UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21	)	
Plaintiffs,	)	Civ. No. 16-752 (JDB)
v.	)	MOTION TO DISMISS
FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
F8, ELI PUBLISHING, and STEVEN J. LUND,	)	
Intervenor-Defendants.	)	

FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(1), the Federal Election Commission ("Commission" or "FEC") hereby moves for an order dismissing plaintiffs' complaint challenging under 52 U.S.C. § 30109(a)(8) the Commission's dismissal of five administrative complaints. A supporting memorandum and a proposed order accompany this motion.[1]

[1] The Federal Election Commission (Commission) has historically voted by a majority vote (pursuant to 52 U.S.C. §§ 30106(c) and 30107(a)(6)) to authorize an appearance by the Office of General Counsel (OGC) on behalf of the Commission in a suit commenced pursuant to 52 U.S.C. § 30109(a)(8). There are, however, two general categories of cases that may come before a court in which there are insufficient votes to pursue a matter arising from an administrative complaint. In the first category of cases, litigation is commenced against the Commission after it does not approve a recommendation by OGC to find "reason to believe" that a violation of the FECA or of its regulations occurred, and the file was consequently closed. 52 U.S.C. § 30109(a)(8). In the second category of cases, the litigation is commenced against the Commission after OGC recommends dismissing the matter, and the Commission closes the file after three or more Commissioners approve OGC's recommendation or there are otherwise three or fewer Commissioners voting to find reason to believe. In both instances, the reason for the inaction of the Commission is that there were not four or more Commissioners' votes to find "reason to believe" regarding the allegations in the administrative complaint.

Respectfully submitted,

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July 1, 2016

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Judicial review of the FEC dismissal of an administrative complaint requires the Court to examine the agency's reasoning as expressed by Commissioners or, in some circumstances, by OGC. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987). In the first category of cases described above, the court must be supplied with a "statement of reasons" of those Commissioners who voted against, or abstained from voting for, the OGC recommendation, who the court has called the "controlling group." *Id.*; *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under Section [30109(a)(8)] . . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."); *Common Cause v. FEC*, 655 F. Supp. 619 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988).

In the second category of cases described above, any member or members of the group of Commissioners who approve OGC's dismissal recommendation may issue their own statement(s) of reasons to provide the basis for his or her action. If one or more members who supported dismissal do not file a statement containing the basis of his or her action, the rationale provided in OGC's report shall be among those considered by the Court. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38 & n.19 (1981) (staff report may provide a basis for the Commission's action). Although the views of the Commissioners who voted to pursue enforcement are not defended by OGC, their statements of reasons are made part of the administrative record as long as they are filed by the time the record is certified, and when filed shall be available for the Court's consideration.

UNITED STATES DISTRICT COURT
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CAMPAIGN LEGAL CENTER and DEMOCRACY 21	)	
Plaintiffs,	)	Civ. No. 16-752 (JDB)
v.	)	
	)	MEMORANDUM
FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
F8, ELI PUBLISHING, and STEVEN J. LUND,	)	
Intervenor-Defendants.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

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Plaintiffs Campaign Legal Center ("CLC") and Democracy 21 seek judicial review of the Federal Election Commission's ("Commission" or "FEC") dismissal of administrative complaints alleging that certain individuals and entities "ma[de] 'straw donor' contributions in violation of various disclosure provisions of the Federal Election Campaign Act" ("FECA" or "Act"). (Compl. ¶ 1.) In particular, plaintiffs alleged violations of FECA's prohibition against contributions made in the name of another, 52 U.S.C. § 30122, and the Act's political committee registration and reporting requirements, 52 U.S.C. §§ 30102-04. Plaintiffs, however, lack Article III standing to obtain review pursuant to FECA's narrow review provision, 52 U.S.C. § 30109(a)(8).

Courts in this Circuit have repeatedly held that to have standing to obtain review under section 30109(a)(8), a complainant must have suffered a legally cognizable injury, such as an informational one, stemming from the Commission's dismissal of its administrative complaint. And the courts have made explicitly clear that a desire for information about whether FECA has been violated is insufficient. Here, that is the only information plaintiffs seek. Indeed, while plaintiffs complain that they were "deprived of *timely* information about the sources" of certain contributions described in their administrative complaints (Compl. ¶ 6 (emphasis added)), plaintiffs' own complaint for judicial review affirmatively identifies those sources, confirming that plaintiffs lack any cognizable informational injury that could be redressed through this judicial-review action.

In any event, even if plaintiffs did not already possess the sought-after information regarding the contributions at issue in their administrative complaints, they would still lack standing because plaintiffs are not voters, they do not claim to be membership organizations with members who are voters, and they are not otherwise participants in political elections and

campaigns. Courts in this Circuit have made clear that non-membership organizational entities like CLC and Democracy 21 lack standing to assert a derivative harm based on their alleged inability to help others who *are* participants in the political process obtain information that those individuals may use in voting.

