IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK and RENEE BEAM,	)	
	)	
Plaintiffs,	)	No. 07 CV 1227
	)	
v.	)	Judge Pallmeyer
	)	
ALBERTO R. GONZALES, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANT ATTORNEY GENERAL'S MEMORANDUM
IN SUPPORT OF HIS MOTION TO DISMISS

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INTRODUCTION

Defendant Alberto R. Gonzales, Attorney General of the United States, respectfully requests dismissal of Plaintiffs' First Amended Complaint for lack of jurisdiction or, in the alternative, for failure to state a claim. Fed. R. Civ. P. 12(b)(1), (6).[1] As explained more fully below, this Court lacks jurisdiction because the Amended Complaint seeks premature review of a speculative set of scattershot legal claims. In short, Plaintiffs do not present a ripe dispute. Withholding judicial review will cause no harm to Plaintiffs' legal interests and, assuming Plaintiffs' facts as true for purposes of the present motion, will protect the integrity of an ongoing criminal grand jury process. Even if Plaintiffs' claims were fit for judicial review, Plaintiffs have not demonstrated that they have standing to challenge Defendant's alleged investigation. They cite no injury sufficient to satisfy Article III's "case or controversy" requirement.

On the merits, the various legal theories contrived by Plaintiffs are not sustainable as a matter of law. Plaintiffs fail to state a claim for each count against Defendant Gonzales due to their fundamental misapprehensions of law and the failure to satisfy basic pleading requirements.

STATUTORY BACKGROUND

The Federal Election Campaign Act ("FECA" or "the Act") was intended to protect the integrity of the electoral process and prevent the corruption and appearance of corruption engendered by unrestricted campaign contributions. *See Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976); *McConnell v. FEC*, 540 U.S. 93, 142-44 (2003). It contains both civil and criminal penalties. 2 U.S.C. § 437g(d)(1). The Act established a Federal Election Commission

[1] As discussed *infra* note 2, Defendants also move to dismiss all counts against the Federal Bureau of Investigation pursuant to Fed. R. Civ. P. 12(b)(5).

("Commission" or "FEC") that includes six voting members, no more than three of whom may be affiliated with the same political party. *Id.* § 437c(a)(1). The Act provides that "[t]he Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions." *Id.* § 437c(b)(1); *see also id.* § 437d(e) ("[T]he power of the Commission to initiate civil actions . . . shall be the exclusive civil remedy for the enforcement of the provisions of this Act."). The Act prescribes the manner in which the Commission may refer criminal violations of the FECA to the Department of Justice, *see id.* § 437g(a)(5)(C), and regulates the ability of the Commission to publicize ongoing investigations. *Id.* § 437g(a)(12)(A) ("Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.").

FACTUAL AND PROCEDURAL BACKGROUND

On June 22, 2007, the Court dismissed Plaintiffs' original complaint and granted Plaintiffs leave to file an amended complaint.[2] Doc. #46. Plaintiffs filed a five-count Amended Complaint on June 29, 2007. In Count I, Plaintiffs allege a violation of the Right to Financial Privacy Act ("RFPA"). *See* Am. Compl. ¶¶ 14-29. Plaintiffs allege that the RFPA creates a right for customers to demand that financial institutions inform them of any compliance with a government subpoena or warrant unless the government has obtained a non-disclosure order. *Id.*

[2] Counsel for Plaintiffs filed lawsuits in three other districts containing the same claims as the original complaint. Two of the three courts have granted Defendants' motions to dismiss and entered judgment on all counts for Defendants. *See Bialek v. Gonzales, et al.*, Civ. No. 1:07-cv-00321 (D. Colo. June 28, 2007) (appeal pending); *Fieger v. Gonzales, et al.*, Civ. No. 2:07-cv-10533 (E.D. Mich. Aug. 15, 2007). A third court has not ruled on Defendants' pending motions. *See Marcus v. Gonzales, et al.*, Civ. No. 3:07-cv-0398 (D. Ariz). None of the related cases have proceeded to discovery.

