United States Court of Appeals
For the First Circuit

No. 00-2124

HEIDI BECKER ET AL.,
PLAINTIFFS-APPELLANTS,

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Reply Brief for the Plaintiffs-Appellants.

Introduction.

The appellants submit this reply brief to respond to the claim by the Federal Election Commission ("FEC") that the District Court did not have subject matter jurisdiction to adjudicate the appellants' challenge to the Debate Regulations. The FEC has attempted to recast the appellants' complaint and has misconstrued the harm alleged by the appellants. The District Court properly rejected the FEC's jurisdictional arguments and so should this Court.

Argument.

I. APPELLANTS HAVE STANDING TO BRING A CHALLENGE TO THE DEBATE REGULATIONS.

The FEC argues that the District Court lacked jurisdiction because, according to the FEC, none of the appellants has standing to challenge the FEC's Debate Regulations. See FEC Brief at 9-24. The FEC's argument is contradicted by the leading decisions on standing in election law cases in both the Supreme Court and this Circuit. See FEC v. Akins, 524 U.S. 11, 26 (1998) (voters had standing to bring claim against the FEC to enforce FECA); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 37 (1st Cir. 1993) (gubernational candidate had standing to challenge state campaign finance law). The appellants – who include a presidential candidate, the political party that nominated him, his campaign organization and both committed and uncommitted voters – represent the core constituencies Congress intended to protect when it enacted FECA. They claim that the Debate Regulations are unlawful because they permit corporate funding of debates that is prohibited by FECA. Under the FEC's standing theory, however, only a party whose own conduct is governed by the Debate Regulations – a debate staging organization, for example (FEC Brief at 13), or its corporate donors – would have standing to challenge the regulations on the basis that they conflict with FECA. But a party of that kind (such as the Commission on Presidential Debates "CPD") would never have any incentive (or even the ability) to challenge the Regulations

on the basis the appellants do, because the Regulations purport to permit conduct by the CPD and its donors that would otherwise be prohibited. Reduced to its essence, the FEC's argument is, therefore, that the provisions in its Debate Regulations allowing the use of corporate funds are effectively immune from judicial review. Nothing in FECA, the APA or Article III of the Constitution should lead this Court to such an unlikely outcome.

Indeed, the FEC's argument is inconsistent with many decisions of the courts, beyond Akins and Vote Choice, that have found or presumed that candidates, as well as their political parties and campaign committees, and voters have standing to challenge the validity of election-related laws and regulations. See, e.g., Buckley v. Valeo, 424 U.S. 1, 12 (1976) ("at least some of the appellants" had standing to challenge FECA itself where they included a presidential candidate, a U.S. Senator, a candidate supporter, a campaign committee and a political party); Common Cause v. Bolger, 512 F. Supp. 26, 30 (D.D.C. 1980) (allowing candidates to challenge statutes establishing franking privileges that benefited incumbent competitors). The Court should reject the FEC's astonishing claim that no party aggrieved by the Debate Regulations has standing to challenge them.

To establish standing, appellants must show only that they suffer injury in fact, that their injury is fairly traceable to the FEC's unlawful regulation, and that a

judicial decision in their favor would redress the injury. Akins, 524 U.S. at 19. In considering the issue of standing, the Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975); accord United States v. AVX Corp., 962 F.2d 108, 114 (1st Cir. 1992). The APA contemplates that "a person . . . adversely affected or aggrieved by agency action" may bring suit alleging that an agency's regulation is "in excess of statutory authority." 5 U.S.C. §§ 702, 706(2)(C). "The Administrative Procedure Act takes a very permissive view of standing ... imposing no additional requirements beyond those inherent in Article III." AVX, 962 F.2d at 117, n.8.

