UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA HOLMES, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	No. 16-5194 REPLY

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION REGARDING BRIEFING SCHEDULE

Daniel A. Petalas
Acting General Counsel
dpetalas@fec.gov

Lisa J. Stevenson
Deputy General Counsel – Law
lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Erin Chlopak
Acting Assistant General Counsel
echlopak@fec.gov

Steve N. Hajjar
Attorney
shajjar@fec.gov

Charles Kitcher
Attorney
ckitcher@fec.gov

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

July 11, 2016

This case is before the en banc Court under a unique statutory provision, 52 U.S.C. § 30110 (formerly 2 U.S.C. § 437h), that grants this Court exclusive jurisdiction to decide the merits of the case *in the first instance*. The Federal Election Commission ("Commission") has requested a briefing schedule allowing each side to file two briefs as provided in the rules most analogous to the unique proceedings here: the rules governing cross-appeals, Fed. R. App. P. 28.1(c) & D.C. Cir. R. 28.1(b). Those rules, as well as this Court's recent decisions in *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) (per curiam) and *Holmes v. FEC*, No. 15-5120, --- F.3d ---, 2016 WL 1639680 (D.C. Cir. Apr. 26, 2016) (*see* FEC's Mot. Regarding Briefing Schedule ("Mot.") at 4-5), underscore the importance of permitting each party to fully address the questions raised in section 30110 cases, where the en banc Court typically decides the merits of a constitutional question in the absence of full merits briefing and decisionmaking by the court below.

In their opposition, plaintiffs do not dispute that merits resolution by this en banc Court most closely resembles cross-appellate practice. Nor do they dispute that allowing the parties equal opportunity to present their arguments would be the fairest procedure. Rather, they advance four reasons in attempting to justify their preference for a disproportionate briefing advantage. None of these reasons is persuasive. The Court should grant the Commission's motion.

1. The merits of plaintiffs' constitutional challenge can be resolved efficiently without depriving the Commission of an opportunity to file two briefs. Plaintiffs' general desire for expedition does not need to come at the expense of an equitable briefing schedule, as section 30110's history suggests. En banc courts were previously required "to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified." 2 U.S.C. § 437h(c) (1974). In 1984, however, Congress struck that expedition requirement and similar provisions in other statutes, *see* Pub. L. No. 98-620, § 402, 98 Stat. 335 (1984), explaining in a committee report that "[t]he courts are, in general, in the best position to determine the need for expedition in the circumstances of any particular case, to weigh the relative needs of various cases on their dockets, and to establish an order of hearing that treats all litigants most fairly." H.R. Rep. No. 98-985, at 4 (1984).

Relative to cases following ordinary procedures, expedition is still achieved in properly certified section 30110 cases by providing for the merits to be decided in the first instance by the en banc court. *See Wagner*, 717 F.3d at 1014 (noting that pretermission of review by district courts saves time). This Court is not, however, required by statute to advance this challenge to a 42-year-old provision of law ahead of any matters that are more time-sensitive.

As plaintiffs indicate (Pls.' Opp'n to FEC's Mot. Regarding Briefing Schedule at 2 ("Pls.' Opp'n")), this Court's consideration of the merits of plaintiffs' First Amendment challenge has been delayed by the *Holmes* panel's consideration of whether plaintiffs' two proposed constitutional questions warranted certification, and its determination — relying on an intervening Supreme Court decision — that the First Amendment question (but not the Fifth Amendment question) should have been certified. But this case's idiosyncratic path on the procedural and jurisdictional issues should not reduce the Commission's opportunity to brief the merits of the constitutionality of a provision of FECA.

In any event, this Court can expedite this case equitably with shorter deadlines, and, if it shares plaintiffs' concerns regarding the *volume* of briefing (Pls.' Opp'n at 2), reduced page limits. Contrary to plaintiffs' argument, expedition is not inconsistent with equal briefing opportunity.

2. Consideration of whether plaintiffs' First Amendment challenge is "straightforward and narrow" provides no basis for unbalanced briefing. (Pls.' Opp'n at 2; *see id.* at 7 ("[T]his case is easier than most.").) The Court of Appeals "regularly hears" complex appeals involving multiple parties and voluminous factual records, as plaintiffs point out (*id.*), but that provides no basis for permitting plaintiffs a greater opportunity to brief the constitutional question

before the Court here. Appeals and cross-appeals typically follow the briefing procedures of Rules 28 and 28.1, respectively, without regard to the breadth or complexity of the issues involved. And the fact that the Commission has prevailed in section 30110 cases despite unbalanced briefing schedules (*see* Pls.' Opp'n at 6) is not evidence that those schedules were appropriate.

