UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 16-1088 (RJL)
v.	)	MOTION TO DISMISS
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

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 an administrative complaint. The plaintiffs lack standing to bring this action because they have suffered no Article III injury. A supporting memorandum of points and authorities 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.

Judicial review of the FEC dismissal of an administrative complaint requires the Court

Respectfully submitted,

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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." *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.

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

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Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Noah Bookbinder lack Article III standing to obtain review of the Federal Election Commission's ("Commission" or "FEC") dismissal of their administrative complaint alleging that Murray Energy Corporation ("Murray Energy"), its separate segregated fund (or "PAC"), and associated individuals violated the Federal Election Campaign Act ("FECA" or "Act"). (Compl. for Injunctive and Declaratory Relief ("Compl.") ¶ 1 (Docket No. 1).) To maintain such a claim under the narrow judicial review provision at 52 U.S.C. § 30109(a)(8), a complainant must have suffered a legally cognizable injury, such as an informational one, stemming from the dismissal of its administrative complaint. A mere desire for more information about whether and how FECA has been violated is insufficient. In this case, plaintiffs did not ask the Commission to find that the respondents in the administrative process had committed any reporting violations. Instead, they have asked that the Commission address different violations involving coercion of employee contributions, contributions that had been made in the name of another, and prohibited corporate contributions. Plaintiffs have suffered no injury caused by these alleged violations.

Furthermore, the only information plaintiffs seek concerns the scope of violations allegedly committed by Murray Energy and the other respondents in connection with alleged efforts to coerce already-reported employee contributions and reimburse them with corporate funds. Plaintiffs argue vaguely that this knowledge would help CREW in "advancing its ongoing mission of educating the public to ensure the public continues to have a vital voice in our political process and government decisions." (Compl. ¶ 11.) But the complaint fails to show how knowledge that Murray Energy illegally coerced a particular employee into making a campaign contribution would provide plaintiffs with information that would be "useful in voting" *by plaintiffs*, as required to support informational standing. *Common Cause v. FEC*, 108

F.3d 413, 418 (D.C. Cir. 1997). Plaintiffs are already aware that certain candidates had support from Murray Energy and associated persons, as that information is already publicly available in reports by the company's PAC and others to the FEC. Thus, even plaintiffs' reference to "false reporting" (Compl. ¶ 1) — a violation they have not alleged — amounts to a request that known contributions be re-labeled. And even if plaintiffs prevail and the Commission acts on the coercion and contribution violations they have actually alleged, the likelihood that a favorable decision would involve revised public disclosures and thus redress their purported injury is entirely speculative. Plaintiffs' real goal appears to be "for the Commission to 'get the bad guys,' rather than disclose information," but plaintiffs have "no standing to sue for such relief." *Common Cause*, 108 F.3d at 418; *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001) (the government's "alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury"). Plaintiffs' complaint should be dismissed.

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Election Commission

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 Prohibitions Against Corporate Contributions, Coercion of Campaign Contributions, and Contributions Made in the Name of Another

FECA prohibits corporations from contributing their treasury funds to candidate committees and other federal political committees. 52 U.S.C. § 30118(a). Though corporate treasury funds may now permissibly be used to finance independent expenditures, *see Citizens United v. FEC*, 558 U.S. 310 (2010), the use of corporate treasury funds to make contributions to candidates remains prohibited. *See generally FEC v. Beaumont*, 539 U.S. 146 (2003).

FECA does permit corporations to form separate segregated funds ("SSFs," commonly known as "PACs"), which may make contributions using funds raised from certain persons affiliated with the corporation. 52 U.S.C. §§ 30118(b)(2)(C), (b)(3). SSFs are, however, barred from using funds that were "secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisals; . . . or other moneys required . . . as a condition of employment." *Id.* § 30118(b)(3)(A).

The Act also prohibits the making of a contribution in the name of another. 52 U.S.C. § 30122 ("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 and no person shall knowingly accept a contribution made by one person in the name of another person.")[1] This provision is independent from the Act's disclosure requirements and source and amount limitations. Examples include making a contribution, all or part of which was provided by another, without disclosing the true source of the contributor to the recipient candidate or committee at the time the contribution is made, 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

[1] 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).

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. As a result, a violation of the prohibition on making contributions in the name of another may also violate the source and amount restrictions of FECA, including the prohibition on corporate contributions, 52 U.S.C. § 30118.

