Court should allow the Commission its ordinary time to determine whether to file a motion to dismiss due to a lack of standing or file an answer to the complaint. If the latter, the parties should then confer under Rule 16 and the Court should set a reasonable discovery schedule to

enable the development of a record on any factual issues related to plaintiffs' standing and the factual issues not addressed in *Wagner*, to be followed by the submission of proposed findings of fact and briefing as to any factual disputes and potential questions to be certified. In this fashion, this Court can perform its proper gatekeeper role prior to any consideration of the matter by the *en banc* Court of Appeals.

Respectfully submitted,

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