UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COOLIDGE REAGAN FOUNDATION,	)	
Plaintiff,	)	Civ. No. 19-1493 (CJN)
v.	)	
FEDERAL ELECTION COMMISSION,	)	MOTION TO DISMISS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(1), defendant Federal Election Commission ("Commission") hereby moves to dismiss plaintiff's Complaint challenging the Commission's alleged failure to act upon an administrative complaint under the Federal Election Campaign Act. *See* 52 U.S.C. § 30109(a)(8)(A). Plaintiff lacks Article III standing because it has failed to allege a concrete and particularized injury. A supporting memorandum of points and authorities and a proposed order accompany this motion.

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July 29, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COOLIDGE REAGAN FOUNDATION Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 19-1493 (CJN) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

MEMORANDUM IN SUPPORT OF DEFENDANT
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TABLE OF CONTENTS

Page

I. BACKGROUND 2

A. The Federal Election Commission 2

B. FECA Requires Disclosure of Campaign Finance Activity and Restricts the Making of Contributions 2

C. FECA's Administrative Enforcement Process and Judicial Review Standard 3

D. Plaintiff CRF's Claims in This Matter 5

II. THIS CASE SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(1) BECAUSE CRF LACKS ARTICLE III STANDING 7

A. Standard of Review 7

B. CRF's Effort to Compel the FEC to Determine that Other Parties Violated the Law Does Not Present a Legally Cognizable Injury to CRF 9

C. CRF Does Not and Cannot Claim Standing Due to Informational Injury 13

1. CRF's Administrative Complaint Seeks a Legal Determination, Not to Uncover New Factual Information 15

2. To the Extent CRF Does Seek Information, It Fails to Show That Such Information Would Be Useful in Its Voting 17

D. CRF Lacks Standing for the Additional Reason that Its Programmatic Activities Are Not Directly and Adversely Affected by Any Alleged Delay 19

III. CONCLUSION 21

TABLE OF AUTHORITIES

Cases ***Page***

21st Century Telesis Joint Venture v. FCC, 318 F.3d 192 (D.C. Cir. 2003) 7

Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996).....20

All. for Democracy v. FEC, 362 F. Supp. 2d 138 (D.D.C. 2005).....12-13, 13, 14-15

All. for Democracy v. FEC, 335 F. Supp. 2d 39 (D.D.C. 2004).....12, 17

Am. Farm Bureau v. EPA, 121 F. Supp. 2d 84 (D.D.C. 2000).....13

Am. Legal Found. v. FCC, 808 F.2d 84 (D.C. Cir. 1987).....8

Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496 (D.C. Cir. 1994) 13

Arpaio v. Obama, 797 F.3d 11 (D.C. Cir. 2015) 7

Ashcroft v. Iqbal, 556 U.S. 662 (2009).....7

ASPCA v. Feld Entm't, Inc., 659 F.3d 13 (D.C. Cir. 2011).....13

Baker v. Carr, 369 U.S. 186 (1962)..... 8-9

Campaign Legal Center v. FEC, 245 F. Supp. 3d 119 (D.D.C. 2017).....16

Citizens for Responsibility and Ethics in Wash. v. FEC,
267 F. Supp. 3d 50 (D.D.C. 2017).....10, 14

Citizens for Responsibility and Ethics in Wash. v. FEC,
799 F. Supp. 2d 78 (D.D.C. 2011).....16

Citizens for Responsibility and Ethics in Wash. v. FEC,
475 F.3d 337 (D.C. Cir. 2007).....16, 17

Citizens for Responsibility and Ethics in Wash. v. FEC,
401 F. Supp. 2d 115 (D.D.C. 2005)..... 17, 18, 20, 20-21, 21

Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of the Treasury, IRS,
21 F. Supp. 3d 25 (D.D.C. 2014).....13

Citizens United v. FEC, 558 U.S. 310 (2010).....21

Common Cause v. FEC, 108 F.3d 413 (D.C. Cir. 1997) 8, 9-10, 10, 11, 12, 17, 20

Diamond v. Charles, 476 U.S. 54 (1986) 19-20

FEC v. Akins, 524 U.S. 11 (1998)..... 14, 17, 18, 18-19, 20

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 5

FEC v. Rose, 806 F.2d 1081 (D.C. Cir. 1986).....4, 5

Flores ex rel. J.F. v. District of Columbia, 437 F. Supp. 2d 22 (D.D.C. 2006) 7-8

Freedom Republicans, Inc. v. FEC, 13 F.3d 412 (D.C. Cir. 1994) 8

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 8

FW/PBS, Inc. v. City of Dall., 493 U.S. 215 (1990) 7

Gill v. Whitford, 138 S.Ct. 1916 (2018)..... 8-9, 11

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987)..... 19-20

Herron for Cong. v. FEC, 903 F. Supp. 2d 9 (D.D.C. 2012).....10

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977) 20

In re Nat'l Cong. Club, Nos. 84-5701, 84-5719,
1984 WL 148396 (D.C. Cir. Oct. 24, 1984).....5