¶¶ 16-18. In Count II, Plaintiffs allege that the federal government is conspiring to retaliate against them for engaging in political speech. *Id*. ¶¶ 30-40. Plaintiffs allege that Defendant authorized a search of the Michigan-based "Fieger law firm," with which Plaintiff Jack Beam is associated, and the homes of "Fieger firm employees." *Id*. ¶¶ 9, 11. Plaintiffs allege that Defendant "secretly obtained Plaintiffs' private banking records" and that unnamed "individuals" have been compelled to testify before a grand jury. *Id*. ¶¶ 31, 35. Plaintiffs allege that the investigation is a form of retaliation for the Fieger firm's support of Senator John Edwards' 2004 presidential campaign. *Id*. ¶¶ 11, 40. In Count III, Plaintiffs allege that Defendants violated the FECA by "secretly and informally sharing and exchanging information about alleged violations of the Act" in violation of a provision governing public disclosure of investigations by the FEC. *Id*. ¶¶ 41-45. Plaintiffs brought two additional claims against the FEC – one under the Administrative Procedure Act, and one seeking a Writ of Mandamus.[3] *Id*. ¶¶ 46-52.

LEGAL STANDARDS

On a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Plaintiffs bear the burden of demonstrating the Court's subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 293 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993). To make a jurisdictional showing

[3] Plaintiffs also name "unknown agents of the Federal Bureau of Investigation" as co-defendants in this matter. Since neither the FBI nor any of its agents have been served as required by Rule 4(i) and Rule 5 of the Federal Rules of Civil Procedure, all claims against the FBI should be dismissed. *See* Fed. R. Civ. P. 12(b)(5). Plaintiffs also fail to cite a waiver of sovereign immunity or plead a case for damages against these co-defendants.

here, Plaintiffs must also properly invoke an applicable waiver of sovereign immunity. *Edwards v. Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a Court should dismiss an action with prejudice if Plaintiffs have failed to state a claim upon which relief can be granted. Under the motion to dismiss standard, all well-pled factual allegations are to be taken as true and reasonable inferences drawn in favor of the plaintiff. *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 977-78 (7th Cir. 1999). "However, [a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *Id.* at 978 (internal quotations omitted).

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE COMPLAINT

The Amended Complaint should be dismissed for lack of subject matter jurisdiction for two reasons. First, Plaintiffs do not present a ripe dispute. They allege an ongoing criminal investigation. The Court cannot determine whether any investigation is conducted in a proper, constitutional manner unless and until an indictment is returned and any facts relevant to that grand jury investigation are revealed. Because this challenge will not become ripe unless and until an indictment is returned against Plaintiffs, this Court lacks jurisdiction under Article III. Second, Plaintiffs have not satisfied jurisdictional standing requirements because they have suffered no cognizable injury.

A. This Case Does Not Present a Ripe Dispute.

In order to demonstrate the Court's subject matter jurisdiction, Plaintiffs must establish that their claims are ripe for review. "The ripeness doctrine is drawn both from Article III

limitations on judicial power, and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (internal quotation omitted). As the Supreme Court explained in *Abbott Labs.*, "injunctive and declaratory remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). To determine whether an agency decision is ripe for review, the Court must examine "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id*. at 149.

1. This case is not fit for judicial review.

This case is not fit for judicial review because it challenges an alleged ongoing investigation, thus requiring evaluation of facts that are still developing. *See Abbott Labs.*, 387 U.S. at 149 (noting that courts should consider whether the issue is "purely legal" and whether the challenged action is final). The Amended Complaint does not present a purely legal issue that can be resolved in a declaratory judgment action. Instead, it challenges the manner in which an alleged investigation has been conducted and the subjective motivations for that investigation. For example, the Amended Complaint alleges that "[f]ederal agents [] revealed that they had previously obtained the Fieger firm employees' and associates' financial records directly from their financial institutions" and that "the government has secretly and illegally obtained private and confidential bank records for over 100 individuals." Am. Compl. ¶¶ 11, 13. It is axiomatic that no criminal "case" exists unless and until an indictment is returned. *See, e.g., In re Stanford*, 68 F. Supp. 2d 1352, 1359 (N.D. Ga. 1999) ("[Plaintiffs] have not satisfied the jurisdictional requirement of the ripeness doctrine because no case or controversy presently exists in this

matter. A criminal case generally does not exist until a grand jury has returned an indictment.") (citing Fed. R. Crim. P. 7(a)).