3. The briefing schedules adopted in past section 30110 cases do not support plaintiffs' position. Plaintiffs do not dispute that the Fifth Circuit permitted the Commission to file a second brief in a section 30110 case. Order, *Cao v. FEC*, Nos. 10-30080, 10-30146 (5th Cir. Mar. 15, 2010) (Docket No. 511052443) (attached as Exhibit A). Their attempt to distinguish that case is misleading and unavailing. In *Cao*, the Commission made the same arguments it makes now, including emphasizing that under FECA's unique certification procedure, the en banc court of appeals decides the merits of the case in the first instance and explaining that section 30110 cases are thus more analogous to cross-appeals. *Compare* FEC's Unopposed Mot. for Reply Br. in *Cao* at 1-4, Nos. 10-30080, 10-30146 (5th Cir. Mar. 9, 2010) (Docket No. 511045408), *with* Pls.' Opp'n at 5 (purporting to distinguish the Commission's request in *Cao*). As plaintiffs concede, the court granted the FEC's motion. (Pls.' Opp'n at 5.)

Plaintiffs point to the unexplained adoption of default briefing schedules in other section 30110 cases, but in none of those cases did the courts actually hold that default briefing procedures were appropriate.

Contrary to plaintiffs' characterization (Pls.' Opp'n at 3), the circumstances in the case on which they primarily rely, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) ("*SpeechNow*"), were not "identical" to the situation here. The initial "standard three-brief schedule" the Court ordered was not, as plaintiffs state (Pls.' Opp'n at 3) for a case that had been certified; it was for an *appeal* to a three-judge panel of the district court's denial of the plaintiffs-appellants' motion for preliminary injunction *SpeechNow v. FEC*, No. 08-5223 (D.C. Cir.). In an appeal, the "appellants . . . bear the burden of demonstrating prejudicial error in the decision being appealed and, therefore, are entitled to the [first and] last word in both the briefs and at oral argument." *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1361 (Fed. Cir. 2005). The three-brief procedure was thus sensibly followed — without objection by the Commission — in both the *SpeechNow* appeal and in plaintiffs' appeal of the district court's earlier denial of certification in this matter.

SpeechNow's preliminary-injunction appeal was later consolidated with a proceeding involving certified questions, 599 F.3d at 690, but by then the appeal of the denial of the preliminary injunction had been fully briefed, as the *SpeechNow*

plaintiffs themselves emphasized in opposing cross-appeal briefing under Rule 28.1. *See* Appellants' Resp. to Mot. to Modify Briefing Schedule, *SpeechNow.org v. FEC*, No. 08-5226 (Docket No. 1212863) (filed Oct. 27, 2009), at 3-4 (arguing that the additional briefing sought by the Commission was unnecessary in light of the briefing of plaintiffs' preliminary injunction appeal). Here, by contrast, there is no active, briefed appeal consolidated with the certified constitutional question.

Nor do any of the other section 30110 cases cited by plaintiffs support their inference that a court of appeals actually *decided* that default appellate briefing is most appropriate in section 30110 cases.[3] In none of the cases plaintiffs cite did any party request an alternative briefing schedule, or was the issue otherwise brought to the courts' attention. Plaintiffs' cases thus have no precedential value on this question. *See, e.g.*, *Wagner*, 717 F.3d at 1016 (explaining that even as to a question regarding jurisdiction, which the Court must consider *sua sponte* even if not raised by the parties, where a controlling decision "never addressed jurisdiction . . . we can thus infer nothing therefrom regarding the jurisdictional issue"); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[3] (*See* Pls.' Opp'n at 4-5 (citing briefing schedules entered in *Wagner v. FEC*, No. 13-5162 (D.C. Cir. June 7, 2013), *California Med. Ass'n v. FEC*, No. 79-4426 (9th Cir. Aug. 1, 1979), and *Mariani v. United States*, No. 99-3875 (3d Cir. Oct. 29, 1999).)