Judicial Watch, Inc. v. FEC, 293 F. Supp. 2d 41 (D.D.C. 2003) 11, 11-12, 12, 15-16

Lance v. Coffman, 549 U.S. 437 (2007) 8-9

Linda R.S. v. Richard D. and Texas, 410 U.S. 614 (1973) 8

Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) 8, 10, 12

McConnell v. FEC, 540 U.S. 93 (2003).....21

McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178 (1936).....7

Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428 (D.C. Cir. 1995).....19, 20

Spann v. Colonial Vill., Inc., 899 F.2d 24 (D.C. Cir. 1990) 19

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) 9

Summers v. Earth Island Inst., 555 U.S. 488 (2009) 9

Vroom v. FEC, 951 F. Supp. 2d 175 (D.D.C. 2013).....14

Warth v. Seldin, 422 U.S. 490 (1975).....8

Wertheimer v. FEC, 268 F.3d 1070 (D.C. Cir. 2001)..... 10, 11, 13-14

Zivotofsky v. Sec'y of State, 444 F.3d 614 (D.C. Cir. 2006).....13

Statutes and Regulations

52 U.S.C. § 30101(8)(A)(i).....3

52 U.S.C. § 30104.....2

52 U.S.C. § 30104(b)(5) 2

52 U.S.C. § 30104(b)(6) 2

52 U.S.C. § 30106.....2

52 U.S.C. § 30106(b)(1) 2

52 U.S.C. § 30106(c) 3-4, 4

52 U.S.C. § 30107.....2

52 U.S.C. § 30109(a)(1).....2, 3

52 U.S.C. § 30109(a)(2)..... 2, 3, 3-4

52 U.S.C. § 30109(a)(4)(A)(i) 4

52 U.S.C. § 30109(a)(6).....2

52 U.S.C. § 30109(a)(6)(A) 4

52 U.S.C. § 30109(a)(8)(A) 4

52 U.S.C. § 30109(a)(8)(C) 5

52 U.S.C. § 30109(a)(12).....4

52 U.S.C. § 30116(a) 2

52 U.S.C. § 30118.....2

52 U.S.C. § 30119 2

52 U.S.C. § 30121 2

52 U.S.C. § 30121 (a)(1) 3

52 U.S.C. § 30121 (a)(2) 3

52 U.S.C. § 30121 (b)(2) 3

11 C.F.R. § 100.52(d)(1) 3

11 C.F.R. § 104.3(b)(3)(i) 2

11 C.F.R. § 104.3(b)(3)(i)(A) 2

11 C.F.R. § 104.3(b)(3)(i)(B) 2

11 C.F.R. § 104.3(b)(3)(ix) 2

11 C.F.R. § 104.3(b)(4)(i) 2

11 C.F.R. § 104.3(b)(4)(i)(A) 2

11 C.F.R. § 104.3(b)(4)(vi) 2

11 C.F.R. § 104.9(a) 2

11 C.F.R. § 104.9(b) 2

11 C.F.R. § 110.20(a)(3) 3

11 C.F.R. § 110.20(b) 3

11 C.F.R. § 110.20(c) 3

11 C.F.R. § 110.20(f) 3

11 C.F.R. § 110.20(g) 3

11 C.F.R. § 110.20(h) 3

11 C.F.R. § 110.20(i) 3

11 C.F.R. § 111.4 3

Plaintiff Coolidge Reagan Foundation ("CRF") lacks Article III standing to bring this suit seeking relief for the alleged failure of defendant Federal Election Commission ("Commission" or "FEC") to timely act on CRF's administrative complaint under the Federal Election Campaign Act ("FECA" or the "Act"). According to the court complaint, CRF filed an administrative complaint with the FEC in August 2018 alleging violations of the FECA. (Verified Compl. ("Compl.") ¶¶ 18-33 (Docket No. 1).) In this case, CRF asserts that the Commission itself has unlawfully failed to act on or delayed in handling the administrative complaint in violation of 52 U.S.C. § 30109(a)(8)(A). (Compl. ¶¶ 43-48.)

CRF has no Article III standing because it has failed to establish any concrete and particularized injury. CRF's generalized desire to see the FEC apply the law against others on CRF's preferred timeline is insufficient to establish standing. Additionally, CRF cannot show any informational injury because it does not claim that the administrative respondents' alleged misreporting of disbursements resulted in a failure to disclose any particular information that is not already publicly available. In any event, CRF has also not alleged that the absence of such information has harmed CRF or its members in voting, as required. Rather, CRF merely alleges that information that has already been reported to the FEC should have been characterized differently or submitted by additional reporting entities. Indeed, CRF says it cited in its own administrative complaint past reporting that provide CRF with knowledge of the alleged true recipient and purpose of the disbursements about which it complains. Nor does CRF claim any specific injury to its programmatic activities.