A premature consideration of Plaintiffs' claims would constitute an unwarranted intrusion into the criminal process. The process leading to a decision to prosecute is one that courts are hesitant to examine, because it is "particularly ill-suited to judicial review," *Wayte v. United States*, 470 U.S. 598, 607 (1985), and examination by courts risks "unnecessarily impair[ing] the performance of a core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465 (1996). The authority to prosecute crimes is an essential component of the President's constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, and thus is "one of the core powers of the Executive Branch of the Federal Government," *Armstrong*, 517 U.S. at 467. Because the prosecution of crimes is a "special province" of the Executive Branch, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), courts are "properly hesitant to examine the decision whether to prosecute." *Wayte*, 470 U.S. at 608.

When consideration of a complaint requires evaluation of material gathered pursuant to a grand jury investigation, which clearly is protected by Rule 6(e) of the Federal Rules of Criminal Procedure, then the proper course is to dismiss the claims.[4] In *In re Stanford*, the plaintiffs

[4] Even if Plaintiffs brought a ripe claim in the proper court, they could not meet the demanding standard to pierce the grand jury process. In order to overcome the traditional secrecy of a grand jury, Plaintiffs must demonstrate to the court with jurisdiction over the investigation that they have a "particularized need" to demand disclosure. *See, e.g., United States v. Broyles*, 37 F.3d 1314, 1318 (8th Cir. 1994). A movant "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to

complained about an ongoing grand jury investigation. As the court explained, not all legal grievances are sufficient to invoke a court's jurisdiction:

> The issues in this matter are not yet ripe for judicial decision because this Court does not know the nature of the charges that may be lodged against [plaintiffs]. Grand juries must conduct their investigations in secrecy. Fed. R. Crim. Pro. 6(e)(2). Only when the grand jury returns an indictment will the parties and this Court know facts and circumstances upon which the prosecution is based.

In re Stanford, 68 F. Supp. 2d at 1359-60. The court further noted that the plaintiffs "failed to show how . . . the mere threat of indictment has subjected them to unique hardships not suffered by every grand jury target." *Id*. at 1360. Plaintiffs cannot establish any legal basis for the Court to pierce the grand jury process and ignore the Federal Rules of Criminal Procedure. The premature evaluation of Plaintiffs' claims would violate fundamental rules of criminal procedure and interfere with any ongoing investigation. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (noting that courts should consider "whether judicial intervention would inappropriately interfere with further administrative action").

There is a strong and fundamental public interest in ensuring that criminal laws are enforced in an orderly, expeditious manner. Even when a pre-indictment challenge is brought in a criminal (as opposed to a civil) proceeding, courts are unwilling to entertain such challenges

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cover only material so needed." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). There is a strong presumption against disclosure, and "[t]he courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the function of future grand juries." *Id*. Bare allegations of misconduct are insufficient. *In re Special April 1977 Grand Jury*, 587 F.2d 889, 892 (7th Cir. 1978) ("Accusations of misconduct based on unsupported suspicion or patently frivolous contentions should not be deemed 'claims' sufficient to require further inquiry and thus delay orderly proceedings of the grand jury."). Plaintiffs cannot bypass the requirements for probing a grand jury process by bringing a civil suit in a different court in a different jurisdiction from where the alleged investigation is underway.

because such challenges "saddle a grand jury with minitrials and preliminary showings." *United States v. Dionisio*, 410 U.S. 1, 18 (1973). Plaintiffs' present attempt is even more audacious; Plaintiffs endeavor to use a civil action to circumvent the rules and laws governing grand juries and the criminal process. *See* Pls.' Mot. to Compel, Doc. #35 (May 22, 2007) (seeking discovery related to alleged criminal investigation). There are, of course, powerful reasons that courts refuse to review federal criminal investigations in advance of an indictment. Pre-indictment judicial review impedes ongoing investigations and interferes with the separation of powers. Because criminal defendants are afforded ample opportunities to vindicate their rights after indictment, "[t]he Supreme Court has routinely rejected collateral challenges which impede ongoing criminal investigations." *North v. Walsh*, 656 F. Supp. 414, 420 (D.D.C. 1987).

