UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	
Plaintiffs,	Civ. No. 1:14-397 (AJT-IDD)
v.	
FEDERAL ELECTION COMMISSION,	REBUTTAL MEM. IN SUPPORT OF MOTION FOR RULE 56(d) RELIEF
Defendant.	

DEFENDANT FEDERAL ELECTION COMMISSION'S REBUTTAL MEMORANDUM IN SUPPORT OF MOTION TO ALLOW TIME FOR DISCOVERY UNDER RULE 56(d)

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TABLE OF CONTENTS

Defendant Federal Election Commission ("FEC" or "Commission") requests that this Court grant its motion under Federal Rule of Civil Procedure 56(d) to allow time for discovery. In its opening brief and Rule 56(d) declaration (Docket Nos. 27-1, 27-2), the Commission demonstrated that plaintiffs filed their motion for summary judgment prematurely and that without discovery, the agency cannot present facts essential to its opposition. Plaintiffs have failed to show otherwise. Nevertheless, they urge the Court to invalidate several 40-year old anti-corruption provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57, on the eve of a federal election, without permitting the government the benefit of *any* discovery.

Plaintiffs fail to counter the Commission's showing that their summary judgment motion — filed just 22 days after their Complaint — would deny the FEC the time for discovery that due process requires. They do not retract their own contentions that the FEC must "introduce actual evidence" to defend FECA. And they make no effort to distinguish the long line of similar cases in which courts have allowed the Commission to take discovery to introduce such evidence.

Plaintiffs claim that this case presents "pure questions of law" and that the factual details of their suit were settled 38 years ago in *Buckley v. Valeo*, where the Supreme Court facially upheld two of the statutes plaintiffs attack here. But plaintiffs assert *as-applied claims* that they have previously argued are "easily distinguishable" from *Buckley*. The Commission is entitled to test whether plaintiffs' as-applied claims are in fact distinguishable. Plaintiffs also claim that there is no need for jurisdictional discovery. But they present one-sided jurisdictional evidence to this Court, seek to present more jurisdictional evidence at the June 20 hearing on this motion — as if that would obviate the need for discovery — and suggest that they will resort to the factbound capable-of-repetition-yet-evading-review doctrine to try to save their soon-to-be-moot claims.

Finally, plaintiffs contend that discovery would "unnecessarily delay" the resolution of their claims, which they assert require expedition. But such assertions are irrelevant to the Rule 56(d) inquiry, and in any event it was plaintiffs' own unnecessary delay in waiting until the eve of an election to file suit that has created the alleged "time pressure" of which they complain.

Accordingly, the Commission's Rule 56(d) motion should be granted.

ANALYSIS

A. Plaintiffs Fail to Refute the Commission's Showing That They Filed Their Summary Judgment Motion Prematurely and That It Denied the FEC the Adequate Time for Discovery That Due Process Requires

In its opening brief (*see* FEC's Mem. in Supp. of Mot. to Allow Time for Disc. Under Rule 56(d) and in Opp. to Pls.' Mot. for Summ. J. ("FEC's Rule 56(d) Br.") at 8-9 (Docket No. 27-1)), the FEC explained that because due process entitles parties to a full opportunity to present their cases, summary judgment is appropriate only after "'adequate time for discovery.'" *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Applying that principle, the Fourth Circuit has reversed a district court's "premature" pre-discovery grant of summary judgment that came just six weeks after the complaint — even where the nonmoving party did not comply with Rule 56(d). *See id.* at 243-47. And at least one court in this district has "refuse[d] to address" the merits of a summary judgment motion because it was filed just 21 days after the complaint. *TC Tech. Mgt. Co. v. Geeks on Call Am., Inc.*, Civ. No. 2:03-714, 2004 WL 5154906 at *7 (E.D. Va. Mar. 24, 2004).[1]

[1] The factual issues regarding the risk of actual and apparent corruption and contribution-limit circumvention in this case are similar in complexity to the factual issues in *Harrods Ltd.* and *TC Tech Mgt*., and so those cases are not distinguishable as plaintiffs assert. (Pls.' Rebuttal Br. in Supp. of Mot. for Summ. J. and Against FEC's Rule 56(d) Mot. ("Pls.' Opp'n") at 11-12 (Docket No. 29).)