For these reasons and those detailed below, plaintiffs' complaint should be dismissed.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The FEC

The FEC is a six-member independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. *See generally* 52 U.S.C. §§ 30106-07. Congress authorized the Commission to "formulate policy" with respect to FECA, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The Commission has exclusive jurisdiction to initiate civil enforcement actions for violations of the Act in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

B. FECA's Administrative Enforcement Process and Judicial-Review Standard

FECA provides that decisions of the Commission "with respect to the exercise of its duties and powers under the provisions of th[e] Act shall be made by a majority vote of the members of the Commission," and that certain specified actions require "the affirmative vote of 4 members of the Commission." 52 U.S.C. § 30106(c). As explained in greater detail below, the decision to open an investigation or take other statutory steps in the process of enforcing against an alleged violation of FECA thus requires the assent of at least four Commissioners. 52 U.S.C. §§ 30106(c), 30107(a)(6), (9). When pursuit of an alleged violation is not supported by four or

more votes of the agency's six Commissioners, the statute precludes the opening of an investigation or advancement of the enforcement process.

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. *Id.* § 30109(a)(1); *see also* 11 C.F.R. § 111.4. After reviewing the complaint and any response filed by the respondent, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). Any investigation under this provision is confidential until the administrative process is complete. *Id.* § 30109(a)(12). If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

If the Commission votes to proceed with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. *Id.* § 30109(a)(4)(A)(i). Like a reason-to-believe determination, a determination to find probable cause to believe that a violation of FECA has occurred requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i). If the Commission so votes, it is statutorily required to attempt to remedy the violation informally and attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, FECA authorizes the agency to institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). Either entering into a conciliation agreement or instituting a civil action requires an affirmative vote of at least four Commissioners. *Id.* § 30106(c); 30109(a)(6)(A).

If, at any point in the administrative process, the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason,

FECA provides the complainant with a narrow cause of action for judicial review of the Commission's dismissal decision. *See id.* § 30109(a)(8)(A). That limited review applies equally to dismissals that result from an evenly divided vote. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") ("[A split vote] dismissal, like any other, is judicially reviewable under [§ 30109(a)(8)]."). In such cases, judicial review is based on the statement of reasons issued by the Commissioners who voted to dismiss. *Id.* "[T]hose Commissioners constitute a controlling group for purposes of the [dismissal] decision," because their "rationale necessarily states the agency's reasons for acting as it did." *Id.*

By statute, the judicial task in such an action "is limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) (describing judicial review under section 30109(a)(8)). As the Supreme Court has explained, the Commission "has the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred" and "Congress wisely provided that the Commission's dismissal of a complaint should be reversed only if 'contrary to law.'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *see Citizens for Responsibility & Ethics in Washington* ("*CREW*") v. *FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("[J]udicial review of the Commission's refusal to act on complaints is limited to correcting errors of law.").

FECA also expressly limits the scope of relief available to a plaintiff challenging an FEC dismissal decision. The reviewing court may only (a) declare that the Commission's dismissal was "contrary to law" and (b) order the Commission to "conform with" the court's declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C). A judicial order to "conform with" a contrary-to-law declaration cannot mandate a different outcome on remand; the Commission remains free to reach the same outcome based on a different rationale. *FEC v. Akins*, 524 U.S. 11, 25 (1998)

(explaining that even where a reviewing court finds that an FEC administrative dismissal was contrary to law, the Commission "(like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason" (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943))); *La Botz v. FEC*, 889 F. Supp. 2d 51, 63 n.6 (D.D.C. 2012) ("*La Botz I*") (clarifying that a judicial determination that an FEC dismissal of an administrative complaint was contrary to law does not mean "that the FEC is required to reach a different conclusion on remand" and suggesting the "possib[ility]" that "the [dismissal] . . . could have been justified entirely by the FEC's prosecutorial discretion, which is 'considerable'" (citation omitted)); *La Botz v. FEC*, 61 F. Supp. 3d 21 (D.D.C. 2014) ("*La Botz II*") (dismissing judicial-review action on mootness grounds following FEC's dismissal of plaintiff's administrative complaint upon remand; explaining further that even if the court had jurisdiction, FEC's dismissal represented a reasonable exercise of prosecutorial discretion that was not contrary to law under FECA**)**.[1]

C. FECA's Prohibition Against Contributions Made in the Name of Another

FECA's prohibition against contributions made in the name of another person complements the Act's contribution limits, disclosure requirements, and source restrictions. It does so by independently prohibiting the "true source" of a contribution from concealing his identity by making his contribution through a mere pass through, or what is commonly known as a "straw donor," *i.e.*, an intermediary or conduit: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution,