2. Withholding court consideration causes no hardship to Plaintiffs.

Second, Plaintiffs cannot demonstrate that they are suffering hardship. With respect to the hardship factor, there must be a "sufficiently direct and immediate" impact on the plaintiff's "day-to-day business," *i.e.*, plaintiff faces the dilemma of either complying with agency action or risking prosecution for failure to do so. *Abbott Labs.*, 387 U.S. at 152. Despite shouldering the burden of establishing this Court's jurisdiction, *see Kokkonen*, 511 U.S. at 377, Plaintiffs have made no attempt to explain why they would suffer hardship from waiting to challenge an indictment against them, if indeed one is forthcoming. Nor could they do so if they tried. In *North v. Walsh*, for example, the court was confronted with a constitutional challenge to the Ethics in Government Act of 1978, which authorized the appointment of independent counsel to investigate Executive Branch officials. The court declined to consider the challenge, despite the fact it presented a purely legal question, noting that "[c]ourts have almost never found that an

ongoing criminal investigation imposes a sufficient hardship to the person investigated to warrant judicial review prior to his or her indictment." *North*, 656 F. Supp. at 420.

Plaintiffs' manifest inability to prove hardship must be considered in the context of the strong judicial policy against intervening in ongoing criminal investigations. This policy is also rooted, in part, in the judiciary's interest in conserving resources. "The criminal justice system is structured to provide the criminal defendant ample opportunity to vindicate his rights *after* he is indicted." *Id*. at 421 (citing Fed. R. Crim. P. 12(b)). If and when Plaintiffs are indicted for criminal violation of campaign finance laws, nothing prevents them from presenting legal challenges, as permitted by the Federal Rules of Criminal Procedure. Waiting until a ripe case or controversy exists before entertaining Plaintiffs' legal arguments accords with our government's separation of powers. As the court in *North v. Walsh* noted, "principles of comity and separation of powers counsel courts against intervening in a criminal investigation conducted by another branch of government." 656 F. Supp. at 421 (citing *Reporters Comm. v. AT&T*, 593 F.2d 1030, 1065 (D.C. Cir. 1978)).

It appears that Plaintiffs have brought suit—not because of any hardship—but to delve into the inner workings of an alleged criminal matter. Courts consistently have deferred civil actions pending the resolution of parallel criminal proceedings in order "to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases." *Degen v. United States*, 517 U.S. 820, 826 (1996); *see also United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970) (collecting cases). In doing so, they have recognized that a "litigant should not be allowed to make use of liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be

entitled to for use in his criminal suit." *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).[5]

Plaintiffs' claims are not ripe for review because the issues are not fit for judicial resolution and because Plaintiffs will suffer no hardship by waiting to challenge the basis or nature of any investigation in the event any indictment is returned. A holding to the contrary would undermine the grand jury process and encourage a raft of civil complaints regarding alleged criminal investigations. Accordingly, this Court should dismiss Plaintiffs' claims for lack of subject matter jurisdiction.

B. Plaintiffs Do Not Have Standing.

The concept of standing is also a part of the Article III limitation on federal court jurisdiction to "actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("Standing to sue is part of the common understanding of what it takes to make a justiciable case."). Plaintiffs must show that they "suffered an invasion of a legally-protected interest that is both '(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'" *Plotkin v. Ryan*, 239 F.3d 882, 885-86 (7th Cir. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Even if there were a judicially recognized "right" not to be investigated, the Amended Complaint contains no allegation that Defendants are conducting a criminal investigation of Plaintiffs themselves. Plaintiffs allege that federal agents "raid[ed] the homes of the associates

[5] The Court, of course, has the inherent power to enter protective orders to limit the scope of discovery as the interests of justice require. Party discovery is currently "suspended" in accordance with this Court's June 22, 2007 Order (Doc. #46).

and employees of the Fieger law firm." Am. Compl. ¶ 9. Plaintiffs cannot establish standing by noting that "Plaintiff Jack Beam serves as *of counsel* to the Fieger law firm, and Plaintiff Renee Beam is the wife of Jack Beam." *Id*. It is patently insufficient for standing purposes to allege that you know someone who is being investigated and that you fear the investigation is being conducted in an unlawful manner. "Mere speculation is not enough to establish an injury in fact." *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" that forms the basis of the complaint. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citation and quotation omitted). *See also Matter of Grand Jury Subpoena Issued to Chesnoff*, 62 F.3d 1144, 1145 (9th Cir. 1995) (dismissing appeal for lack of standing because litigant who was not the subject of the challenged criminal investigation had not suffered injury adequate to satisfy Article III's case-or-controversy requirement).