Plaintiffs here filed their summary judgment motion just 22 days after the Complaint. (Docket No. 6.) They do not claim in their opposition brief that 22 days provides adequate time for discovery, nor could they. By the time plaintiffs filed their summary judgment motion, the FEC had yet to even appear in the case, and the agency still had 41 days to file its responsive pleading. (Decl. of Counsel in Supp. of FEC's Mot. to Allow Time for Disc. Under Rule 56(d) ("Hancock Decl.") ¶ 5 (Docket No. 27-2).) At that point, the FEC was not even permitted to begin taking discovery, since plaintiffs' premature filing had prevented the parties from having a reasonable opportunity to meet and confer under Rule 26(f) to make a discovery plan. Fed. R. Civ. P. 26(d)(1). On that ground alone, this Court may deny plaintiffs' summary judgment motion. *See, e.g.*, *Harrods Ltd.*, 302 F.3d at 244-45.

B. The Court Should Deny Plaintiffs' Motion Without Prejudice to Allow Time for Discovery Because the FEC Has Satisfied Rule 56(d)

In any event, the Court should deny plaintiffs' motion for summary judgment under Rule 56(d) because the FEC has demonstrated in its declaration (Docket No. 27-2) that it "cannot present facts essential to justify its opposition," Fed. R. Civ. P. 56(d); *see also McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483-84 (4th Cir. 2014) ("A Rule 56(d) motion must be granted where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." (internal quotation marks omitted)).

The Complaint's three claims challenge the constitutionality of several FECA provisions. First, plaintiffs claim that FECA's requirement that a political committee ("PAC") be registered with the FEC for six-months before becoming a multicandidate PAC, 2 U.S.C. § 441a(a)(4), violates the First Amendment as applied to plaintiff Stop Reckless Economic Instability caused by Democrats PAC ("Stop PAC"). (*See* Hancock Decl. ¶ 4 (Docket No. 27-2).) Second, plaintiffs contend that FECA's limit of $2,600 per election on contributions from "persons" to a

federal candidate, 2 U.S.C. § 441a(a)(1)(A), violates the Fifth Amendment as applied to Stop PAC and a $5,000 contribution that it wants to make to plaintiff and federal candidate Niger Innis and plaintiff Niger Innis for Congress before the June 10, 2014 Nevada primary election.[2] (*See* Hancock Decl. ¶ 4 (Docket No. 27-2).) Third, plaintiffs argue that FECA's annual limits on contributions from multicandidate PACs, such as plaintiff Tea Party Leadership Fund ("Tea Party Fund"), to national party committees, 2 U.S.C. § 441a(a)(2)(B) ($15,000), and to state party committees, *id.* § 441a(a)(2)(C) ($5,000), violate the Fifth Amendment. (*See* Hancock Decl. ¶ 4 (Docket No. 27-2).) In support of these claims, plaintiffs have made numerous factual contentions and submitted evidence. (*See* Docket Nos. 6-2, 6-3, 6-4, 29-1, 29-2, 29-3, 29-4.)

As fully explained in its Rule 56(d) declaration, the FEC requires discovery to present its own evidence essential to its defense of FECA, both on the merits and jurisdictional grounds.

1. The FEC Requires Discovery Essential to Its Opposition to Plaintiffs' Motion on the Merits

The Commission needs discovery regarding at least the following categories of facts to defend this case:

- The burdens that plaintiffs allege FECA has placed on their ability to associate with each other and to speak. (Hancock Decl. ¶¶ 7.a, 7.f (Docket No. 27-2).)
- Plaintiffs' allegations that they have limited alternative means to speak and associate aside from making contributions that violate FECA. (*Id.* ¶¶ 7.b, 7.f.)
- The disadvantages and discrimination that Stop PAC and the Tea Party Fund allege they suffer as a result of FECA. (*Id.* ¶¶ 7.c, 7.f.)
- Whether any constitutional burdens imposed by the challenged FECA provisions are justified since the statutes are closely drawn to further an important government interest.[3] (*Id.* ¶¶ 7.d-7.f.)

[2] A "person" subject to this limit includes any "individual . . . [or] organization." 2 U.S.C. § 431(11).

[3] In its brief regarding discovery, the FEC did not concede the appropriate level of constitutional scrutiny in this case, as plaintiffs claim. (*See* Pls.' Opp'n at 6-8 (Docket No. 29).)