[1] If the Commission fails to conform with a contrary-to-law declaration within 30 days, FECA permits the administrative complainant to bring "a civil action to remedy the violation involved in the original [administrative] complaint." 52 U.S.C. § 30109(a)(8)(C); *see FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985).

and no person shall knowingly accept a contribution made by one person in the name of another person." 52 U.S.C. § 30122.[2]

Commission regulations illustrate the types of activities and transactions that constitute making a contribution in the name of another. These include making a contribution, all or part of which was provided by another without disclosing the true source of the contributor, or making a contribution and attributing its source to another person who was not the contribution's true source. *See, e.g.*, 11 C.F.R. § 110.4(b)(2)(i)-(ii). Both the Act and Commission regulations provide that a person who furnishes another with funds for the purpose of contributing to a candidate or committee makes the resulting contribution.

D. Political Committee Registration and Reporting Requirements

FECA imposes several different kinds of disclosure obligations that apply depending upon the nature of the organization making the communications and the timing, form, and content of the communications. In addition to imposing certain event-driven disclosure requirements that apply whenever speakers' communications meet certain regulatory criteria, FECA provides that certain organizations, which qualify as "political committees," must, *inter alia*, register with the Commission, appoint a treasurer, maintain names and addresses of contributors, and file periodic reports disclosing to the public most receipts of $200 or more. 52 U.S.C. §§ 30103, 30104(a)-(b). Under FECA, any "committee, club, association, or other group of persons" that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" in a calendar year is a "political committee." 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). The Act defines "contribution" and "expenditure" to include any payment of money

[2] The term "person" for purposes of the Act as well as this prohibition includes partnerships, corporations, and "any other organization or group of persons." 52 U.S.C. § 30101(11).

to or by any person "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i). In *Buckley v. Valeo*, however, the Supreme Court explained that the way FECA defines political-committee status "only in terms of amount of annual 'contributions' and 'expenditures'" might result in an overbroad application by reaching "groups engaged purely in issue discussion." 424 U.S. 1, 79 (1976) (per curiam). The Court therefore concluded that, in order to "fulfill the purposes of the Act," FECA's political-committee provisions "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* *Buckley* thus established that an entity that is not controlled by a candidate must register as a political committee only if the group (1) crosses the $1,000 threshold of contributions or expenditures and (2) has as its "major purpose" the nomination or election of federal candidates.

II. FACTUAL BACKGROUND

According to the complaint, plaintiff CLC is a nonpartisan, nonprofit organization based in Washington, D.C. that works "to ensure that the public has access to information about the financing of our election campaigns" including through litigation involving campaign finance matters, as well as participation in rulemaking and advisory opinion proceedings before the Commission. (Compl. ¶¶ 10-11.) The complaint similarly alleges that plaintiff Democracy 21 is a nonpartisan, nonprofit organization that participates in litigation involving the constitutionality of campaign finance laws as well as rulemakings, advisory opinions, and other administrative matters before the Commission. (*Id.* ¶ 14.)

In this action for judicial review under section 30109(a)(8), plaintiffs challenge the Commission's dismissal of five administrative complaints filed by plaintiffs in which they made similar allegations regarding specific contributions received by certain independent-expenditure-

only political committees (also known as "super PACs"), as disclosed in those groups' reports to the Commission. Specifically, plaintiffs' administrative complaints alleged that several different closely held corporations or corporate limited liability companies (LLCs) may have been used by certain individuals to make so-called "straw donor" contributions to the identified super PACs, in violation of 52 U.S.C. § 30122. (Compl. ¶¶ 1-2.) Plaintiffs also alleged that four of the five identified LLCs may have violated 52 U.S.C. §§ 30102, 30103, and 30104, by failing to register and file reports as political committees. (Compl. ¶ 2.)

On February 23, 2016, the Commission voted and lacked the statutorily required four affirmative votes to find reason to believe that "a violation of FECA had occurred with respect to the allegations in plaintiffs' administrative complaints" and the Commission accordingly dismissed each of the administrative complaints. (Compl. ¶¶ 3, 34, 39, 43, 50.) As described in their judicial complaint, plaintiffs disagree with the legal analyses and conclusions in the controlling Commissioners' Statement of Reasons (*id.* ¶¶ 52-55), and claim that the dismissals of their administrative complaints deprived plaintiffs "as well as the public . . . of *timely* information about the sources, of the contributions made to the super PACs." (*Id.* ¶ 6 (emphasis added); *see also id.* ¶¶ 60, 63, 66, 69.) Plaintiffs do not allege that they continue to lack such information regarding the sources of the contributions they identify; on the contrary, plaintiffs' judicial complaint repeatedly identifies the individuals that provided the money used to make the contributions that are the basis for each of plaintiffs' administrative complaints.