A. The Appellants Have Alleged Sufficient Injury-In-Fact.

This case does not present the kinds of hypothetical harms that have been found to be insufficient to confer standing. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (vague allegations about future visits to observe wildlife fail to establish imminent harm); Citizens to End Animal Suffering and Exploitation v. New England Aquarium, 836 F. Supp. 45, 52 (D. Mass. 1993) (no allegations of future harm). The appellants have alleged precisely when and how corporate money is going to be illegally spent to support campaign activity, showcasing Mr. Nader's opponents in the presidential race, to the detriment of Mr. Nader and his organizational supporters (A. 84-85, 90-92). A

"realistic risk of future exposure to" an injury "is sufficient to satisfy not only the standing requirements that Article III imposes, but also the prudential concerns that sometimes trouble courts." Berner v. Delahanty, 129 F.3d 20, 24 (1st Cir. 1997); see DuBois v. United States Dep't. of Agric., 102 F.3d 1273, 1283 (1st Cir. 1996).

The FEC claims that because the appellants have not challenged the exclusion of Mr. Nader from the presidential debates, the injury to the appellants is "nothing more than ideological frustration at seeing debates take place that are paid for with certain kinds of corporate funding." FEC Brief at 14-16. The harm suffered by Mr. Nader and his organizational supporters, however, is much more than the "ideological frustration" asserted by the FEC. Mr. Nader and his organizational supporters have been harmed in at least two separate, concrete ways by the FEC's illegal Debate Regulations.

Mr. Nader and his organizational supporters have been forced to adjust their campaign strategy to compensate for the enormous benefits that Mr. Nader's leading competitors for the presidency are receiving as a result of the illegal Debate Regulations. Mr. Nader and his organizational supporters have also been harmed as a competitor of candidates Bush and Gore because of the provisional benefits that they are receiving and Mr. Nader is not.

1. The Debate Regulations Have Forced Mr. Nader And His Organizational Supporters To Adjust Their Campaign Strategy To Offset The Effect Of Those Regulations.

Mr. Nader's injury stems in large part from the fact that he has been forced to adjust his campaign strategy around the reality that his leading competitors for the presidency have already received, and will continue to receive, massive benefits as a result of the illegal Debate Regulations. For example, Mr. Nader has been forced to spend more of his campaign's money on advertising in order to overcome the free television time that candidates Bush and Gore have and will continue to receive as debate participants.

This Court's decision in Vote Choice was not based on the plaintiff's "coerced choice," as the FEC suggests, but on the fact that the plaintiff's competitors might potentially receive benefits as a result of an illegal statute. Vote Choice, 4 F.3d at 37. In Vote Choice, this Court held that a gubernatorial candidate had standing to challenge a state election law that conferred benefits such as free television time on candidates who accepted public funding. 4 F.3d at 29-30. In that case, the candidate's opponent did not accept public funding and therefore did not receive the benefits that the plaintiff alleged were illegal. Id. at 31 n.7. This Court held, however, that the plaintiff had alleged sufficient injury-in-fact to confer standing because she needed to adjust her campaign strategy for the

possibility that her opponent might choose to accept public funding. Id. at 37.[1] The harm that has precipitated this action is far less speculative: unless the FEC's Debate Regulations are set aside, it is inevitable that the presidential debates will continue to be underwritten with illegal corporate contributions.

The FEC claims that Vote Choice is distinguishable because it involved a law that directly regulated the plaintiff's campaign behavior. FEC Brief at 17-18. In fact, though, the plaintiff in Vote Choice decided not to accept public funding, and therefore was not subject to the statute's regulations. Vote Choice, 4 F.3d at 37. Thus, the fact remains that Vote Choice is directly applicable to the present case. No matter how hard it tries, the FEC can not avoid the clear holding of Vote Choice which compelled the District Court's conclusion that Mr. Nader and his organizational supporters have standing.

2. Mr. Nader And His Organizational Supporters Have Standing As Competitors Of Candidates Bush And Gore.

Mr. Nader and his organizational supporters are also directly harmed by the fact that their competitors are receiving illegal benefits that Mr. Nader is not

[1] The Court of Appeals also found that the candidate's injury could be traced to the statutory provisions she challenged and was redressable by an injunction preventing continued enforcement of the statutes that were causing her injury. Vote Choice, 4 F.3d at 37. Mr. Nader and his supporters will suffer more concrete injuries than the candidate in Vote Choice, and the present case involves the same traceability and redressability issues that were resolved in Vote Choice.

