UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INGA L. PARSONS, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 14-1265 (JEB)

MEMORANDUM OPINION AND ORDER

Plaintiffs Inga Parsons and Stephen Leckar have brought a First Amendment challenge to the Federal Election Campaign Act's ban on political contributions by individual government contractors. On the very same day that they filed their Complaint, Plaintiffs also moved this Court, pursuant to FECA's judicial-review provision, 2 U.S.C. § 437h, to certify the facts and constitutional questions of the case to the *en banc* D.C. Circuit. In opposition, Defendant Federal Election Commission asks for more time to decide whether to file a motion to dismiss or, alternatively, to engage in discovery. As the Court sees no compelling reason to hurry this case, it will deny Plaintiffs' Motion without prejudice as premature.

I. Background

The dispute in this case relates to a lawsuit filed nearly three years ago, Wagner v. FEC, No. 11-1841 (D.D.C.). The plaintiffs in Wagner are consultants who contracted with various executive-branch agencies. See Wagner v. FEC, 717 F.3d 1007, 1008-9 (D.C. Cir. 2013). Like Plaintiffs here, they brought a First Amendment challenge to FECA's prohibition on political contributions by individual government contractors. See id. The Court of Appeals ultimately held that under FECA's judicial-review provision, 2 U.S.C. § 437h, only the *en banc* D.C.

Circuit had jurisdiction to decide the merits of the issue. Wagner, 717 F.3d at 1011-15. It therefore remanded the case, asking this Court, first, "to make appropriate findings of fact, as necessary," and, second, "to certify those facts and the constitutional questions to the *en banc* court of appeals." Id. at 1017. That task completed, see Wagner, No. 11-1841, ECF No. 51 (June 5, 2013), oral argument before the *en banc* Court of Appeals is currently scheduled for September 30, 2014.

Plaintiffs in the instant case filed their Complaint on July 24, 2014. See ECF No. 1. That same day, they also filed a Motion to Certify Facts and Constitutional Questions to the *en banc* Court of Appeals. See ECF No. 2.

In their Motion, Plaintiffs describe theirs as a "companion case" to Wagner, featuring "identical" legal issues. Mot. at 1. They explain that the plaintiffs in Wagner may have their claims rendered moot before the D.C. Circuit or the Supreme Court can enter a final judgment on the merits. To avoid that predicament, which would require refiling and rebriefing of the matter, Plaintiffs seek to have their own claims quickly certified and joined with those in Wagner. Plaintiffs here are lawyers who, as part of their practice, represent indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 30006A. They have attached to their Motion two declarations outlining their work and their concerns about FECA. See Mot., Att. 2 (Declaration of Inga L. Parsons); id., Att. 3 (Declaration of Stephen C. Leckar).

The Federal Election Commission opposes Plaintiffs' Motion as premature. The Commission says it needs more time to consider whether to file a motion to dismiss Plaintiffs' Complaint or, alternatively, to engage in discovery so that this Court can certify a more fully developed factual record to the Court of Appeals.

II. Analysis

The Court will not bury the lede: There is no need to rush this case to the Court of Appeals.

To begin with, the odds are low that Wagner will be dismissed as moot. According to Plaintiffs, the Wagner litigants are in danger of having their claims mooted only if the case remains undecided as of June 26, 2016, the date when plaintiff Jane Miller's contract with the federal government will expire. See Mot. at 1. The *en banc* Court of Appeals is scheduled to hear oral argument in Wagner on September 30, 2014. Even using a very conservative assumption that the decision takes eight months to issue, it would come down in May of 2015, more than a year ahead of the purported D-Day. If the losing side decides to appeal, it will still have plenty of time to petition for certiorari so that the Supreme Court can decide the matter during its 2015-2016 term, leaving room to spare before Miller's government contract terminates. While it is possible that the D.C. Circuit or the Supreme Court may take longer to issue their decisions, thus throwing off this timeline, the risk appears fairly small.

Balanced against that risk are two compelling reasons to wait. First, Federal Rule of Civil Procedure 12(a)(2) gives federal agencies 60 days following service to file a responsive pleading, and the Commission reasonably seeks to use that time here "to evaluate and determine whether to file a motion to dismiss due to lack of jurisdiction." Opp. at 2. The FEC raises significant doubts as to whether FECA's restriction on political contributions even applies to CJA attorneys such as Plaintiffs. See id. at 4-5. By contrast, there was no doubt that FECA applied to at least one of the Wagner litigants. See FEC Advisory Op. 2008-11 (Lawrence Brown), http://saos.fec.gov/saos/searchao?AONUMBER=2008-11. Plaintiffs suggest that FECA clearly does apply to them, see Reply at 3-4, but based on the few pages of briefing so far filed,

the Court is not yet convinced. If the provision in question does not apply to Plaintiffs, then their case may be dismissed for lack of standing, without any need to certify it to the Court of Appeals. See Cal. Med. Ass'n v. FEC, 453 U.S. 182, 192 n.14 (1981). There is, the Court notes, an administrative process through which parties may ask the Commission to issue an advisory opinion on the scope of FECA's application, in order to determine whether they would be covered by the statute, see 2 U.S.C. § 437f(a)(1), but Plaintiffs have not pursued that option.

Second, even if the Commission does not file a motion to dismiss, some discovery will be necessary before the Court can certify the facts of this case to the *en banc* Court of Appeals. To certify a case brought under 2 U.S.C. § 437h, a district court must first "develop a record for appellate review by making findings of fact" and "determine whether the constitutional challenges are frivolous or involve settled legal questions." Wagner v. FEC, 717 F.3d 1007, 1009 (D.C. Cir. 2013). The importance of a "fully developed factual record" in cases like this one is well settled. Cal. Med. Ass'n, 453 U.S. at 192 n.14; see also Bread Political Action Comm. V. FEC, 455 U.S. 577, 580 (1982); Mariani v. United States, 212 F.3d 761, 767 (3d Cir. 2000) (*en banc*); FEC v. Colo. Republican Fed. Campaign Comm., 96 F.3d 471, 473 (10th Cir. 1996); Khachaturian v. FEC, 980 F.2d 330, 331-32 (5th Cir. 1992) (*en banc*). As the Commission rightly observes, the two declarations submitted with Plaintiffs' Motion are not enough for the Court to develop such a record. Several pertinent facts remain unknown, distinct from those certified in Wagner, including the payment rules for CJA attorneys, the process for choosing such attorneys and assigning them to clients, and the possibility of political influence in that process. See Opp. at 9-11. Plaintiffs' appeal to Federal Rule of Civil Procedure 1 – "These rules . . . should be construed and administered to secure the just, speedy, and inexpensive

determination of every action and proceeding" – is insufficient to overcome these important concerns.

III. Conclusion

Although Plaintiffs' efforts to cooperate with the FEC and expedite this matter are admirable, the Court cannot circumvent the normal procedures. For the forgoing reasons, the Court ORDERS that Plaintiffs' Motion to Certify Facts and Constitutional Questions to the *en banc* Court of Appeals is DENIED WITHOUT PREJUDICE as premature.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: August 21, 2014