Specifically, with respect to Matter Under Review ("MUR") 6485 (W Spann), plaintiffs' judicial complaint identifies Edward Conard as having "authorized W Spann to make the $1 million contribution" to Restore Our Future, a super PAC that supported Mitt Romney's 2012 presidential campaign. (Compl. ¶ 32; *see id* ¶ 31, 34.) With respect to MURs 6487 and 6488

(F8/Eli Publishing), plaintiffs' judicial complaint identifies Steven J. Lund as "the source of the two $1 million contributions" to Restore Our Future in March 2011. (*Id.* ¶ 36; *see id.* ¶ 37.) Regarding MUR 6711 (Specialty Investments Group, Inc., et al.), plaintiffs' judicial complaint identifies Richard Stephenson as having "made twenty contributions totaling over $12 million" to the super PAC FreedomWorks for America through the Specialty Investment Group Inc. and Kingston Pike Development LLC. (*Id.* ¶ 41.) And finally, regarding MUR 6930 (Pras Michel), plaintiffs' judicial complaint identifies Pras Michel as having "provided $1.225 million in total to Black Men Vote," including $875,000 contributed "in the name of SPM Holdings LLC." (*Id.* ¶ 49.)

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE DISMISSALS OF THEIR ADMINISTRATIVE COMPLAINTS

A. Plaintiffs Bear the Burden of Establishing Article III Standing

This Court has "'an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.'" *Jones v. Ashcroft*, 321 F. Supp. 2d 1, 5 (D.D.C. 2004) (citation omitted). As the parties invoking the court's jurisdiction, plaintiffs bear the burden of establishing the elements of constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1279 (D.C. Cir. 2012). And plaintiffs cannot simply rely on 52 U.S.C. § 30109(a)(8), the statutory provision that allows challenges to the dismissal of an administrative complaint, to satisfy the standing requirements of Article III. "Section [30109(a)(8)(A)] does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (per curiam); *accord, e.g.*, *CREW*, 475 F.3d at 330-31; *Judicial Watch, Inc. v. FEC*, 180 F.3d 277 (D.C. Cir. 1999); *CREW v. FEC*, 799 F. Supp. 2d 78, 85 (D.D.C. 2011).

In general, to demonstrate Article III standing a plaintiff must establish that: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan*, 504 U.S. at 560-561). Thus, where, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult" to prove. *Lujan*, 504 U.S. at 562 (quotation marks omitted); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). Standing "focuses on the complaining party to determine 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Am. Legal Found. v. FCC*, 808 F.2d 84, 88 (D.C. Cir. 1987) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

1. Informational Injury

In limited circumstances, an injury for purposes of Article III standing can arise from a statute that has "explicitly created a right to information." *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 97 (D.D.C. 2000) (quoting *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 502 (D.C. Cir. 1994)). "For a plaintiff to successfully claim standing based on an informational injury, he must allege that he is directly deprived of information that must be disclosed under a statute." *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011) ("For purposes of informational standing, a plaintiff 'is injured-in-fact . . . because he did not get what the statute

entitled him to receive.'") (quoting *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006)).

In evaluating whether an administrative complainant has informational-injury standing to seek judicial review under section 30109(a)(8), "the nature of the information allegedly withheld is critical to the [court's] standing analysis." *Common Cause*, 108 F.3d at 417; *CREW* 401 F. Supp. 2d 115, 120 (D.D.C. 2005) ("The character of the information sought weighs heavily on the informational standing analysis."). The Supreme Court has thus explained that to demonstrate standing in a suit brought under section 30109(a)(8), the information of which plaintiffs claim to have been deprived must be "directly related to voting" to constitute a legally cognizable injury. *Akins*, 524 U.S. at 24-25. The D.C. Circuit has similarly explained that a particularized informational injury is sufficient to create standing where plaintiffs have alleged that "voter[s] [we]re deprived of useful [political] information at the time" of voting, *e.g.*, information showing "how much money a candidate spent in an election," or the identity of donors to a candidate's campaign, *and* the denied information is "useful in voting and required by Congress to be disclosed." *Common Cause*, 108 F.3d at 418 (citation omitted). In addition, courts in this District have recognized that the sought-after information must "have a concrete effect on *plaintiffs'* voting," *i.e.*, that plaintiffs (or their members) must be participants in political elections and campaigns. *Alliance for Democracy v. FEC* ("*Alliance I*"), 335 F. Supp. 2d 39, 48 (D.D.C. 2004); *see also Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 46 (D.D.C. 2003) (explaining that in a section 30109(a)(8) action, a legally cognizable information injury "occurs when a voter is deprived of information showing how much money a candidate spent during an election, or the identity of donors to a candidate's campaign, because both types of information are useful in voting and are required by Congress to be disclosed").

