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.	)	OPPOSITION
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
OPPOSITION TO PLAINTIFFS' MOTION
TO JOIN AMERICAN FUTURE PAC

Defendant Federal Election Commission ("FEC" or "Commission") opposes plaintiffs' last-minute motion to join potential plaintiff American Future PAC ("AF PAC") just before discovery closes on September 12, 2014. Plaintiffs state that they have filed their motion because they fear that the Court will find that the claims of current plaintiff Stop Reckless Economic Instability caused by Democrats ("Stop PAC") are moot once Stop PAC becomes a multicandidate political committee on September 11 and gains the right it seeks here to make larger candidate contributions. But that concern does not justify joinder of a new plaintiff. As an initial matter, plaintiffs' motion is untimely under this Court's July 16 Scheduling Order, which required that motions seeking joinder be made as soon as counsel or the party became aware of the grounds for them. In this case, plaintiffs were aware of the issue no later than the July scheduling filings and their counsel was aware no later than November 2012.

In any event, plaintiffs fail to qualify for permissive joinder under Federal Rule of Civil Procedure 20 because AF PAC's purported claims do not arise out of the same transactions or occurrences as those of the current plaintiffs and they would not present any question of law or fact common to all plaintiffs, in light of key differences in AF PAC's situation. Moreover, joinder here would either delay the resolution of this case, if the Court were to allow joinder with an extension for FEC discovery as due process would require, or cause prejudice to the Commission, in the event AF PAC was joined without permitting the Commission adequate discovery, as plaintiffs request. Plaintiffs' efforts to use radically different appellate cases applying the court's nonjoinder authority under Rule 21 are unavailing. And whatever rule were applied, the Commission's ability to defend itself would be greatly prejudiced if it were denied the opportunity to conduct reasonable discovery as to any plaintiff in this as-applied constitutional challenge. This Court should deny plaintiffs' joinder motion.

BACKGROUND

Plaintiffs have brought as-applied constitutional challenges to longstanding provisions of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C §§ 431-457) ("FECA"), that set limits on contributions by multicandidate political committees that differ from those applicable to contributions by committees that have yet to attain multicandidate status. (Amended Complaint ("Am. Compl.") pp. 15-16 (Doc. No. 37).) Plaintiff Stop PAC claims specifically that FECA unconstitutionally prevents it from contributing more than $2,600 per election to a federal candidate until it has been registered with the Commission for at least six months and thus attains multicandidate committee status (assuming other requirements are met), when it can contribute $5,000. (*Id.*) Plaintiffs Tea Party Leadership Fund ("TPLF") and the Alexandria Republican City Committee challenge FECA provisions that limit contributions a

multicandidate committee can make annually to a national political party committee ($10,000) and to a state or local party committee ($5,000). (*Id.*)

Plaintiffs initiated this lawsuit on April 14, 2014 (Doc. No. 1), and 21 days later they filed a motion for summary judgment (Doc. No. 6). In response, the Commission filed a motion under Rule 56(d) of the Federal Rules of Civil Procedure, requesting that the Court permit discovery and opposing plaintiffs' summary judgment motion. (Doc. No. 27.) This Court granted the Commission's motion for discovery and held that plaintiffs' motion for summary judgment was premature. (Doc. No. 33.)

Plaintiffs "request[ed] permission" in the parties' July 2, 2014 proposed discovery plan "to join additional 'new' political committee plaintiffs as necessary to preserve the justiciability of this dispute through its pendency," with the first moving for joinder "as close to the end of Stop PAC's six-month period as reasonably possible." (*See* Jt. Prop. Discovery Plan ("Plan") at 3-5.) (Doc. No. 34.) The Commission opposed that request, explaining that plaintiff Stop PAC's claims would become moot on September 11, 2014; that the Commission lacked the power to stipulate to the Court's jurisdiction; and that an adequate period of time should be available for discovery about any new plaintiffs permitted to join the action. (*Id.* at 6.) The Court did not grant plaintiffs' request, and instead ordered on July 16, 2014 that "[a]ny motion to amend the pleadings or to join a party shall be made as soon as possible after counsel or the party becomes aware of the grounds for the motion." (Rule 16(B) Scheduling Order ("Scheduling Order") ¶ 5 (Doc. No. 40).) Plaintiffs did not file a motion for joinder after the issuance of that order.