In their Rule 56(d) opposition, plaintiffs do not retract any of the statements in their summary judgment brief emphasizing that the FEC must "introduce actual evidence" to defend FECA. (*See* Mem. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' SJ Br.") at 21-24 (Docket No. 6-1).) Nor have plaintiffs even tried to distinguish the many cases the FEC cited in demonstrating the importance of a full factual record, created in part by discovery, in constitutional challenges to FECA. (*See* FEC's Rule 56(d) Br. at 13-14 (Docket No. 27-1).)

Nevertheless, plaintiffs urge this Court to deny the FEC's Rule 56(d) motion and strike down several 40-year-old elements of federal campaign finance law on the eve of an election without permitting the government any discovery to defend those laws. (Pls.' Opp'n at 1 (Docket No. 29).) To support this extraordinary request, plaintiffs first rely upon cases outside the campaign finance context that actually *support* the FEC's claim to discovery. Most strikingly, plaintiffs cite a Fourth Circuit panel ruling that affirmed a district court's denial of a Rule 56(d) motion in a case involving a First Amendment overbreadth claim. (Pls.' Opp'n at 2 n.1 (Docket No. 29) (citing *Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Balt.*, 683 F.3d 539, 559 (4th Cir. 2012).) The plaintiffs fail to acknowledge, however, that the *en banc* Fourth Circuit later reheard that panel decision and *vacated* the district court's ruling for being "laden with error, in that the court denied the defendants essential discovery and otherwise disregarded basic rules of civil procedure." *Greater Balt. Ctr. for Pregnancy Concerns v. Mayor*

Instead, the FEC pointed out that "plaintiffs allege" that the challenged FECA provisions fail "closely drawn" scrutiny (*i.e.*, intermediate scrutiny), and therefore the Commission should be entitled to discovery to disprove plaintiffs' allegation. (*See* FEC's Rule 56(d) Br. at 12 (Docket No. 27-1).) Rebutting plaintiffs' allegation does not preclude the FEC from arguing in the alternative that the challenged provisions need not satisfy closely drawn scrutiny since a lesser level of constitutional scrutiny should apply; indeed the Commission will demonstrate that a lower level of scrutiny applies to plaintiffs' equal protection claims. But whatever the level of scrutiny, the history of FECA challenges shows that the level of scrutiny provides a framework for courts to analyze the kind of detailed factual record the FEC seeks to develop. (*See id.* at 13-14 (Docket No. 27-1).)

of Balt., 721 F.3d 264, 271 (4th Cir. 2013) (*en banc*). The case presented a First Amendment challenge to a city law requiring limited-service pregnancy centers to post certain disclaimers. *Id.* The *en banc* Fourth Circuit explained that to the extent the case involved an as-applied challenge, the district court "was obliged to first afford the City discovery." *Id.* at 282. And to the extent the case presented a facial challenge, "the district court could not properly evaluate the Ordinance's validity in all or most of its applications without evidence concerning the distinctive characteristics of Baltimore's various limited-service pregnancy centers." *Id.* ("[R]egardless of the type of [constitutional] analysis utilized—facial or as-applied—the court abused its discretion by failing to recognize and honor the City's right to discovery.").[4]

Next, plaintiffs contend that discovery is unnecessary because the burdens and discrimination they claim to face due to FECA are issues of law that the Supreme Court settled 38 years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), when it upheld the facial validity of FECA's contribution limits. (Pls.' Opp'n at 2-3, 6-7, 9 (Docket No. 29).) In fact, plaintiffs claim that "[t]he constitutionality of [FECA's] limits cannot hinge on *any* facts relating to Plaintiffs themselves." (*Id.* at 9 (emphasis added).) According to plaintiffs, the only relevant evidence about the risks of corruption or circumvention that would result from the relief they request is that which Congress relied upon in 1974 when it enacted the FECA provisions plaintiffs challenge (*id.* at 9) — evidence that *Buckley* examined in facially upholding FECA's contribution limits, *see, e.g.*, 424 U.S. at 26-27 & n.28 (discussing the record's "deeply

[4] Plaintiffs also rely upon *Pisano v. Strach*, 743 F.3d 927, 932 (4th Cir. 2014), which also offers them no help. (*See* Pls.' Opp'n at 2 n.1 (Docket No. 29).) There, the Fourth Circuit affirmed a district court's denial of a Rule 56(d) motion because the information sought was largely already in the record, the party seeking discovery had "ample opportunity" to pursue it and yet "simply chose not to do so," and there was a "wealth of case law assessing similar challenges." *Pisano*, 743 F.3d at 932. None of that is true in this case.

disturbing examples surfacing after the 1972 election" of large contributions made to obtain political *quid pro quos*).