2. Standing of Organizational Plaintiffs

"The injury in fact component of the standing inquiry is often difficult for organizational plaintiffs . . . to satisfy." *CREW*, 401 F. Supp. 2d at 120. If an organization has members or is a trade association, it may qualify for representative or associational standing on behalf of those members or constituents. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-44 (1977). As the D.C. Circuit has explained, where an organizational plaintiff brings suit on its own behalf, "it must establish 'concrete and demonstrable injury to the organization's activities — with [a] consequent drain on the organization's resources — constitut[ing] . . . more than simply a setback to the organization's abstract social interests.'" *Common Cause*, 108 F.3d at 417 (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)); *see also id.* ("The organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action."). This standing requirement for organizations suing on their own behalf "may only be satisfied by a showing that [the plaintiff] has suffered a 'concrete and demonstrable injury' to its organizational activities, in conjunction with a depletion of resources, that constitutes more than a simple inconvenience to 'abstract social interests.'" *CREW*, 401 F. Supp. 2d at 120 (*citing Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1433).

B. Plaintiffs Have Not Suffered a Legally Cognizable Injury In Fact

1. Plaintiffs Have Not Suffered Any Cognizable Informational Injury Because Their Judicial Complaint Affirmatively Alleges The Very Information They Could Possibly Obtain Through Their Judicial Review Action

In light of the well-established requirement that section 30109(a)(8) plaintiffs have suffered a cognizable informational injury, courts have explained that where the information plaintiffs purport to seek through such an action is already available to them, the plaintiffs lack

standing to bring their claims. *See, e.g.*, *Judicial Watch*, 293 F. Supp. 2d at 47 (holding that a plaintiff who had alleged reporting violations regarding his own contributions to a candidate lacked standing because he was "already aware of the facts underlying his own alleged contributions" and his judicial-review action was unlikely to produce additional facts of which the plaintiff was not already knowledgeable); *CREW*, 799 F. Supp. 2d at 89 (holding that plaintiffs lacked a cognizable informational injury where they failed to "allege any specific factual information . . . that [wa]s not already publicly available"); *see also CREW*, 475 F.3d at 339-40 (holding that plaintiffs lacked standing in part because "any citizen who wants to learn the details of the transaction . . . can do so by visiting the Commission's website, which contains the [sought after] list and a good deal more").

Here, plaintiffs apparently attempt to establish standing through their general claim that they "were deprived of *timely* information about the sources[] of the contributions" at issue in the underlying administrative matters. (Compl. ¶ 6 (emphasis added); *see id.* ¶¶ 60, 63, 66, 69 (same).) But this carefully worded allegation, repeated throughout plaintiffs' complaint, is revealing. Regardless of *when* plaintiffs obtained the information they sought through their underlying administrative complaints, they have such information *now*. Indeed, as described *supra* pp. 8-9, plaintiffs' judicial complaint repeatedly identifies the individuals that provided the money used to make the contributions that are the basis of each of plaintiffs' administrative complaints. (*See* Compl. ¶¶ 31-32, 34 (describing contributions at issue in MUR 6485); *id.* ¶¶ 36, 37 (describing contributions at issue in MURs 6487 and 6488); *id.* ¶ 41 (describing contributions at issue in MUR 6711); *id.* ¶ 49 (describing contributions at issue in MUR 6930).) Thus here, as in *CREW*, plaintiffs have failed to allege a cognizable informational injury because they are "already privy to the information" they could potentially obtain if they were to prevail in

this judicial-review action. 401 F. Supp. 2d at 123; *see also Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 145 (D.D.C. 2005) ("*Alliance II*") (concluding that "the plaintiffs lack standing because they already have the information they are seeking and therefore have not suffered an informational injury"); *Judicial Watch*, 293 F. Supp. 2d at 47 & n.9 (holding that plaintiff lacked a cognizable information injury where he was already "aware of the facts" concerning certain allegedly unreported contributions, and where the underlying administrative complaint was "unlikely" to "yield additional facts about [the] alleged reporting violations") (citing *Wertheimer v. FEC*, 268 F.3d 1070, 1074-75 (D.C. Cir. 2001)); *CREW*, 475 F.3d at 339-40 (holding that plaintiffs lacked standing in part because "any citizen who wants to learn the details of the transaction . . . can do so by visiting the Commission's website").