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

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 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. 52 U.S.C. § 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). Entering into a conciliation agreement or instituting a civil action each 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* 52 U.S.C. § 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)]." (citation omitted)). 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)). 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) (citations omitted); *see Citizens for Responsibility & Ethics in Wash. v. FEC* ("*CREW*"), 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); *see Perot v. FEC*, 97 F.3d 553, 557-59 (D.C. Cir. 1996).

II. FACTUAL BACKGROUND

According to the court complaint, "[p]laintiff CREW is a non-profit, non-partisan corporation . . . committed to protecting the rights of citizens to be informed about the activities of government officials, ensuring the integrity of government officials, protecting our political system against corruption, and reducing the influence of money in politics." (Compl. ¶¶ 6-7.) The complaint states that plaintiff Noah Bookbinder, the executive director of CREW, "is a citizen of the United States and a registered voter and resident of the state of Maryland." (*Id.* ¶ 16.)

In this action under 52 U.S.C. § 30109(a)(8), plaintiffs challenge the Commission's dismissal of an administrative complaint in which they alleged that Murray Energy, Murray Energy PAC, and associated individuals had unlawfully coerced Murray Energy employees to make contributions to the PAC and to federal candidates, and that Murray Energy had reimbursed such contributions through its bonus program, so that contributions reported to have been made by the employees were in fact being made by Murray Energy. (Compl. ¶¶ 29-40, 52.) The alleged FECA violations in the administrative complaint were "coercing employee donations, causing contributions to be made in the name of another and knowingly accepting such contributions, and using corporate funds to make contributions in connection with a federal election." (*Id.* ¶ 40; *see also In the Matter of Murray, et al.*, MUR 6661, Am. Compl. ¶¶ 14-19 (Nov. 18, 2015), AR 199-200 (to be included in forthcoming appendix); http://eqs.fec.gov/eqsdocsMUR/16044394574.pdf.)

On April 12, 2016, the Commission voted on recommendations of its General Counsel in this matter and, lacking the statutorily required four affirmative votes to find reason to believe that a FECA violation occurred, *see* 52 U.S.C. § 30109(a)(2), the Commission dismissed the administrative complaint. (Compl. ¶ 52.) Plaintiffs then filed this suit, claiming that the reasoning of the Commissioners who formed the controlling group was contrary to law. (*Id.* ¶¶ 55-59, 61-64.)

III. STANDARD OF REVIEW

Plaintiffs bear the burden of invoking this Court's subject matter jurisdiction, including establishing that they have standing. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 900 (2016). To survive the Commission's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), plaintiffs' complaint "must contain sufficient factual matter, accepted as true, to 'state a claim [of standing] that is plausible on its face.'" *Arpaio*, 797 F.3d at 19 (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although the Court must accept as true all of the plaintiff's well-pled factual allegations and draw all reasonable inferences in favor of the plaintiff, the Court need not accept the plaintiff's legal conclusions as true. *See Alexis v. District of Columbia*, 44 F. Supp. 2d 331, 336-37 (D.D.C. 1999). Also, this Court "may look beyond the allegations contained in the complaint" to "materials outside the pleadings" to determine whether plaintiffs can carry their burden of proving they have standing. *Flores ex rel. J.F. v. District of Columbia*, 437 F. Supp. 2d 22, 28-29 (D.D.C. 2006) (internal quotation marks omitted).

IV. PLAINTIFFS LACK STANDING TO CHALLENGE THE DISMISSAL OF THEIR ADMINISTRATIVE COMPLAINT

This Court lacks jurisdiction over plaintiffs' claims because the plaintiffs cannot demonstrate that they have Article III standing. 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 Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-561 (1992)). 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)).

A. Plaintiffs' Effort to "Get the Bad Guys" Is Not a Legally Cognizable Injury

Plaintiffs lack standing to pursue a determination that Murray Energy and its affiliates violated FECA through coerced employee donations, contributions in the name of another, and corporate contributions. What they are seeking is "a legal conclusion that carries certain law enforcement consequences" for others. *Wertheimer*, 268 F.3d at 1075. *See* Compl. ¶¶ 1-4. In such situations, where "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 establish. *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."). Plaintiffs have not, and could not, establish it here.

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." *CREW v. U.S. Dep't of the Treasury, IRS*, 21 F. Supp. 3d 25, 32 (D.D.C. 2014); *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)).