4. This case is *not* an appeal, and the Commission's likelihood of prevailing is not a basis for permitting imbalanced briefing on the merits of a constitutional question. Plaintiffs' final argument in favor of asymmetrical briefing relies on their mischaracterization of this case as "a garden-variety appeal." (Pls.' Opp'n at 7.) This Court has "*exclusive original jurisdiction*" in this section 30110 case, *Wagner*, 717 F.3d at 1016, and no merits determination from the court below is on review here. On an *appeal*, appellants get the last word because they have the burden of demonstrating error in the decision below. *See supra* p. 5. This is not that situation. Indeed, while the allocation of burden for the Court's de novo determination has been disputed in this matter, plaintiffs have contended that the burden falls on the Commission. *See, e.g.*, Pls.' Opening Br. Regarding Certification at 15 (Mar. 13, 2015) (Docket No. 25, below).[4]

And contrary to plaintiffs' suggestion (Pls.' Opp'n at 2-3), challenges to administrative rulemakings are similar to ordinary appeals, and thus the adoption of default appellate briefing schedules in such matters does not support plaintiffs' opposition here. Much like ordinary district court proceedings, an agency will typically have compiled a record in a rulemaking proceeding, made a

[4] Plaintiffs' argument that there is "no true *cross* appeal present here" (Pls.' Opp'n at 6 (emphasis added)) is a straw man. The Commission's contention (Mot. at 3) is that the rules governing the briefing of cross-appeals are the *closest analog* to briefing on cross-motions for summary judgment and thus are suitable for this section 30110 proceeding. With no merits decision by the district court on the certified First Amendment question, it is obviously not an appeal of any kind.

determination, and provided a written explanation for that determination. *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 910 (D.C. Cir. 2004) (discussing the similarity between agency and district court records). Challengers to rulemaking proceedings typically bear the burden of showing error in the agency action, just as ordinary appellants do for trial court actions.

Plaintiffs' assertion that "[t]here is no . . . need [for equal briefing] here," (Pls.' Opp'n at 7) ignores the indisputable fact that a default appellate briefing schedule would grant plaintiffs two opportunities to be heard and the Commission only one. Balanced briefing is appropriate whenever this Court exercises its exclusive authority to decide in the first instance whether an Act of Congress should be struck down — "the gravest and most delicate duty that [courts are] called on to perform," *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

For the foregoing reasons and those presented in the Commission's Motion Regarding Briefing Schedule, any schedule adopted by this Court should, like that set forth in Rule 28.1, allow each side an equal opportunity to fully address the certified constitutional question at issue.

Respectfully submitted,

Daniel A. Petalas
Acting General Counsel
dpetalas@fec.gov

Lisa J. Stevenson
Deputy General Counsel – Law
lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Erin Chlopak
Acting Assistant General Counsel
echlopak@fec.gov

/s/ Steve N. Hajjar
Steve N. Hajjar
Attorney
shajjar@fec.gov

Charles Kitcher
Attorney
ckitcher@fec.gov

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

July 11, 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA HOLMES, *et al.*,	)	
Plaintiffs,	)	No. 16-5194
v.	)	CERTIFICATE
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2016, I electronically filed the Commission's Reply in Support of its Motion Regarding Briefing Schedule with the Clerk of the Court of United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. I also certify that I caused to be delivered to the Court the requisite number of copies. Service was made on the following through the CM/ECF system:

Allen Dickerson
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800

/s/ *Steve N. Hajjar*
Federal Election Commission
999 E Street, NW
Washington, DC 20463
(202) 694-1650
shajjar@fec.gov

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAURA HOLMES, *et al.*,	
Plaintiffs,	No. 16-5194
v.	
FEDERAL ELECTION COMMISSION,	EXHIBIT A
Defendant.	

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30080

United States Court of Appeals
Fifth Circuit
FILED
March 15, 2010

Charles R. Fulbruge III
Clerk

In Re:

ANH CAO, also known as JOSEPH CAO; REPUBLICAN NATIONAL COMMITTEE; REPUBLICAN PARTY OF LOUISIANA

consolidated w/

No. 10-30146

ANH CAO, also known as Joseph Cao; REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs - Appellants

v.

FEDERAL ELECTION COMMISSION,

Defendant - Appellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

O R D E R :

IT IS ORDERED that appellee's unopposed motion for leave to file a supplemental sur-reply brief one week after appellants' supplemental reply brief is filed GRANTED.

/s/ EDITH H. JONES

EDITH H. JONES
UNITED STATES CIRCUIT JUDGE