The "existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*." *Lujan*, 504 U.S. at 569 n.4. Plaintiffs' claims to have been deprived of *timely* information are thus of no moment, since the relevant question here is: did plaintiffs lack information to which they are entitled under FECA *when they filed suit*? As described *supra*, plaintiffs' judicial complaint affirmatively alleges the very information plaintiffs complain was not "timely" disclosed — information that plaintiffs were, and continue to be, free to use for all the purposes they claim. Plaintiffs thus fail to allege any legally cognizable informational injury that could be remedied through this judicial review action.

2. Plaintiffs' Disagreement With the Analyses in the Controlling Statements of Reasons and Their Preference for Different Administrative Determinations Are Insufficient to Confer Standing

Plaintiffs' mere disagreement with the legal analyses and conclusions in the Statement of Reasons issued by the controlling group of Commissioners is likewise insufficient to establish their standing to bring this action. Courts have repeatedly distinguished as *not* legally cognizable

"an injury that occurs when a person is deprived of information that a law has been violated." *Judicial Watch,* 293 F. Supp. 2d at 46. Where plaintiffs merely seek information "'that a violation of FECA has occurred,' the plaintiff has not suffered the type of injury that satisfies the standing requirement." *Id.* (quoting *Common Cause,* 108 F.3d at 418); *see Wertheimer,* 268 F.3d at 1075 (holding that plaintiffs lacked standing to seek a legal determination that certain transactions constitute coordinated expenditures); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178-79 (D.D.C. 2013) (holding that plaintiff lacked standing to seek a legal determination that certain political committees were affiliated). The D.C. Circuit has thus explicitly refused "[t]o hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred." *Common Cause,* 108 F.3d at 418; *see id*. (explaining that such a holding "would be tantamount to recognizing a justiciable interest in the enforcement of the law"). Indeed, "while 'Congress can create a legal right . . . the interference with which will create an Article III injury,' Congress cannot, consistent with Article III, create standing by conferring 'upon *all* persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law.'" *Id.* (quoting *Lujan,* 504 U.S. at 573).

The D.C. Circuit and courts in this district have consistently applied that principle in circumstances underscoring plaintiffs' lack of standing here. For example in *Wertheimer,* several individuals associated with "good government" groups alleged that the Commission had failed to identify certain disbursements by the major political parties as impermissible coordinated expenditures. 268 F.3d at 1071-73. The plaintiffs attempted to rely on *Akins* in claiming that the Commission's failure deprived them of "required information about the source and amount of candidates' financing." *Id.* at 1073. The D.C. Circuit held, however, that the

plaintiffs "do not really seek additional facts but only the legal determination that certain transactions constitute coordinated expenditures." *Id.* at 1075. The Court of Appeals further concluded that the plaintiffs lacked standing because they not only failed "to show . . . that they [we]re directly being deprived of any information," but also that "the legal ruling they [sought] might lead to additional factual information." *Id.* at 1074. Here, as in *Wertheimer*, plaintiffs merely seek legal determinations that are different from the conclusions reached by the controlling group of Commissioners. Under *Wertheimer*, such an interest is insufficient.

A court in this District similarly found no informational injury in *Vroom*, where the plaintiff had attempted to challenge the Commission's dismissal of his administrative complaint alleging that one corporate political committee had improperly disaffiliated from another corporate political committee and in doing so, violated FECA's contribution limits. 951 F. Supp. 2d at 175-75, 178-79. Noting that the contributions by both political committees were "already fully disclosed," the court concluded that the plaintiff did not seek additional facts about the political committees' financing, but rather sought a legal determination that the committees were affiliated and that their contributions in the aggregate exceeded FECA's limits. *Id.* at 178-79. In other words the court held that Mr. Vroom, like plaintiffs here, lacked standing to obtain judicial review under section 30109(a)(8) on the basis of his disagreement with the Commission's legal analysis and conclusions.

And in yet another case in this District, a court again found no informational injury where the plaintiff was "already aware of the facts" concerning the contributions at issue in his administrative complaint and thus was "really seeking . . . a legal determination by the Commission" that the allegations he had asserted established "a violation of the FECA," *i.e.*, "for the [Commission] to 'get the bad guys,' rather than disclose information." *Judicial Watch*, 293

F. Supp. 2d at 47 (quoting *Common Cause*, 108 F.3d at 418). In *Judicial Watch*, as here, the plaintiff lacked "a justiciable interest in the enforcement of the law," and the court accordingly found that his "alleged 'informational injury' [wa]s not cognizable injury under FECA, sufficient to satisfy the standing requirement." The same is true here.