But plaintiffs cannot plausibly claim that their new as-applied challenge to a statute that was facially upheld long ago raises "pure questions of law." (Pls.' Opp'n at 2 (Docket No 29).) In particular, plaintiffs cannot suddenly embrace *Buckley* as a shield against discovery while also claiming that the case is irrelevant to the merits of their as-applied challenge. In their summary judgment brief, plaintiffs argue that their case is a "narrower, as-applied challenge" that is "easily distinguishable" from *Buckley*. (Pls.' SJ Br. at 18-21 (Docket No. 6-1).) *Buckley* upheld the facial constitutionality of the same provisions plaintiffs attack in counts one and two of their Complaint against essentially identical First and Fifth Amendment claims. *Buckley* first held that the limit on contributions from persons to a federal candidate (which was $1000 per election at the time) is a constitutionally valid method of preventing corruption and the appearance of corruption. 424 U.S. at 23-35. The Court then held that the criteria for multicandidate PAC status — including the six-month registration period — "serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id.* at 35-36. The Court rejected the plaintiffs' claim that the requirements "unconstitutionally discriminate against ad hoc organizations." *Id.* at 35. "Rather than undermining freedom of association," the *Buckley* opinion explained, the higher $5,000 contribution limit for multicandidate PACs "enhances the opportunity of bona fide groups to participate in the election process," with the qualification criteria, including the six-month registration period, limiting the potential for abuse of that opportunity. *Id.* at 35-36.

Thus, *Buckley*'s holding should dispose of plaintiffs' first two claims in this case. *Cf. RNC v. FEC*, 698 F. Supp. 2d 150, 157 (D.D.C.) (three-judge court) ("[A] plaintiff cannot

successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision."), *aff'd*, 130 U.S. 3544 (2010). Nevertheless, plaintiffs argue that *Buckley* is factually distinguishable from their as-applied challenge because it allegedly involved different types of political committee plaintiffs, and *Buckley*'s holding that the six-month registration period helps prevent circumvention is now "patently inapplicable to this suit" in light of subsequent changes in the law. (Pls.' SJ Br. at 19-20 (Docket No. 6-1).)

Plaintiffs' efforts to evade *Buckley*'s holding should be unavailing, but the Commission cannot simply assume that courts at all levels will agree. Instead, discovery is necessary to build a record regarding plaintiffs' new as-applied claim — including plaintiffs' distinctive characteristics, the burdens and discrimination they claim to face, and whether any of their conduct illustrates that the risks of corruption, the appearance of corruption, and circumvention identified by *Buckley* persist today. *See Greater Balt. Ctr. for Pregnancy Concerns*, 721 F.3d at 282 ("But to properly employ an as-applied analysis, the court was obliged to first afford the City discovery."); *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (*en banc*) (explaining that as-applied challenges, *i.e.*, those "based on a developed factual record and the application of a statute to a specific person," entail "case-by-case analyses"). Indeed, numerous courts entertaining as-applied challenges to FECA contribution limits long after *Buckley* have permitted discovery. *See, e.g.*, *Libertarian Nat'l Comm. v. FEC*, 930 F. Supp. 2d 154, 156-57, 166-67 (D.D.C. 2013) (allowing seven months for discovery in an as-applied challenge to a contribution limit, and then relying in part upon plaintiff's Rule 30(b)(6) deposition testimony to deny its claim), *aff'd mem. in relevant part*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014); *Wagner v. FEC*, Civ. No. 11-1841 (D.D.C. Apr. 26, 2012)