In the Scheduling Order, the Court also set September 12 as the conclusion of discovery and September 19 as the deadline for submission of summary judgment motions and briefs. (Scheduling Order ¶¶ 1, 3; Amended Joint Discovery Plan ¶ 13 (Doc. No. 39).) Since that time,

the Commission has been diligently conducting discovery. The Commission has served written discovery and deposition notices on all the current plaintiffs as well as third party deposition and production subpoenas on the Innis parties and an associate of several of the parties. By agreement with counsel for plaintiffs, the Commission scheduled six depositions for September 3, 4, and 9, 2014. In addition, the Commission responded to written discovery requests from plaintiffs Stop PAC and TPLF on September 5, 2014.

On August 27, 2014, a little more than two weeks before the close of discovery, plaintiffs filed their Motion of Plaintiffs and Putative Plaintiff-Intervenor American Future PAC Seeking Leave for American Future PAC to Join the Suit Pursuant to Fed. R. Civ. P. 21 and an accompanying Memorandum in Support ("Pls.' Mem."). (Doc. Nos. 50, 50-1.) On September 11, 2014, Stop PAC will become a multicandidate political committee, because it will then be a committee that has been registered with the Commission for at least six months, accepted contributions from more than 50 persons, and made contributions to at least five federal candidates. 52 U.S.C. § 30116a(a)(4) (formerly 2 U.S.C. § 441a(a)(4)). Thus, Stop PAC will be permitted to contribute $5,000 per election to candidates and its claim here will become moot. Plaintiffs seek to join AF PAC, registered more recently, to assert claims now made by Stop PAC. In the meet-and-confer discussion regarding the motion, the Commission opposed joinder for the reasons explained in this opposition but suggested that if joinder of a new plaintiff did occur, the case schedule should be extended to permit time for motions and discovery about the new plaintiff.

ARGUMENT

I. Plaintiffs' Joinder Motion Should Be Denied Because It Is Untimely Under the Court's Scheduling Order

Plaintiffs' counsel expressed the desire to join a new plaintiff to make the Stop PAC claims more than two months ago, yet did nothing, so this motion is untimely. This Court's Scheduling Order provided that such a motion should be filed "*as soon as possible after counsel or the party becomes aware of the grounds for the motion*." (Scheduling Order ¶ 5 (emphasis added) (Doc. No. 40).) Plaintiffs explained their plan for joining new plaintiffs at the beginning of July. (*See* Plan at 3-5.) Plaintiffs thus clearly did not file their August 27 motion "as soon as possible" after becoming aware of the grounds for it.

In fact, plaintiffs' counsel was aware of this mootness problem long before July 2014, since plaintiff TPLF and its counsel here had previously filed a suit in the District of Columbia challenging the same FECA provisions that plaintiff Stop PAC challenges now. *See Tea Party Leadership Fund v. FEC* (*"TPLF I"*), Civ. No. 12-1707 (D.D.C. Oct. 18, 2012) (Doc. Nos. 1-2). Plaintiff TPLF and its counsel knew of the mootness problem they now confront at least as early as November 2012, when TPLF itself became a multicandidate political committee and could make the larger contributions it claimed, in *TPLF I*, that FECA unconstitutionally prevented it from making.[1] There, TPLF tried to prevent its claims from becoming moot by filing a motion in February 2013 to join a newly created political committee. *TPLF I* (Doc. No. 25). In the end, however, TPLF moved to voluntarily dismiss its suit with prejudice. *TPLF I* (Doc. No. 50).