FECA is, of course, a statute that explicitly requires disclosure and can be the source of an informational injury. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11 (1998). But none of the violations that plaintiffs allege involve directly depriving them of information for which FECA requires disclosure. Their claims involve the solicitation and making of contributions, not public disclosure. (Compl. ¶ 40; *In the Matter of Murray, et al.*, MUR 6661, Am. Compl. ¶¶ 14-19 (Nov. 18, 2015), AR 199-200.) To be sure, the prohibition on making contributions in the name of another furthers informational interests as a general matter and is an essential companion to the Act's reporting requirements, but it does not itself require public reporting of any information for which plaintiffs could be said to have been "directly deprived." *CREW v. U.S. Dep't of the Treasury, IRS*, 21 F. Supp. 3d at 32. 52 U.S.C. § 30122 merely prohibits the making and accepting of contributions, and it is separate from FECA's requirement that disclosure reports be filed, 52 U.S.C. § 30104. The Commission's implementing regulation discusses examples of violations involving failing to provide information "to the recipient candidate or committee at the time the contribution is made," not a disclosure report to the public. *See* 11 C.F.R. § 110.4(b)(2)(i). Indeed, treasurers of recipient committees need not even deposit any unlawful contributions they detect, including contributions made in the name of another, during the ten days in which they are required to screen receipts. *See* 11 C.F.R. § 103.3.

Moreover, if the Commission were to investigate plaintiffs' allegations of unlawful contributions in the name of another, plaintiffs would not learn the identity of any donors of whom they are currently unaware. They already allege that Murray Energy is the true source of funds. (Compl. ¶¶ 3, 38-39.) Rather than missing information about the identity of donors, all that remains with respect to the violations plaintiffs allege is a legal determination of whether Murray Energy in fact made contributions in the name of another. That is insufficient to confer standing. Even if plaintiffs' legal and factual allegations were correct, their desire "for the Commission to 'get the bad guys'" is not a legally cognizable interest. *Common Cause*, 108 F.3d at 418; *CREW v. FEC*, 401 F. Supp. 2d 115, 122 (D.D.C. 2005). "[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.

Where the information that claimants purport to seek is already available to them, as with the identity of the purported true source of funds here, those claimants lack standing to bring their claims. *See, e.g.*, *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 47 (D.D.C. 2003) (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 v. FEC*, 799 F. Supp. 2d 78, 89 (D.D.C. 2011) (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").

Plaintiffs merely disagree with the legal analyses and conclusions in the Statement of Reasons issued by the controlling group of Commissioners, which is insufficient to establish their standing to bring this action. Courts have repeatedly emphasized that "an injury that occurs when a person is deprived of information that a law has been violated" is *not* legally cognizable. *Judicial Watch*, 293 F. Supp. 2d at 46; *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 [FECA] 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, "[w]hile '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.* (internal quotation marks and citations omitted) (quoting *Lujan*, 504 U.S. at 573). Plaintiffs' disagreement with the controlling group of Commissioners about the legal threshold for what is sufficient to constitute reason to believe a violation has occurred does not constitute a valid injury in fact sufficient for standing to obtain judicial review under section 30109(a)(8).

B. Plaintiffs Have Failed to Establish the Information They Allegedly Lack Would Be Useful When Any Plaintiff Votes

Even if plaintiffs' claims could be construed to have alleged violations of law that deprived them of information, they have not demonstrated that any such information would be

useful in voting by any plaintiff. An administrative complainant must make that showing in order to demonstrate informational injury to support judicial review under 52 U.S.C. § 30109(a)(8). Plaintiffs have alleged that Murray Energy coerced its employees into contributing to its PAC and reimbursed them for doing so, thereby concealing the true sources of funding to the PAC. But these general allegations, even if taken as true, do not establish that plaintiffs themselves have been deprived of information with the requisite connection to their voting.

As the Supreme Court has put it, to constitute a legally cognizable injury for an action seeking review of an FEC dismissal, the information of which plaintiffs claim to have been deprived must be "directly related to voting." *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, *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. *All. for Democracy v. FEC* ("*Alliance I*"), 335 F. Supp. 2d 39, 48 (D.D.C. 2004) (emphasis added). In this context, "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 at 115 ("The character of the information sought weighs heavily on the informational standing analysis." (citation omitted)).

Plaintiffs have failed to show how knowing the precise nature of the alleged unlawful coercion or reimbursement, or which specific affiliates of Murray Energy support a given candidate, would directly and concretely affect *their* voting. Plaintiffs' assertions regarding their

alleged injuries make apparent their lack of a concrete or particular injury. None of the four paragraphs of the complaint that appear to assert an informational injury explain specifically how any of the information sought would be used by a plaintiff in voting.