Like the unsuccessful plaintiffs in *Wertheimer*, *Vroom*, and *Judicial Watch*, CLC and Democracy 21 merely seek "a legal conclusion that carries certain law enforcement consequences," *Wertheimer*, 268 F.3d at 1075, specifically the determination that certain entities and individuals violated FECA by "making 'straw donor' contributions in violation of various disclosure provisions" of the Act. (Compl. ¶ 1.) Even if plaintiffs' allegations were true and their alternative legal analyses were correct, their desire "for the Commission to 'get the bad guys'" is not a legally cognizable interest that confers standing to bring this action. *Common Cause*, 108 F.3d at 418; *CREW*, 401 F. Supp. 2d at 122. "[T]he government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury." *Wertheimer*, 268 F.3d at 1074. This Court thus lacks jurisdiction under section 30109(a)(8) to hear plaintiffs' challenge to the Commission's dismissal of their administrative complaints.

3. Plaintiffs Lack Standing Because They Are Not Voters, Do Not Claim Any Voting Members, and Are Not Otherwise Participants in Political Elections and Campaigns

As explained above, cases in this Circuit require that the information sought by section 30109(a)(8) plaintiffs must "have a concrete effect on *plaintiffs'* voting," *i.e.*, that plaintiffs (or their members) must be participants in political elections and campaigns. *Alliance I*, 335 F.Supp.2d at 48 (emphasis added); *Judicial Watch*, 293 F. Supp. 2d at 46; *CREW*, 401 F. Supp. 2d at 120. In *Alliance I*, for example, the district court held that the plaintiffs had not

suffered a cognizable injury because they had "failed to show how information about the precise value of a mailing list . . . could have a concrete effect on plaintiffs' voting in future elections involving different candidates." 335 F. Supp. 2d at 48; *see also Alliance II*, 362 F. Supp. 2d at 144-45 (same). Likewise in *CREW*, the court found that CREW's interest in learning the value of a contact list that was allegedly donated to a presidential campaign as an unlawful in-kind contribution was insufficient to establish an informational injury. The court reached that conclusion, in part, because the value of the list could "[]not be useful to CREW in voting," because of CREW's status as a non-profit corporation that is not a "participant[] in the political election and campaign process" and that already knew the identities of those involved in the transaction. 401 F. Supp. 2d at 120-21. In affirming the district court's decision, the D.C. Circuit distinguished *Akins* because unlike the voters in that case, "who wanted certain information so that they could make an informed choice among candidates in future elections, CREW cannot vote; it has no members who vote; and because it is a § 501(c)(3) corporation under the Internal Revenue Code, it cannot engage in partisan political activity."[3] The same is true of plaintiffs here.

CLC and Democracy 21 are merely "asserting a derivative harm — an alleged inability to help *others* (participants in the political process) realize that *they* may have been deprived of information." *CREW*, 401 F. Supp. at 121. As the district court in *CREW* explained, "[T]o withstand the rigors of Article III, an injury in fact must be suffered by the plaintiff or the plaintiff's members; one cannot piggyback on the injuries of wholly unaffiliated parties." *Id.*

[3] Section 501(c)(3) corporations are prohibited by law from participating in political campaigns. *See* 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1.

CLC and Democracy 21 are "simply the wrong part[ies] to seek redress for the injury that has allegedly been suffered." *Id.*[4]

4. Plaintiffs Do Not Allege That Their Programmatic Activities Are Directly and Adversely Affected by the Challenged Dismissal Decisions

In addition to lacking any legally cognizable informational injury, CLC and Democracy 21 cannot demonstrate standing in any representative or associational capacity. Plaintiffs claim no members and are not trade associations, *see supra* p. 7; they are suing on their own behalf (Compl. ¶¶ 10-16) and are therefore required to allege a direct and adverse effect on specific programmatic concerns from the challenged dismissals to meet Article III's injury requirement. *See, e.g., Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1433; *Common Cause*, 108 F.3d at 417; *CREW*, 401 F. Supp. 2d at 120. CLC and Democracy 21 have failed to do so. Their complaint nowhere alleges anything that could fairly be read to suggest that their resources have been depleted. Nor do plaintiffs allege concrete and direct harm to their programmatic activities.[5] *Common Cause*, 108 F.3d at 417.

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[4] One court in this district has held that, in addition to voters, candidates, authorized candidate committees, and other political committees may have standing to allege an informational injury under section 30109(a)(8). *Kean for Congress Comm. v. FEC*, 398 F. Supp. 2d 26, 38 (D.D.C. 2005) (concluding that the campaign committee of an unsuccessful former candidate had alleged a cognizable informational injury). *Kean for Congress* does not support any claim of standing by plaintiffs here, however, because CLC and Democracy 21 are neither voters, nor do they claim to be membership organizations with members who are voters, nor are they registered as political committees. *See supra* p. 7; (Compl. ¶¶ 10-16).