Plaintiffs complain that the Commission has repeatedly taken the position that the claims of committees like Stop PAC become moot when all the requirements for multicandidate committee status are met, so they must keep joining new plaintiffs to continue pursuing these

[1] *See* The Tea Party Leadership Fund, Notification of Multicandidate Status (Nov. 9, 2012), http://docquery.fec.gov/pdf/889/12961256889/12961256889.pdf.

claims. (Pls.' Mem. at 1, 6 n.3.) But instead of trying to circumvent this Court's Scheduling Order, a more appropriate approach would be for plaintiffs to wait for the Commission to file a motion to dismiss Stop PAC for mootness, and at that time, fully brief their position that those claims are not moot because they are capable of repetition but evading review. As noted, TPLF did not pursue that strategy in *TPLF I*, but chose instead to move for voluntary dismissal. *TPLF I* (Doc. No. 50). Plaintiffs could also have filed a class action suit, which might help them avoid mootness. Instead, they now attempt to cure their impending mootness through the belated joinder of a newly created plaintiff. But plaintiffs' motion is untimely and contravenes the Court's Scheduling Order. On those grounds alone, the Court should deny plaintiffs' joinder motion.

II. Plaintiffs' Joinder Motion Should Be Denied Because They Fail to Demonstrate That Joinder Is Warranted

A. Plaintiffs Fail to Meet Their Burden to Show That AF PAC Qualifies for Permissive Joinder Under Rule 20

1. Standards for Joinder Under Rule 20(a)(1)

Rule 20(a)(1) of the Federal Rules of Civil Procedure provides that "[p]ersons may [be] join[ed] in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). Rule 20 requires that the proposed plaintiff meet both parts of its two-prong test. *See* G*regory v. FedEx Ground Package Sys., Inc.*, 2:10CV630, 2012 WL 2396873, at *9 (E.D. Va. May 9, 2012), *adopted by* 2012 WL 2396861 (E.D. Va. June 25, 2012) (for joinder to be proper, plaintiffs must satisfy *both* conditions set forth in Rule 20). Plaintiffs, as the moving party, bear the burden of demonstrating that joinder is warranted under Rule 20(a)(1). *See Meth v. Natus Med. Inc.*, slip op., 2014 WL 3544989, at *3 (E.D. Va. Jul.

17,2014); *Gregory*, 2012 WL 2396873, at *9. Although courts are to construe the permissive joinder provision liberally, they also are to construe it "in light of its purpose, which is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 218 n.5 (4th Cir. 2007) (citation and internal quotation omitted). The district court has the discretion to deny joinder if permitting it would not foster the purpose of the joinder rule. *Id.* (citing 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1652 (3d ed. 2001)). Indeed, the court has the discretion to deny joinder even if the two-pronged test for permissive joinder is satisfied, in the interests of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness. *See Sykes v. Bayer Pharm. Corp.*, 548 F. Supp. 2d 208, 218 (E.D. Va. 2008) (citing *Aleman*, 485 F.3d at 218 n.5). *Cf. El v. Clarke*, 3:12CV402, 2014 WL 2611336, at *2 (E.D. Va. June 11, 2014) (denying joinder of defendants).

2. Plaintiffs Do Not Meet the Standards of Rule 20

To meet the first condition for Rule 20 joinder, plaintiffs and the potential plaintiff must show that AF PAC satisfies the "transactional relatedness test," which requires that AF PAC's right to relief arises under the same transaction or occurrence as the existing plaintiffs. *See Davidson v. District of Columbia*, 736 F. Supp. 2d 115, 119 (D.D.C. 2010). Plaintiffs cannot meet this burden.

First, AF PAC's claimed right to relief does not arise under the same transaction, occurrence, or series of transactions of occurrences as those of the existing plaintiffs. Of course, TPLF and the Alexandria Republican City Committee allege the unconstitutionality of FECA provisions governing contributions by multicandidate political committees to political party affiliate committees, whereas Stop PAC and potential plaintiff AF PAC challenge the limits on