(Docket No. 29) (allowing discovery in as-applied constitutional challenge to FECA ban on contributions by federal government contractors); *Cao v. FEC*, 688 F. Supp. 2d 498, 504-34 (E.D. La.) (making findings of facts relying on discovery materials following four-month discovery period in as-applied challenge to FECA limits on contributions in the form of coordinated expenditures by parties), *aff'd sub nom. In re Cao*, 619 F.3d 410, 414, 433 & n.32 (5th Cir. 2010) (*en banc*) (relying on deposition testimony).[5]

Plaintiffs' allegations illustrate the as-applied nature of their claims and the FEC's need for discovery despite *Buckley*. For instance, plaintiffs allege that Stop PAC is particularly limited in its ability to associate with Innis, besides making contributions in excess of FECA's limits, because its members largely reside outside Nevada. (*See* Hancock Decl ¶ 7.b (Docket No. 27-2).) They also allege that Stop PAC is unable to engage in independent speech on Innis's behalf. (*Id.*) These allegations stand in contrast to *Buckley*'s finding that FECA's contribution limits leave contributors free to engage in alternative means of association and expression, such as volunteering services and engaging in independent speech. 424 U.S. at 28-29. The doubt that the public record casts on plaintiffs' allegations (*see* Hancock Decl. ¶ 7.b (Docket No. 27-2)) only further strengthens the need for discovery to clarify the record. Tellingly, plaintiffs have now offered to strike from their listing of "undisputed facts" the portions regarding their speech alternatives (Pls.' Opp'n at 8 (Docket No. 29)), but these alternatives are still part of the legal analysis. Plaintiffs cannot maintain an as-applied claim that would strike down a federal statute

[5] Plaintiffs note (Pls.' Opp'n at 11 (Docket No. 29)) that no discovery occurred in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), but that was a result of the FEC's view (shared by the lower court) that the law was settled in its favor; the Supreme Court never said discovery was foreclosed. Indeed, that case makes clear that a record is critical because a higher court may decide to revisit settled law.

while at the same time preventing discovery of information that is critical to a proper evaluation of that claim.

Finally, the FEC notes that plaintiffs have not disputed its observation that Stop PAC's chairman appears to be a contributor and political consultant to the Innis campaign, as well as a former colleague of Innis's. (*Compare* FEC's Rule 56(d) Br. at 12-13 (Docket No. 27-1) *and* Hancock Decl. ¶ 7.e (Docket No. 27-2) *with* Pls.' Opp'n at 9-11 (Docket No. 29).) Plaintiffs claim that these facts do not "have anything to do with the six-month cut-off." (Pls.' Opp'n at 10 (Docket No. 29).) On the contrary, these facts raise the possibility that Stop PAC is a method of "evad[ing] the applicable contribution limitations." *Buckley*, 424 U.S. at 35-36. Any evidence suggesting that Stop PAC or similarly situated groups threaten to facilitate circumvention of FECA's contribution limits in the absence of the six-month registration period would illustrate that the risks of corruption and circumvention identified by *Buckley* persist today. And such evidence would undermine plaintiffs' contention that changes in the law since *Buckley* have rendered that Court's circumvention concerns obsolete. Plaintiffs' attempt to prevent the Commission from obtaining any such evidence is impossible to square with their previous acknowledgment that "[i]f the Government wishes to establish that newer committees pose a greater risk of actual or apparent *quid pro quo* corruption or circumvention of other contribution limits, it must provide some concrete evidence." (Pls.' SJ Br. at 23 (Docket No. 6-1).)[6]

[6] Stop PAC's chairman's apparent close relationship with Innis also raises an additional jurisdictional issue requiring discovery. Under FECA, a candidate may designate a committee besides his or her principal campaign committee to serve as an "authorized committee." 2 U.S.C. § 432(e)(1). Authorized committees may receive contributions on their candidate's behalf. *Id.* § 431(6). If Innis has authorized Stop PAC, FECA would bar Stop PAC from ever becoming a multicandidate PAC, *see id.* § 432(e)(3), and thus Stop PAC would lack standing to bring its claims in this case. *See infra* Part B.2.