receiving. The District Court correctly pointed out that the "corporate money filtered through CPD" relieves the two major parties of the burden of having to spend their own money to get their candidates' message out (Memorandum and Order at 19; A. 233). Thus, the appellants can claim "competitive advocate standing," as articulated in Catholic Conference v. Abortion Rights Mobilization, Inc., 885 F.2d 1020, 1028-31 (2nd Cir. 1989). Ralph Nader, his campaign committee and the Green Party are all undeniably "players in the [electoral] arena." Id. at 1029; see also Gottlieb v. FEC, 143 F.3d 618, 621 (D.C. Cir. 1998) (while PAC not affiliated with a competing candidate does not have competitive advocate standing, "another candidate could make such a claim"). Indeed, the financial advantage the Debate Regulations give to Mr. Nader's political competitors is very similar to the kinds of economic injuries that have given business competitors standing. See Catholic Conference, 885 F.2d at 1030; Clarke v. Securities Indus. Ass'n., 479 U.S. 388, 403 (1987); Investment Co. Inst. v. Camp, 401 U.S. 617, 620 (1971); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970). The FEC misconstrues this point when it argues that Nader cannot claim standing as a competitor because he does not compete with debate staging organizations, but rather competes with opposing candidates. See FEC Brief at 19-20.

3. The Standing of Mr. Nader And His Organizational Supporters Is Separate And Distinct From The Standing Of The Voter Appellants.

The appellants will not repeat the arguments set forth in their initial brief regarding the issue of the voter appellants' standing. See Appellants' Initial Brief at 31-34. For purposes of this reply brief, it is enough to note that the harm suffered by the voter appellants is separate and distinct from the standing of Mr. Nader and his organizational supporters. Thus, even if the Akins rationale were not followed to give voters the right to vindicate the core prohibitions of FECA, plaintiff Nader, his campaign organization and his nominating party indisputably have Article III standing and fall within the core of § 441b's zone of interest.

B. Appellants' Harm Is Directly And Uniquely Traceable To The Illegal Debate Regulations.

The District Court was correct in finding that the harm suffered by the appellants is traceable to the Debate Regulations (Memorandum and Order at 16-17, A. 230-231). Without the protection of the FEC's ultra vires Debate Regulations, no debate staging entity would have the legal ability to accept corporate funds to defray the costs of the debate. Without illegal, corporate funded debates, the appellants would not be harmed. Thus, the appellants' harm is directly traceable to the FEC's unlawful regulations. This is enough to show that the Regulations have caused the voter appellants' injury. See Vote Choice, 4 F.3d at

37 ("the statutory provisions, and the Board's implementation of them, caused the harm…").

C. Appellants' Harm Can Be Redressed By The Court.

A declaration that the Debate Regulations are null and void because the FEC adopted them in excess of its statutory authority will remedy the injuries alleged by the appellants. If the Debate Regulations are vacated, debate staging organizations will no longer have a "safe harbor" to solicit and employ corporate funds to stage debates. Should any organization then violate the prohibitions of § 441b by using or donating corporate money to stage debates, the FEC or others would be able, and obliged, to seek enforcement of the law. The District Court properly recognized that the invalidation of the Debate Regulations would redress the harm that propels this lawsuit (Memorandum and Order at 17, A. 231).

In Vote Choice, this Court addressed a similar question of redressability. See 4 F.3d at 37. This Court held that a state gubernatorial candidate's injury stemmed directly from the challenged statute and that, therefore, striking down the law would redress the claimed injury. Id. Where, as here, the appellants' harm stems from an illegal regulation or statute, the injury can be redressed by striking down the offensive law. Id. That is exactly what the appellants have asked this Court to do. This case is therefore nothing like Fulani v. Bentsen, 35 F.3d 49 (2nd Cir. 1994), or the other cases the FEC relies upon (FEC Brief at 21, 23-24), where

there was a missing link in the chain between the injury alleged and the relief requested.