contributions by political committees that have not met the criteria to be a multicandidate committee may make to candidates. (Am. Compl. ¶ 13; Pls.' Mem. at 5-6.) So transactional relatedness could exist only as to Stop PAC. But even as to Stop PAC, the test is not met. There is no indication that AF PAC seeks to make contributions to the same candidates as Stop PAC. Stop PAC made contributions to candidates in several primary elections in Nevada (Niger Innis, Joe Heck, Mark Amodei, and Jose Padilla) as well as to the Senate campaign of incumbent Dean Heller) in April 2014; to Dan Sullivan in Alaska's Senate primary in June; and to a candidate in the general election (Joe Heck) in July. (Am. Compl. ¶¶ 20, 24, 28; Declaration of Dan Backer ¶ 4 (Doc. No. 29-1.) AF PAC did not register with the Commission until August 5, 2014, and the first candidate contributions it alleges, made to Senator Cory Gardiner of Texas, Representative Tom Cotton of Arkansas, and Senator Mike Coffman of Colorado, were in August. (Decl. of Jerad Najvar, Exhs. 1, 2.) (Doc. No. 50-4.) Thus, AF PAC's claims cannot arise from the same transactions or occurrences as those of Stop PAC. *See Davidson* 736 F. Supp. 2d at 119 (holding that common transaction or occurrence requirement of Rule 20(a) was not met where claims arose under same statute following events occurring on different dates involving different parties).

The second prong of the Rule 20(a)(1) test requires that there be a "question of law or fact common to *all* plaintiffs." Fed. R. Civ. P. 20(a)(1)(B) (emphasis added). Plaintiff Stop PAC and proposed plaintiff AF PAC — neither of which has yet qualified as a multicandidate committee — do both allege that they have a constitutional right to make contributions to federal candidates in the amount of $5,000 per election, as FECA permits multicandidate political committees to make, instead of the $2,600 contribution limit applicable to most persons, including committees that do not qualify for multicandidate status. (Pls.' Mem. at 5-6.) But

proposed plaintiff AF PAC shares that question of law only with plaintiff Stop PAC. TPLF and the Alexandria Republican City Committee are different types of committees and they challenge the limits on contributions by multicandidate committees to political party committees. And of course, after September 11, Stop PAC's claim will become moot and so there will no longer be jurisdiction for Stop PAC to maintain it. Thus, AF PAC will not present a question of law or fact in common with *all* plaintiffs as Rule 20(a)(1)(B) requires.

Moreover, even though plaintiff Stop PAC and proposed plaintiff AF PAC are similar in that they are both political committees that have not been registered with the Commission for at least six months, the questions of law and fact they present differ. First, unlike AF PAC, Stop PAC registered as a "hybrid" committee. (*See* Stop PAC, FEC Form 1, Statement of Organization, http://docquery.fec.gov/pdf/575/14031193575/14031193575.pdf; AF PAC, FEC Form 1, Statement of Organization, http://docquery.fec.gov/pdf/364/14950060364/14950060364.pdf.) A hybrid committee maintains two accounts: a "contribution account" that accepts contributions only from individuals in increments of $5,000 or less and is used to finance contributions to candidates, and a separate "non-contribution account" that accepts unlimited individual or corporate contributions and is used to finance independent expenditures or electioneering communications.[2] Because a hybrid committee may fund independent expenditures in support of a candidate with contributions of unlimited amounts, it has a major additional way of expressing its support for a candidate in addition to contributions that are limited by FECA.

Another distinction involves Stop PAC's contention that its contributors do not reside in the states of the candidates to whom Stop PAC has made contributions and so they have no

[2] *See* FEC, *Statement on* Carey v. FEC: *Reporting Guidance for Political Committees That Maintain a Non-Contribution Account* (Oct. 5, 2011), http://www.fec.gov/press/press2011/20111006postcarey.shtml.

means other than financial contributions to associate with those candidates. (Am. Compl. ¶ 34.) The contributor list submitted with plaintiffs' current motion indicates, however, that many of AF PAC's contributors do reside in the states of the candidates to whom AF PAC has made contributions. (*See* Decl. of Jerad Najvar, Exh. 3, (Doc. No. 50-4).) Thus, although Stop PAC and AF PAC would — temporarily — be making the same basic legal claim here, they ultimately would not present the same questions of law or fact.