Plaintiffs' first allegation of informational injury is that the FEC's dismissal of their administrative complaint "deprives CREW of information critical to advancing its ongoing mission of educating the public to ensure the public continues to have a vital voice in our political process and government decisions." (Compl. ¶ 11.) This broad policy language does not suggest any injury specific to any voting by a plaintiff.

Plaintiffs next allege injury because "[w]ithout information about the individuals and entities funding the political activities of organizations and individuals like Murray Energy and Robert Murray, CREW is stymied in fulfilling its central mission." (Compl. ¶ 12.) But neither Murray Energy nor Robert Murray are officeholders or candidates for office. Plaintiffs do not show how the internal political activities of those administrative respondents would have been useful to any plaintiff when voting. There is no allegation in the complaint that any plaintiff planned to vote differently depending on whether specific funds had been contributed unlawfully.

Plaintiffs' next claim of informational injury is that due to allegedly unlawful reporting, "CREW has no access to information detailing the true sources of the money used to fund the political activities of federal candidates and outside groups like Murray Energy PAC . . . thereby limiting CREW's ability to obtain and review campaign finance information." (Compl. ¶ 15.) Again, this broad language attempts to obscure the lack of connection to any information useful in voting here. In particular, despite the reference to the "political activities of federal candidates," the only relevant political activity that federal candidates engaged in is accepting the

support of Murray Energy PAC and Murray Energy employees. Plaintiffs are already aware of the identities of the employees and the candidates, and the amount of support the candidates received from those affiliated with Murray Energy. As explained above, plaintiffs who already have access to the relevant portions of information they purportedly seek have no standing. *See supra* p. 10. Plaintiffs fail to demonstrate how whether Murray Energy coerced or was the true source of some of its employees' past contributions would affect any votes that plaintiffs will make.

Plaintiffs' final allegation of informational injury is that "Mr. Bookbinder is harmed in exercising his right to an informed vote when a political committee fails to report the true source of its contributions, as the FECA requires." (Compl. ¶ 16.) But again, even setting aside that plaintiffs have not alleged that there are any reporting violations, plaintiffs fail to establish that Murray Energy or its PAC contributed or raised money for any candidates who will be on one of Mr. Bookbinder's ballots. And even if they could establish that there will be such an appearance on one of his ballots, they also have not shown any direct connection between learning the true sources of funds contributed to Murray Energy PAC and candidates it supports, and Mr. Bookbinder's ability to cast an informed vote for any such specific candidate. Plaintiffs make no effort to explain how, for example, if Murray Energy PAC contributed to a candidate on Mr. Bookbinder's ballot, it would affect Mr. Bookbinder's vote to know whether some of the PAC's funds had previously been obtained unlawfully. While there is an undoubted general public interest in such information, plaintiffs must make a particularized showing of personal injury from the specific alleged FECA violations and the purported missing information in order to have standing to challenge the Commission's dismissal.

Alleged failures to follow FECA's public reporting requirements can be the source of

informational injuries. In *FEC v. Akins*, for example, the plaintiffs challenged the FEC's dismissal of an administrative complaint that made numerous allegations about the failure of the American Israel Public Affairs Committee ("AIPAC") to register with the Commission as a "political committee" and "make disclosures regarding its membership, contributions, and expenditures that FECA would otherwise require." 524 U.S. at 13. The plaintiffs, who opposed AIPAC, argued that "the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Id.* at 21. The Court agreed that this injury was "concrete and particular." *Id.*

By contrast, in this case, details about the receipts and disbursements of Murray Energy PAC are already public because of the PAC's reports to the FEC. *See, e.g.*, Murray Energy PAC Report of Receipts and Disbursements, http://docquery.fec.gov/cgi-bin/fecimg/?_20160715902049816O+0. Plaintiffs fail to show how the knowledge that a particular contribution was coerced or reimbursed would be useful to Mr. Bookbinder in deciding whom to vote for in any specific election, or to CREW, if it had members who voted. Thus, if Mr. Bookbinder opposed Murray Energy's positions, if for example he had an opinion on some issue related to the coal industry, he would already know from FEC reporting which candidates were supported by persons affiliated with Murray Energy, even if the company's PAC was using funds provided involuntarily by an employee or illegally from Murray Energy's corporate treasury. The information plaintiffs claim to have been deprived of relates to the relationship among Murray Energy, its PAC, its executives, and its employees. Plaintiffs have not established any manner in which this information would specifically assist them in making

decisions about any particular candidates.