2. The FEC Also Requires Discovery Essential to Its Opposition to Plaintiffs' Motion on Jurisdictional Grounds

Plaintiffs' brief also confirms the FEC's need for jurisdictional discovery. As explained in the Commission's Rule 56(d) declaration, this Court may lack jurisdiction over some or all of plaintiffs' claims, depending on the underlying facts. (Hancock Decl. ¶ 8 (Docket No. 27-2).) First, authority from outside this Circuit suggests that this Court may lack jurisdiction to evaluate the merits of Innis's claims if he is eligible to vote in a presidential election. (*Id.* ¶ 8.a.) Second, the claims of Stop PAC, Innis, and Niger Innis for Congress will likely become moot after the June 10, 2014 Nevada primary, potentially raising the fact-intensive issue of whether those claims are capable of repetition yet evading review. (*Id.* ¶ 8.b.) Third, whether this Court can redress plaintiffs' alleged injuries hinges on several of their factual allegations, which the FEC is entitled to test. (*Id.* ¶ 8.c.)

In response, plaintiffs present new jurisdictional evidence (*see* Docket Nos. 29-1 to 29-5) that was not included with their motion for summary judgment. And plaintiffs essentially request that the Court convert the June 20 oral argument on their summary judgment motion into a one-sided evidentiary hearing. (Pls.' Opp'n at 12 (Docket No. 29).) That request seems to contradict plaintiffs' contention that the FEC is entitled to no discovery (*id.* at 1-2); perhaps plaintiffs believe that the FEC is entitled only to the factual information plaintiffs choose to include with their opposition brief.[7]

Plaintiffs object that the Commission did not assume that Innis is a registered voter and did not simply accept plaintiffs' view that their claims are redressable. (Pls.' Opp'n at 2, 13

[7] This Court's hearings on plaintiffs' motion for summary judgment and the FEC's Rule 56(d) motion are scheduled for June 20, 2014, not June 23, as plaintiffs misstate. (*See* Pls.' Opp'n at 12 (Docket No. 29); Decl. of Dan Backer, Esq. in Supp. of Pls.' Mot. for Summ. J. and Against FEC's Rule 56(d) Mot. ¶ 7 (Docket No. 29-1); *but see* Docket Nos. 8, 27-4).

(Docket No. 29).)[8] But the point of the discovery process is that plaintiffs do not get to decide unilaterally what facts they need to disclose or which of their allegations need not be proved with actual evidence. This is particularly true when the Court's jurisdiction is at issue. In their rush to "return focus to the merits of this case," plaintiffs describe jurisdictional discovery as "unnecessary delay." (Pls.' Opp'n at 2, 13-14 (Docket No. 29).) The Court, however, has no power to address the merits of a case unless it has jurisdiction in the first place, *see, e.g., Litman v. George Mason Univ.*, 5 F. Supp. 2d 366, 370 (E.D. Va. 1998), and that jurisdiction must rest upon more than plaintiffs' assurances.[9]

Plaintiffs effectively concede that counts one and two of the Complaint will soon become moot by suggesting that a mootness exception will save those claims. (Pls.' Opp'n at 4 n.5 (Docket No. 29); *see* Hancock Decl. ¶ 8.b (Docket No. 27-2).) As the FEC explained, after the June 10 Nevada primary in eight days, Stop PAC will no longer be able to make, and Innis will be unable to accept, a $5,000 contribution in connection with that election as they desire. (*See* Hancock Decl. ¶ 8.b (Docket No. 27-2).) And on September 11, 2014, Stop PAC will become a multicandidate PAC, in plenty of time to make the $5,000 contributions to candidates in connection with the November general election or any future other election that it wishes to make. (*Id.*)

Plaintiffs apparently plan to argue that Stop PAC's and Innis's claims are saved from mootness by the capable-of-repetition-yet-evading-review exception. (Pls.' Opp'n at 4 n.5

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[8] Innis's status as a candidate registered to file reports with the Commission does not shed light on whether he is a registered voter, as plaintiffs suggest (Pls.' Opp'n at 2 (Docket No. 29)), since voter registration is not a prerequisite for candidate status. *See* 2 U.S.C. § 431(2); 11 C.F.R. § 100.3.

[9] For example, plaintiffs incorrectly claim that the Court "need not resolve" whether it has jurisdiction over Innis's claims merely because his principal campaign committee, a different plaintiff, requests the same relief as he does. (Pls.' Opp'n at 4 n.4 (Docket No. 29).)