Plaintiffs have failed to satisfy either prong of Rule 20(a) and so the Court should deny plaintiffs' joinder motion. *See Gregory*, 2012 WL 2396873, at *9.

3. Joinder Would Result in Delay

Even if plaintiffs did satisfy the two-prong test of Rule 20(a)(1), joinder would create a delay in the proceedings and is therefore unwarranted on that ground alone. As the Commission explains in Section III below, due process would require that the Commission receive an opportunity for reasonable discovery as to the new plaintiff, just as the Court provided for the existing plaintiffs. But if the Court were to extend the discovery and briefing schedules for that purpose, the resolution of this case would be delayed. The Court has set September 12, 2014 as the end of discovery and September 19, 2014 as the deadline for submission of summary judgment briefs by the parties. In *Meth*, this Court denied joinder of potential plaintiffs when the discovery deadline was approximately two months away and a two-day trial was three months away from the date the Court decided the joinder motion. 2014 WL 3544989, at *4. The relevant deadlines in this case are much closer, and so this Court should deny plaintiffs' joinder motion so as to avoid greater delay in resolution of this case.

4. Joinder Here Would Not Further the Purpose of the Joinder Provision

Joinder in this case would not further the purpose of Rule 20. *See Aleman*, 485 F.3d at 218 n.5. With their joinder motion, plaintiffs seek to breathe life into the dying claims of plaintiff Stop PAC. When it becomes a multicandidate committee on September 11, 2014, Stop PAC will no longer be constrained by FECA's six-month registration period and so it will be permitted to make larger contributions to candidate committees than FECA now permits. The purpose of the joinder provision is to promote judicial efficiency, not facilitate end-runs around Article III to preserve the justiciability of a party's claims in the middle of a district court proceeding. And it is designed to accommodate the interests of particular parties presenting cases or controversies, not abstract law reform agendas. Joining AF PAC to dodge the impending mootness of a plaintiff who will no longer have any interest in the claim it brought would create unfairness to the Commission, and hence it should be denied. *See Sykes*, 548 F. Supp. 2d at 218.

B. AF PAC Does Not Qualify for Joinder Under Rule 21

Plaintiffs rely on wildly inapposite appellate cases joining parties under Rule 21 of the Federal Rules of Civil Procedure, the general rule addressing a court's power to cure "misjoinder" and "nonjoinder," which provides that "the court may at any time, on just terms, add or drop a party." Courts may use Rule 21 to join parties in several situations, including when the person is the real party in interest under Rule 17(a), an indispensable party under Rule 19(a), or a person who may be permissibly joined under Rule 20(a). *See* 2 Motions in Federal Court § 6:23 (3d ed.). To the extent the rule operates to allow permissive joinder, however, the same Rule 20 standards explained above apply, and plaintiffs cannot meet them here.

Plaintiffs claim that "[w]hen a litigant's initially justiciable claim is at risk of becoming non-justiciable due to a potential loss of standing or mootness, a court generally should permit a new plaintiff, seeking to raise the same claim based on the same arguments, to continue the

litigation to reach a judgment on the merits" (Pls.' Mem. at 7), but they offer no support for applying that doubtful proposition here. Plaintiffs rely heavily on two cases in which courts permitted joinder *at the appellate level* in order to cure jurisdictional defects that existed initially, but were not raised until the cases were heard on appeal. *Mullaney v. Anderson,* 342 U.S. 415, 416-420 (1952); *Cal. Credit Union League v. City of Anaheim* ("*Anaheim III*"), 190 F.3d 997, 1001 (9th Cir. 1999). In both instances, the court explicitly noted the exceptional circumstances of the case warranting joinder at the appellate level. In *Mullaney*, the Supreme Court stated that Rule 21 will "rarely come into play." 342 U.S. at 417. Similarly, the court in *Anaheim III* emphasized that it represented "one of the rare cases where a jurisdictional defect can be retroactively cured at the appellate level." 190 F.3d at 999; *see id.* at 1001 ("We recognize that our authority to join a party to cure a jurisdictional defect must be 'exercised sparingly.'") (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989)). Thus, contrary to plaintiffs' assertion, the cited cases do not support a general granting of joinder to cure pending jurisdictional defects.