For example, the Fulani court determined that Dr. Fulani did not have standing to pursue her claim against the Secretary of the Treasury because that claim was premised only on the incremental benefit that Fulani's competitors might receive based on the fact that the debates were co-sponsored by a tax-exempt organization, the League of Woman Voters. Fulani, 35 F.3d at 52-53. Because CNN, which was not a party to the case and would not be subject to any remedial order by the Internal Revenue Service, planned to continue with debates regardless of whether the League of Women Voters also participated, the court in Fulani was clearly unable to remedy the plaintiff's injuries. Id. at 52-53.

Unlike Dr. Fulani, the instant appellants do not claim that their injuries arise from the tax-exempt status of debate staging organizations such as the CPD. Instead, they arise from the fact that Mr. Nader and his supporters have had to adjust their campaign strategy because of the illegal corporate debate expenditures. Vote Choice, 4 F.3d at 37. They also arise from the fact that the FEC's Debate Regulations have allowed millions of dollars of general treasury corporate funds to be expended on behalf of Mr. Nader's opponents.

Finally, the FEC argues that the Court cannot redress the appellants' injuries and that a judgment vacating the Debate Regulations would be futile, because,

according to the FEC, the CPD might choose to continue to stage the debates even if the Debate Regulations were struck down. See FEC Brief at 56-58. In essence, the FEC has argued that because the CPD might choose to violate the law, the appellants should be denied relief. This argument should be swiftly rejected.

D. FECA Did Not Foreclose The District Court's Jurisdiction.

The FEC claims that FECA forecloses judicial review under the APA because it gives the FEC exclusive jurisdiction for civil enforcement of FECA. See FEC Brief at 25-30. The FEC's argument, however, has already been rejected by the District Court (Memorandum and Opinion at 10-11; A. 224-225) and should be rejected by this Court. The FEC has not argued on appeal, as it did below, that the plaintiffs were required to exhaust administrative remedies before bringing this action. The appellants are not seeking relief against the CPD; they have alleged in unmistakable terms that the FEC itself exceeded its statutory authority when it adopted the Debate Regulations (A. 14). The appellants are not seeking an adjudication of the law applicable to the CPD, which is within the Commission's exclusive enforcement jurisdiction, but rather are seeking an adjudication of the question of whether the FEC itself exceeded its statutory authority in promulgating the Debate Regulations. This is not the type of action that lies within the Commission's exclusive jurisdiction under 2 U.S.C. § 437.

Nothing in FECA purports to give the FEC exclusive jurisdiction to determine whether its own regulations are "in excess of statutory authority." It therefore follows, as the Court of Appeals for the District of Columbia Circuit has held, that an action seeking judicial review of an FEC regulation should be brought under the APA. Perot v. FEC, 97 F.3d 553, 560-61 (D.C. Cir. 1996). The Court of Appeals concluded that because "FECA has no provisions governing judicial review of regulations ... an action challenging its implementing regulations should be brought under the judicial review provisions of the [APA]." Id.[2] That is exactly what the appellants have done. The District Court had jurisdiction to hear the appellants' complaint under the APA, 5 U.S.C. § 706(2)(C), because it presents a federal question. 28 U.S.C. § 1331; Stockman v. FEC, 138 F.3d 144, 152 n.13 (5th Cir. 1998). The FEC's claim to have exclusive jurisdiction to review its own regulation must be rejected.

[2] The Court of Appeals reversed the District Court's grant of summary judgment on the ultra vires claim in order to preserve the plaintiffs' right to pursue review of the Debate Regulations under the APA. Perot, 97 F.3d at 560-61.

Conclusion.

For the reasons stated both in his reply brief and in the plaintiff's initial brief, the Court of Appeals should reverse the Final Judgment of the District Court and vacate the FEC's Debate Regulations.

Respectfully submitted,

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Corporate Disclosure Statement.

In accordance with Fed. R. App. P. 26.1, Plaintiff-Appellant Nader 2000 Primary Committee, Inc. states that it is a non-profit corporation which has no parent corporations and has no stock owned by a publicly held corporation.

In accordance with Fed. R. App. P. 26.1, Plaintiff-Appellant Green Party USA states that it is a non-profit corporation which has no parent corporations and has no stock owned by a publicly held corporation.

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