Plaintiffs may have a general interest in learning whether contributions were coerced or reimbursed by Murray Energy, but they possess standing to challenge only information that is statutorily required to be disclosed and tied directly to their own voting. Plaintiffs fail to demonstrate that their allegations of coercion and contributions by a corporation in the name of company affiliates constitutes that sort of informational injury personal to plaintiffs. This case should therefore be dismissed.

C. CREW Suffers No Cognizable Injury Additionally Because It Is Not a Voter, Does Not Claim Any Voting Members, and Is Not Otherwise a Participant in Political Elections and Campaigns

As explained above, 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. Likewise in *CREW*, the district 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," given CREW's status as a non-profit corporation that was 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." *CREW*, 475 F.3d at 339.[2]

Here again, CREW is 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 that earlier *CREW* case 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.* CREW is "simply the wrong party to seek redress for the injury that has allegedly been suffered." *Id.*

D. CREW Lacks Standing for the Additional Reason that Its Programmatic Activities Are Not Directly and Adversely Affected by the Challenged Dismissal Decision

In addition to lacking any legally cognizable informational injury, CREW cannot demonstrate standing in any representative or associational capacity. CREW claims no members and is not a trade association; it is suing on its own behalf and is therefore required to allege a direct and adverse effect on specific programmatic concerns from the challenged dismissals to meet Article III's injury requirement. CREW has failed to do so. The complaint nowhere alleges anything that could fairly be read to suggest that CREW's resources have been depleted. Nor does CREW allege concrete and direct harm to its programmatic activities.[3]

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[2] 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.

[3] 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.'" *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (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)).

"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. Wash. State Apple Advert. 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.*, 68 F.3d at 1433); *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).

Rather than citing direct and specific harm to CREW's programmatic activities, plaintiffs assert that CREW uses information obtained from disclosure reports filed with the Commission to "publicize[] the role of . . . individuals and entities in the electoral process and the extent to which they have violated federal campaign finance laws." (Compl. ¶ 9.) But plaintiffs offer only abstract generalities without specifying, for example, any particular publicity plan that the Commission's dismissal decision challenged here might have hindered. This amounts to little more than speculation that the information plaintiffs claim to have been deprived of might someday prove useful. 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. 8-11.

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. *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 CREW could obtain if it was 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 CREW is] already privy to information" about the political candidates that Murray Energy or persons affiliated with it have supported. *Id.*; *see supra* p. 10. CREW thus lacks any injury in fact that is "concrete," "distinct and palpable," and "actual or imminent." *McConnell v. FEC*, 540 U.S. 93, 225 (2003) (citation omitted), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

In sum, plaintiffs have failed to provide evidence of a concrete and particularized injury to any "discrete programmatic concerns" of CREW's, let alone demonstrate that the organization is being directly and adversely affected by its purported lack of "timely" information regarding

the contributions that are the subject of their administrative complaints. This failure is another independent reason CREW cannot demonstrate Article III standing.

E. Plaintiffs' Alleged Injury Is Neither Caused by the FECA Violations They Allege Nor Redressable by a Decision in Their Favor

For many of the same reasons that plaintiffs have not been injured in fact by the alleged FECA violations, *see supra* Part IV.A., their claim to standing fails for reasons of both causation and redressability. They seek to have revised disclosure reports filed (Compl. ¶¶ 15-17, 21), but did not allege in their administrative complaint that Murray Energy and its affiliates had committed any reporting violations (Compl. ¶ 40; *In the Matter of Murray, et al*., MUR 6661, Am. Compl. ¶¶ 14-19 (Nov. 18, 2015), AR 199-200) (to be included in appendix); http://eqs.fec.gov/eqsdocsMUR/16044394574.pdf). Their allegations about other, distinct violations — coercion and contributions in the name of another — are thus not the cause of any failure to file revised disclosure reports, and a decision in their favor would not redress their purported injury from not being able to access information contained in revised reports.