Moreover, plaintiffs' Rule 21 cases differ greatly from the current case, notably in that the relationship of the joined parties to the existing plaintiffs in the prior cases was extremely close. In *Mullaney,* a 1952 decision, the Supreme Court permitted joinder of two non-resident union members as plaintiffs in a suit originally filed by the union and its secretary-treasurer *on behalf of non-resident union members*. 342 U.S. at 417. The Supreme Court held that "[t]o grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent." *Id.* Nonetheless, the Supreme Court considered the case to present "special circumstances," noting that the defendant would not be prejudiced ("embarrassed") because the

defendant had not challenged jurisdiction in the district court and the plaintiff remained the same, changing only from agent to principal. *Id.*

Similarly, in *Anaheim III*, on remand from the Supreme Court, the Ninth Circuit permitted joinder of the United States as a co-plaintiff to cure a jurisdictional defect because the Tax Injunction Act, under which suit was brought, enjoined federally chartered financial institutions from suing a state in federal court without the United States as plaintiff. *See* 190 F.3d at 998. What made joinder warranted were the facts that the defendant had not challenged the jurisdiction of the plaintiffs at the district court level, did not oppose joinder, and had already litigated fully at all levels; in addition, starting over in the district court would only achieve "a pre-ordained judgment." *Id.* at 1001.

Unlike the principal-agent situation of *Mullaney* and the federal co-plaintiff situation in *Anaheim III*, AF PAC is a different political committee from Stop PAC, making contributions to different candidates at different times and in different elections.[3] In addition, jurisdiction did exist here at the commencement of this suit, but the Commission put plaintiffs on notice early on that it challenges the continuing justiciability of plaintiff Stop PAC's claims after September 11, 2014. (Pls.' Mem. at 6 n.3.) Indeed, in a much more recent appellate case that specifically distinguished *Mullaney*, *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 1381 (Fed. Cir. 2000), the court denied a motion for joinder to preserve jurisdiction under Federal Rule of Appellate Procedure 27. In that case, the defendant had challenged the standing of the plaintiffs at the district court level, and adding a new plaintiff on appeal would have prejudiced the defendant by depriving it of the opportunity for discovery of the new plaintiff. *Id.* The same basic situation exists here. And unlike the defendants in *Anaheim III*, the FEC *has* challenged

[3] Primaries and general elections are separate "elections." 11 C.F.R. § 100.2.

jurisdiction at the district court level; there is no statutorily mandated co-plaintiff; and there is no preordained judgment waiting if the case were to start over with a new plaintiff.[4] Thus, there is no basis for this Court to join AF PAC pursuant to Rule 21.[5]

III. The Commission's Ability to Defend the Statute Would Be Undermined If Joinder Was Permitted Without Time for Discovery as to Any New Plaintiff

Plaintiffs seek to add a plaintiff to this as-applied constitutional challenge at the close of discovery, effectively foreclosing the Commission from taking discovery as to that plaintiff. But the Commission needs to build a record to defend the FECA challenge by the potential plaintiff just as much as it did as to the current plaintiffs. The Commission explained the need for discovery in such cases in the memorandum filed in support of its Rule 56(d) motion ("FEC Rule 56(d) Mem.") (Doc. No. 26), and this Court recognized the Commission's legitimate need to take discovery when it granted the Commission's motion, (Doc. No. 33). Plaintiffs are, in effect, now attempting to circumvent the Court's prior Rule 56(d) ruling.

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[4] Plaintiffs also cite *Atkins v. State Bd. of Educ.*, 418 F.2d 874 (4th Cir. 1969) (*per curiam*), but this case, too, fails to support plaintiffs' joinder motion. In *Atkins*, the court permitted parents to intervene as substitute plaintiffs for their child's grandfather who was ruled not to have standing. The court held that substitution would cause no prejudice and was warranted because of the special nature of the merits: in public education cases, courts have recognized "the intense interest of parents in the education of their children." *Id*. at 876. Of course, as with *Mullaney* and *Anaheim III*, no such relationship exists here.