Even if Plaintiffs alleged that they were personally being investigated, any "injury" related to the manner of, or the motivation behind, an investigation is entirely conjectural and hypothetical. As Plaintiffs and the Fieger law firm no doubt are aware, an ongoing investigation is insufficient to confer a cognizable injury. As one court has noted:

> The possibility of an injury is insufficient to confer standing on a plaintiff; rather, the plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.
>
> Fieger cannot establish standing in this matter because, at present, he has suffered no injury-in-fact. As Fieger concedes, there is no

> ongoing state proceeding that places his license to practice law in jeopardy. The Grievance Administrator's investigation is still pending. At the conclusion of the investigation, the Grievance Administrator may either dismiss the request for investigation or refer the matter to the Commission for its review. However, even if the matter is referred to the Commission, there is no certainty that a formal complaint will be filed because the Commission also has discretion to dismiss the request for investigation.

Fieger v. Thomas, 125 F.3d 855, 1997 WL 618793, at *2 (6th Cir. Oct. 6, 1997) (unpublished opinion) (internal citations and quotations omitted). As in *Fieger*, Plaintiffs have no concrete injury that can support this Court's subject matter jurisdiction. *See Wis. Right to Life, Inc.*, 366 F.3d at 488 ("This jurisdictional requirement ensures that the resources of the federal judiciary are not expended on advisory opinions and hypothetical disputes."). Because Plaintiffs have not alleged any injury sufficient to confer standing, this Court lacks jurisdiction to entertain Plaintiffs' claims. *Steel Co.*, 523 U.S. at 103-104 ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.").

II. THE COMPLAINT FAILS TO STATE A CLAIM

Even if Plaintiffs did not face jurisdictional barriers to bringing a case at this time, Counts I, II, and III of the Amended Complaint should be dismissed on alternative grounds. With regard to each of these counts, Plaintiffs fail to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).[6]

[6] Co-Defendant Federal Election Commission will file a separate motion explaining why each count in Plaintiffs' Amended Complaint should be dismissed for failure to state a claim.

A. Plaintiffs Cannot State a Claim Against Defendant Gonzales Pursuant to the Right to Financial Privacy Act.

The Right to Financial Privacy Act ("RFPA") provides no basis for the claim that Plaintiffs assert against Defendant Gonzales. *See* 12 U.S.C. § 3401 *et seq*. The RFPA allows a government authority to obtain from a financial institution the financial records (or any financial information contained in the records) of a customer, either with the customer's consent or by administrative or judicial subpoenas, search warrants, or formal written requests. *Id*. §§ 3402, 3404-08. In passing the RFPA, Congress "intended to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." H.R. Rep. No. 95-1383, 95th Cong. at 33 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9305. Congress sought "to strike a balance" between the customer's rights to privacy and the needs of law enforcement agencies. *Id*.; *see also United States v. Frazin*, 780 F.2d 1461, 1465 (9th Cir.), *cert. denied*, 479 U.S. 844 (1986) (discussing the purpose and legislative history of the RFPA).

Plaintiffs rely on section 3404, a "customer authorizations" provision that governs disclosures of information that have been authorized by the customer. The crucial provision reads as follows:

> **(c) Right of customer to access to financial institution's record of disclosures**
> The customer has the right, unless the Government authority obtains a court order as provided in section 3409 of this title, to obtain a *copy of the record which the financial institution shall keep* of all instances in which the customer's record is disclosed to a Government authority *pursuant to this section*, including the identity of the Government authority to which such disclosure is made.

12 U.S.C. § 3404(c) (emphasis added). Plaintiffs cannot state a claim for at least two reasons.

First, to the extent section 3404 confers a right of action upon customers, the right of action would lie against the financial institution, and not the government. The provision clearly refers in two separate places to the records maintained *by the financial institution*—including in the title. The provision nowhere suggests the existence of any customer rights vis-a-vis the federal government. If, as Plaintiffs allege, Defendant has obtained financial information in connection with a grand jury investigation, then Defendant is prohibited by Federal Rule of Criminal Procedure 6(e) from disclosing that information. As a result, Plaintiffs cannot state a claim against Defendant for declining to reveal facts that he is prohibited by law from disclosing.