[5] It is well established that resources expended on litigation cannot be deemed injury for Article III purposes. "'An organization cannot . . . manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.'" *National Taxpayers Union*, 68 F.3d at 1434 (quoting *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)). This position "would enable every litigant automatically to create an injury in fact by filing a lawsuit," and "has been expressly rejected by the Supreme Court." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 n.2 (D.C. Cir. 1987) (citing *Diamond v. Charles*, 476 U.S. 54, 55 (1986)).

Instead, plaintiffs assert that they use information obtained from disclosure reports filed with the Commission for "legal analysis and advice" (Compl. ¶ 11), "campaign finance litigation" (*id.* at ¶ 12), "public education efforts" (*id.* at ¶ 14), "in preparing testimony before Congress and state and local legislatures and agencies, publications, op-eds, blog posts and other commentary" (*id.* at ¶ 13; footnote omitted), and so on. But plaintiffs' list of the typical ways in which they utilize campaign finance-related information offers only abstract generalities without specifying, for example, any particular litigation, scheduled testimony, or current or looming outreach activity that the Commission's dismissal decisions challenged here might have hindered. This amounts to little more than speculation that the "timely information" plaintiffs claim to have been deprived of (Compl. ¶¶ 6, 60, 63, 66, 69) might someday prove useful in one of these broad categories of activity. Such conjecture hardly meets the exacting definition of informational injury: "[T]his type of injury is narrowly defined; the failure must impinge on the plaintiff's daily operations or make normal operations infeasible in order to create injury-in-fact." *Akins v. FEC*, 101 F.3d 731, 735 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998); *see supra* pp. 10-11.

This case is on all fours with *CREW*, 401 F. Supp. 2d 115, and for the very same reasons identified by the court in that case, plaintiffs here have not suffered any injury to their programmatic activities. In *CREW*, the district court found that the plaintiff non-profit organization had not sufficiently identified any programmatic activities adversely affected by the Commission's dismissal of its administrative complaint, nor could it since the plaintiff already possessed the information it sought. *Id.* at 121. Here, as in *CREW*, plaintiffs have not "specified any programmatic concerns that have been concretely and directly impacted adversely by the FEC's actions," nor have they identified any "particular plan" for using any information they

could obtain if they were to prevail in this action. *Id*. at 122-23. Moreover, while the court in *CREW* acknowledged "that it may be difficult to detail how information will be used when a plaintiff does not yet possess that information," here, as in *CREW*, "such hardship is not implicated [because plaintiffs are] already privy to the information that [they could] seek[]." *Id.*; *see supra* pp. 8-9. Plaintiffs thus lack any injury in fact that is "concrete," "distinct and palpable," and "actual or imminent." *McConnell v. FEC*, 540 U.S. 93, 225 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Indeed, despite their own affirmative allegations regarding the original sources of the contributions at issue in their administrative complaints, *see supra* pp. 8-9, plaintiffs do not even aver that they have publicized or plan to publicize the facts they already have, further suggesting that any generalized programmatic injuries are neither actual nor imminent.

Plaintiffs' remaining allegations (Compl. ¶¶ 5-6) of harm to abstract social interests are even vaguer and do not, in any event, support standing. Alleged harms shared in equal measure by all citizens, *e.g.*, that "[e]ffective enforcement of FECA disclosure requirements is essential to ensure that the public can trust it is receiving accurate information" and that dismissal of their complaints "undermined FECA's purposes, including its goal of promoting transparency in elections" are not cognizable injuries. Courts, including the Supreme Court, have "consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see CREW*, 401 F. Supp. 2d at 122 ("It is axiomatic that standing cannot rest on a plaintiff's alleged interest in

having the law enforced . . . because such an injury is too generalized and ideological.") (citation omitted).

In sum, plaintiffs have failed to provide evidence of a concrete and particularized injury to any "discrete programmatic concerns," let alone demonstrate that the plaintiffs are being directly and adversely affected by the organization's purported lack of "timely" information regarding the contributions that are the subject of their administrative complaints. This failure independently reveals that the plaintiffs cannot demonstrate Article III standing.

CONCLUSION

For all the foregoing reasons, the Court should dismiss plaintiffs' complaint for lack of jurisdiction.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21 Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, F8, ELI PUBLISHING, and STEVEN J. LUND, Intervenor-Defendants.	Civ. No. 16-752 (JDB) [PROPOSED] ORDER

[PROPOSED] ORDER

Upon consideration of the defendant Federal Election Commission's Motion to Dismiss, any opposition filed by plaintiffs Campaign Legal Center and Democracy 21, and the Commission's reply, it is hereby

ORDERED that the Federal Election Commission's Motion to Dismiss is GRANTED.

Dated: _____, 2016

_____
The Hon. John D. Bates
United States District Judge