[5] In addition to their attempts to add AF PAC as a plaintiff through Rules 20 and 21, plaintiffs assert in a footnote that an alternative basis for joining AF PAC lies in Rule 24(b), governing permissive intervention. (Pls.' Mem. at 13-14, n.4.) Plaintiffs' claims under that rule must fail for the same reasons as under Rule 20. Permitting AF PAC to intervene at this late date would cause delay or prejudice the Commission, and under Rule 24(b)(3), intervention may be permitted only if it will not "unduly delay or prejudice the adjudication of the original parties' rights." Plaintiffs attempt to brush aside the fact that they do not satisfy the requirements of Rule 24 by claiming that any prejudice the Commission will suffer is merely "technical." *Id.* But permitting the Commission adequate time to obtain discovery is not a minor technicality that can be waved away, it is at the heart of the inquiry in Rule 24. Intervention of a new plaintiff is not permitted without it.

Plaintiffs argue that they have made an "unprecedented" unilateral offer of "discovery" regarding AF PAC, but they concede that their offer would only "minimize" the potential prejudice the Commission could suffer. (Pls.' Mem. at 13.) Plaintiffs have indeed provided some written information as if the Commission had propounded exactly the same discovery to AF PAC as it did to Stop PAC. But that is not how our judicial system works. The Commission is entitled to conduct its *own* discovery, rather than having to rely on what plaintiffs choose to supply. (*See* FEC Rule 56(d) Mem. at 13-14, citing cases permitting discovery in constitutional cases.) If the Court permits AF PAC to join this case, the Commission intends to serve written discovery requests, tailored to AF PAC's specific situation, and it may issue Rule 30(b)(6) deposition notices and third party subpoenas, depending on what items AF PAC provides in response. The putative plaintiffs have offered no deposition testimony, nor is there time for that to occur under the current discovery schedule.

More generally, at this juncture there is no time under the Court's scheduling order for a new plaintiff. The weeks preceding the close of discovery on September 12 have included a heavy schedule of written discovery and depositions. Dispositive motions are due on September 19. That schedule will not permit discovery about an additional plaintiff, and a lack of such discovery of the potential plaintiff would seriously prejudice the Commission, denying it the ability to probe the factual basis of AF PAC's claims.

Plaintiffs suggest that even if the Court permits any additional time for discovery, the Commission should be given no more than *one week*. (Pls.' Mem. at 3.) The Commission proposed in the meet and confer discussion a schedule for motions and discovery about the new plaintiff equivalent to what the Court had ordered for the original plaintiffs in this action, and plaintiffs never countered in the negotiation with any reasonable offer of time. Plaintiffs do now

describe an extension of "only 30 or 60 days" as "less shocking" to them (*id.* at 4 n.1.), but even those periods are apparently unacceptable to plaintiffs. In fact, a 60-day discovery extension would approximate the amount of time permitted for the initial discovery period in the Court's July Scheduling Order. If the Court finds that joinder is warranted, an extension of that length from the date of any such court order would be a reasonable one in this case.

CONCLUSION

For the reasons stated above, the Court should deny plaintiffs' joinder motion. Alternatively, if the Court grants plaintiffs' joinder motion, it should also grant the Commission an adequate amount of time to conduct discovery of the new plaintiff, and concomitantly extend the deadline for submission of motions for summary judgment.

Respectfully submitted,

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September 8, 2014

**Admitted pro hac vice*

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STOP RECKLESS ECONOMIC INSTABILITY CAUSED BY DEMOCRATS, *et al.*,	
Plaintiffs,	Civ. No. 1:14-397 (AJT-IDD)
v.	
FEDERAL ELECTION COMMISSION,	
Defendant.	

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, I have caused to be served by the Court's ECF system and by email the foregoing on the following counsel:

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