Second, Plaintiffs cannot rely upon section 3404 to assert a claim against *anyone* in these circumstances. The provision applies only to records that are disclosed "pursuant to this section." Section 3404 addresses disclosures that are authorized by the customer. *Id*. § 3404(a). Plaintiffs do not allege that they authorized the release of financial information, which is the only type of circumstance covered by this provision. Despite Plaintiffs' allegation that this provision creates a broad "mandatory disclosure requirement," section 3404 of the RFPA plainly does not create a right of action against the federal government.[7] Accordingly, Count I should be dismissed for failure to state a claim.

Although the Court need not reach this issue, section 3404 does not create a "mandatory disclosure requirement" for financial institutions. *See* Am. Compl. ¶ 17. Another provision of the RFPA specifically states that any rights created by the RFPA do not apply to subpoenas issued in grand jury proceedings. 12 U.S.C. § 3413(i). Moreover, provisions in other statutes

[7] "[W]aivers of sovereign immunity are to be strictly construed in favor of the government. . ." *Marcus v. Shalala,* 17 F.3d 1033, 1039 (7th Cir. 1994).

make it a crime for financial institutions to disclose grand jury subpoenas to customers in certain circumstances. *See, e.g*, 18 U.S.C. § 1510(b)(2). Therefore, financial institutions do not face a so-called "mandatory disclosure requirement."

B. Plaintiffs Cannot State a Claim for Retaliation for Constitutionally Protected Activity.

Plaintiffs allege that they are affiliated with a law firm that is being investigated for campaign finance violations and that the alleged retaliatory investigation constitutes a violation of their First Amendment right to make political contributions.[8] Am. Compl. ¶ 9-10. For the reasons that follow, Plaintiffs cannot state a claim for retaliation for protected First Amendment activity.[9]

Plaintiffs cite no legal basis to assert a retaliation claim where the alleged retaliatory act is an investigation for violating campaign finance laws. Indeed, the Supreme Court recently cast doubt on whether any action would lie for a retaliatory *investigation*, as opposed to a retaliatory *prosecution*. *See Hartman v. Moore*, 126 S. Ct. 1695, 1705 n.9 (2006) ("No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort. . . . Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional

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[8] Plaintiffs also state as a general matter that "[c]ompelling individuals to appear, under a threat of compulsion, and disclose their political preferences [and] their voting record" would constitute retaliation for engaging in constitutionally protected activity. Am. Compl. ¶ 38. The Court need not consider this issue, however, because Plaintiffs do not allege that *they*, as opposed to some hypothetical "*individuals*," have been so questioned. Plaintiffs plainly do not meet the requirements to establish third party standing. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

[9] Plaintiffs also have failed to allege a waiver of sovereign immunity that is applicable to this claim.

violation is not before us."). Defendant is not aware of any case where a plaintiff has successfully stated a claim for a retaliatory investigation in the context of alleged violations of the campaign finance laws. Plaintiffs ask the Court to recognize an entirely new cause of action, but they provide the Court no justification for doing so.

Permitting a claim of retaliatory investigation to proceed in these circumstances makes no logical sense. At an irreducible minimum, a tort claim for retaliation is premised on the assumption that the plaintiff has engaged in constitutionally protected activity. For Plaintiffs to complain that they are being investigated in retaliation for First Amendment-protected activity begs a crucial question—whether all of their political contributions were lawful under federal law, and thus protected by the First Amendment, or unlawful and thus unprotected by the First Amendment. That question can be resolved only at the conclusion of the criminal process and not during an alleged pending investigation. To permit Plaintiffs' retaliatory investigation claim to proceed puts the cart before the horse. If such a claim could be stated in these circumstances, any target of a criminal investigation regarding campaign contributions could turn the prosecutor into the prosecuted, thus turning the entire campaign finance enforcement structure on its head. Deferring court consideration, however, would permit courts to establish whether contributions were lawful, protected by the First Amendment, and thus a potential predicate for a constitutional tort claim. The Court's inability to resolve this conundrum at this time, of course, underscores that this claim is not ripe for review.