When the Commission has handled past allegations of contributions in the name of another that were not accompanied by alleged reporting violations, it has typically negotiated administrative settlements that did not contain any requirement to file revised disclosure reports. Instead, the remedies in such conciliation agreements typically involved only payment of civil penalties, refund or disgorgement, and cease-and-desist terms.[4] This illustrates the independence

[4] *See, e.g.*, Conciliation Agreement, *In the Matter of Habie, et al.*, MUR 4646, ¶¶ IX, XIII, http://eqs.fec.gov/eqsdocsMUR/0000192D.pdf; Conciliation Agreement, *In the Matter of Walt Roberts for Congress*, MUR 4818, ¶¶ V-VII, http://eqs.fec.gov/eqsdocsMUR/00001618.pdf; Conciliation Agreement, *In the Matter of Friends of Maurice Hinchey, et al.*, MUR 4843, ¶¶ VI-VII, http://eqs.fec.gov/eqsdocsMUR/000010D6.pdf; Conciliation Agreement, *In the Matter of DNC Services Corp., et al.*, MUR 4909, ¶¶ VI-VII, http://eqs.fec.gov/eqsdocsMUR/00000536.pdf; Conciliation Agreement, *In the Matter of Jamie Jacob Morgan*, MUR 5358, ¶ VI,

of contribution-in-the-name-of-another violations from reporting violations, the failure of plaintiffs here to allege violations that caused their purported informational injury, and the low probability that prevailing here would redress that claimed injury.

Perhaps recognizing their jurisdictional vulnerability, and notwithstanding their failure to allege reporting violations, plaintiffs supplemented their administrative complaint with a request for the remedy of mandated filing of revised disclosure reports. (*In the Matter of Murray, et al*., MUR 6661, Letter from Noah Bookbinder to Kim Collins (Nov. 18, 2015), AR 194 (explaining that the amended complaint added "the relief sought" of "an order that respondents file with the FEC and make public appropriate disclosure reports") (to be included in appendix); *In the Matter of Murray, et al*., MUR 6661, Am. Compl. at 7 (Nov. 18, 2015), AR 201) (to be included in appendix); http://eqs.fec.gov/eqsdocsMUR/16044394574.pdf.)) But even if they prevailed here, the likelihood of such a remedy is far from assured. The court's remedy would be limited to declaring that the Commission's dismissal was "contrary to law" and ordering the Commission to "conform with" that declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C).

Such a judicial order in favor of challengers to FEC dismissal decisions cannot mandate any particular outcome — let alone remedy — on remand. *Akins*, 524 U.S. at 25; *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" given the availability

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http://eqs.fec.gov/eqsdocsMUR/00005C11.pdf; Conciliation Agreement, *In the Matter of Edwards for President, et al.*, MUR 5366, ¶ VI, http://eqs.fec.gov/eqsdocsMUR/000054C0.pdf; Conciliation Agreement, *In the Matter of Int'l Ass'n of Machinists, et al.*, MUR 5386, ¶ VI, http://eqs.fec.gov/eqsdocsMUR/00004B68.pdf; Conciliation Agreement, *In the Matter of Nat'l Air Transp. Ass'n, et al.*, MUR 6889, ¶ VII, http://eqs.fec.gov/eqsdocsMUR/15044371751.pdf; Conciliation Agreement, *In the Matter of ACA Int'l, et. al.*, MUR 6922, ¶ VII, http://eqs.fec.gov/eqsdocsMUR/15044376234.pdf.

of alternative rationales); *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). Courts may not dictate specific Commission actions on remand. *See, e.g.*, *Hagelin v. FEC*, 332 F. Supp. 2d 71, 81-83 (D.D.C. 2004) (rejecting request that court dictate that the Commission make a reason-to believe finding on remand), *rev'd on other grounds*, 411 F.3d 237 (D.C. Cir. 2005). Plaintiffs' hope that if they prevail the Commission will order revised disclosure reports is a departure from past Commission practice and far too speculative to establish either causation or redressability. Plaintiffs lack standing.

V. CONCLUSION

Plaintiffs CREW and Mr. Bookbinder have not suffered any informational injury because they have not alleged any reporting violations or demonstrated that they lack information tied directly to their own voting, and failed to demonstrate that any injury they have suffered was caused by the FECA violations they allege or redressable through further proceedings related to those allegations. CREW lacks standing for the additional reasons that it does not participate in elections, does not have members who do, and does not have programmatic activities directly harmed by the challenged FEC dismissal. 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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	
Plaintiffs,	Civ. No. 16-1088 (RJL)
v.	[PROPOSED] ORDER
FEDERAL ELECTION COMMISSION,	
Defendant.	

[PROPOSED] ORDER

Upon consideration of the defendant Federal Election Commission's Motion to Dismiss, any opposition filed by plaintiffs Citizen for Responsibility and Ethics in Washington and Noah Bookbinder, and the Commission's reply, it is hereby

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

Dated: _____, 2016

_____
United States District Judge