(Docket No. 29).) But that inquiry is "highly fact-specific." *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005). Whether Innis's claims are capable of repetition will turn on whether he will be a candidate in a future federal election. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 736 (2008) (candidate's postelection claim was capable of repetition yet evading review where he publicly announced his intention to run in a future election). Nothing in the new evidence plaintiffs provide sheds light on Innis's plans if he were to lose the Nevada primary. Yet, elsewhere in their brief, plaintiffs make the apparently alternative claim (relying upon non-FECA cases) that whether Innis will be a candidate again is irrelevant to the mootness of his claims, simply because this case involves an election. (Pls.' Opp'n at 12 n.12.) However, courts addressing FECA claims, including the Supreme Court, have consistently required "a reasonable expectation that *the same complaining party* will be subject to the same action again" for a claim to be capable of repetition. *Davis*, 554 U.S. at 735 (emphasis added; internal quotation marks omitted)); *see Herron for Congress v. FEC*, 903 F. Supp. 2d 9, 14 (D.D.C. 2012) (finding a former candidate's FECA claim incapable of repetition and thus moot because he "admits that he is only *considering* a run for office in the future"); *see also* Mem. Order at 7, *Tea Party Fund I*, Civ. No. 12-1707, (D.D.C. Aug. 26, 2013) (Docket No. 35) ("Whether or not Plaintiffs [former federal candidates] Sean Bielat and John Raese will be disadvantaged by the six-month waiting period in the future is an inquiry that may be answered through the discovery being sought by Defendant [FEC]," which asked, *inter alia*, whether Bielat and Raese planned to run for office again). And the Commission is not foreclosed from discovery simply because it would not be relevant under plaintiffs' theory of the case. Parties are entitled to take discovery relevant to their theory of the case, particularly where, as here, that is the theory that finds overwhelming support in the relevant precedent. *See, e.g.*, *Charter Oak*

Fire Ins. Co. v. Am. Capital, Ltd., Civ. No. 09-100, 2011 WL 6000562, at *2 (D. Md. Nov. 29, 2011) ("[A] party is entitled to seek discovery on its theory of the facts and the law, and is not limited in discovery by the opponent's theory." (alteration in original) (quoting 8 Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 2011 (3d ed. 2011))). The FEC therefore will require discovery to test whether plaintiffs' claims are in fact capable of repetition yet evading review, among other jurisdictional issues.

C. Plaintiffs' Delay Until the Eve of an Election to File This Suit Does Not Override the Commission's Right to Conduct Discovery

Plaintiffs argue that the discovery the FEC is entitled to "will lead only to unnecessar[y] delay." (Pls.' Opp'n at 2 (Docket No. 29).) The Rule 56(d) standard, however, does not take into account whether the party moving for summary judgment claims to be in a rush (*see* FEC's Rule 56(d) Br. at 15 (Docket No. 27-1)), and plaintiffs do not contend otherwise. Plaintiffs' alleged concerns regarding delay ring especially hollow given their own unnecessary delay in waiting until the eve of a federal election to file this lawsuit. Plaintiffs allege that they need to make "immediate[]" contributions in connection with the June 10 primary, or immediately thereafter. (*Id.*) And yet they waited until April 14 to file their Complaint, even though they could have sued much earlier. (*Id.*) The Tea Party Fund does not dispute that it could have asserted its claim more than a year and a half ago. (*See id.*) Similarly, Stop PAC does not deny that it could have registered far sooner than it did to trigger the six-month registration period so that it would expire in plenty of time for the June 10 Nevada primary and subsequent elections. (*See id.* (citing 11 C.F.R. § 104.1(b)).)

Plaintiffs argue that the "time pressure" they claim to face is a result of the "impermanent nature" of the six-month registration period itself (Pls. Opp'n Br. at 4-5 (Docket No. 29)), but again, plaintiffs can control when that six-month period begins to run and whether it will expire

in time for an election. Plaintiffs opine that PACs are more likely to form "as elections draw near" (*id.* at 5 n.8), but the record is unclear regarding whether Stop PAC formed when it did due to the impending June 10 Nevada primary. This is yet another topic for discovery, since if Stop PAC could have registered early enough so that the six-month registration period would have expired in time for the June 10 Nevada primary, Stop PAC caused its own alleged injury — not the FEC or FECA.

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's Rule 56(d) motion and deny plaintiffs' motion for summary judgment to allow the FEC time to take discovery.

Respectfully submitted,

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Defendant.	

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following counsel for plaintiff:

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