Assuming, *arguendo*, that an action for retaliatory investigation does exist in these circumstances, Plaintiffs still would not be able to state a claim because they have failed to satisfy the prima facie requirements for constitutional torts. The Supreme Court recently

reiterated a plaintiff's obligation to plead all the elements of a constitutional tort in order to avoid dismissal. *Hartman*, 126 S. Ct. at 1699. Most clearly, Plaintiffs have failed to allege the absence of probable cause.[10] In *Hartman*, the plaintiff brought *Bivens* claims against postal inspectors alleged to have engineered a retaliatory prosecution against the plaintiff. The Court held that establishing a lack of probable cause for the prosecution is an essential element of this cause of action and that plaintiff must not only prove this element but plead it in his complaint:

> [Plaintiff] says that the issue of probable cause or its absence is simply an evidentiary matter going to entitlement in fact. But the [defendants] are making more than a claim about the evidence in this case: they are arguing that we should hold that a showing of no probable cause is an element of the kind of claim [plaintiff] is making against them. In agreeing with the [defendants], we are addressing a requirement of causation, which [plaintiff] must plead and prove in order to win . . .

Id. at 1702 n.5; *see also id.* at 1707 ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven"); *see also id*. at 1707 (Ginsburg, J., dissenting) (noting majority holding imposes on plaintiff the burden to "plead and prove" the "no probable cause" element of a retaliatory prosecution claim). Here, Plaintiffs have failed to plead facts to establish a lack of probable

[10] In addition to alleging lack of probable cause, Plaintiffs also must allege the following prima facie elements of a constitutional tort for retaliation: (1) participation in constitutionally protected activity; (2) defendant's action chills participation in that activity; and (3) defendant's adverse action was motivated by plaintiff's protected activity. *See generally Ctr. for Bio-Ethical Reform, Inc., et al. v. City of Springboro*, 477 F.3d 807, 821 (6th Cir. 2007) (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 479 U.S. 274 (1977)). Plaintiffs have neither pled nor satisfied all of these requirements.

cause. Therefore, even if this Court were inclined to be the first to recognize a cause of action in these circumstances, the claim currently before the Court cannot stand.[11]

C. Plaintiffs Cannot State a Claim for Violation of FECA.

Plaintiffs allege that section 437g(a) of FECA "imposes on the FEC a duty not to disclose any information regarding the targets of its investigations" and that the FEC and Attorney General routinely violate the Act by "sharing and exchanging information." Am. Compl. ¶¶ 43-44. This claim cannot stand. In fact, the Act explicitly allows for such communications in its referral provision. *See* 2 U.S.C. § 437g(a)(5)(C). Section 437g(a), on which Plaintiffs rely, states that "[a]ny notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." *Id.* § 437g(a)(12)(A). This provision regulates only outside or "public" disclosure. This section in no way addresses inter-agency communications. Plaintiffs cannot be correct that this provision prohibits all communications from the Federal Election Commission to the Department of Justice because, if it did, the entire referral provision would be unlawful, as would another provision granting the FEC broad authority to "report apparent violations to the appropriate law enforcement authorities." *Id.* § 437d(a)(9); *see, e.g., Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("It is the cardinal principle of statutory construction that it is our duty to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section.") (internal

[11] Indeed, Plaintiffs have not even established the threshold question of whether they are the subject of any investigation and thus an "injured" party with standing to challenge the investigation. Moreover, the absence of facts relevant to an inquiry into probable cause serves further to highlight the prematurity of this action and the lack of ripeness required to present a justiciable "case or controversy."

quotation marks, ellipses, and brackets omitted). Even assuming the facts as Plaintiffs present them, Plaintiffs cannot state a claim for violation of the FECA.

CONCLUSION

This Court lacks subject matter jurisdiction over Plaintiffs' Amended Complaint because the claims therein are not ripe for review and because Plaintiffs do not have standing to challenge Defendants' alleged activities. Even if Plaintiffs were able to establish this Court's jurisdiction, they cannot state a claim upon which relief can be granted. For the foregoing reasons, Defendant's motion to dismiss should be granted.

Dated: August 23, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT ATTORNEY GENERAL'S MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS was served on August 23, 2007 in accordance with Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing ("ECF") pursuant to the district court's system as to ECF filers.

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