Because a generalized interest in seeing federal law enforced is insufficient to establish Article III standing, CRF's suit must be dismissed for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

I. BACKGROUND

A. The Federal Election Commission

Defendant 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, *inter alia*, to investigate possible violations of FECA, *id.* § 30109(a)(1)-(2), and granted the Commission exclusive jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts, *id.* §§ 30106(b)(1), 30109(a)(6).

B. FECA Requires Disclosure of Campaign Finance Activity and Restricts the Making of Contributions

FECA regulates the financing of federal election campaigns by imposing, *inter alia*, disclosure requirements, limitations on political contributions generally, and prohibitions on receipts from certain sources. 52 U.S.C. §§ 30104, 30116(a), 30118-19, 30121.

The Act requires disclosure of certain campaign finance activity. Among other things, FECA requires that political committees file reports with the Commission disclosing to whom they make disbursements in excess of $200 as well as the purpose of such payments. 52 U.S.C. § 30104(b)(5), (6); 11 C.F.R. §§ 104.3(b)(3)(i), (ix), (4)(i), (vi), 104.9(a), (b). Commission regulations define "purpose" as a "brief statement or description of why the disbursement was made." 11 C.F.R. § 104.3(b)(3)(i)(A), (B); *id.* § 104.3(b)(4)(i)(A). Examples of sufficient statements of purpose include, but are not limited to, dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs. 11 C.F.R. § 104.3(b)(3)(i)(B); *id.* § 104.3(b)(4)(i)(A).

In addition, FECA prohibits any "foreign national" from directly or indirectly (1) making a contribution or donation of money or other thing of value in connection with a federal, state, or local election; (2) making a contribution or donation to a committee of a political party; or (3) making an expenditure. 52 U.S.C. § 30121(a)(1); *see also* 11 C.F.R. § 110.20(b), (c), (f).[1] FECA also prohibits any person from knowingly soliciting, accepting, or receiving a contribution from a foreign national, 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g), and the Commission's regulations provide that "[n]o person shall knowingly provide substantial assistance in the solicitation, making, acceptance, or receipt of" a prohibited contribution or donation by a foreign national, 11 C.F.R. § 110.20(h). Finally, the Commission's regulations also bar any foreign national from directing, dictating, controlling, or directly or indirectly participating in the "decision-making process of any person . . . with regard to such person's Federal or non-Federal election-related activities," such as, the "making of contributions."[2] 11 C.F.R. § 110.20(i).

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. 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 whose conduct is at issue, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's Commissioners vote to find such reason to believe,

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[1] The Act's definition of "foreign national" includes an individual who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence. 52 U.S.C. § 30121(b)(2); 11 C.F.R. § 110.20(a)(3).

[2] The Act defines "contribution" to include the giving of "anything of value" by "any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). "[A]nything of value includes all in-kind contributions" such as "the provision or any goods or services without charge or at a charge that is less than the usual and normal charge." 11 C.F.R. § 100.52(d)(1); *see also* 52 U.S.C. § 30101(8)(A)(i).

the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2). Any administrative investigation under this provision is confidential until the administrative process is complete. *Id*. § 30109(a)(12).

If an investigation is conducted, the FEC must then determine whether there is "probable cause" to believe that FECA has been violated. Like a reason-to-believe finding, a probable-cause finding requires an affirmative vote of at least four Commissioners. 52 U.S.C. §§ 30106(c), 30109(a)(4)(A)(i). If the FEC makes such a determination, the agency is statutorily required to attempt to remedy the apparent 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 requires an affirmative vote of at least four Commissioners. *Id*. §§ 30106(c), 30109(a)(6)(A).

Administrative complainants may challenge the FEC's handling of their complaints in two limited situations. *See* 52 U.S.C. § 30109(a)(8)(A). First, a party who has filed an administrative complaint may sue the Commission in the event of "a failure of the Commission to act on [the administrative] complaint during the 120-day period beginning on the date the complaint is filed." *Id*. This 120-day period is a jurisdictional threshold before which suit may not be brought, not a timetable within which the Commission must resolve an administrative complaint. *See, e.g.*, *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986). The second situation in which an administrative complainant may file suit is where the Commission decides to dismiss the complaint. In that event, FECA provides a cause of action for complainants to seek review of the dismissal in court. 52 U.S.C. § 30109(a)(8)(A).

If a court finds that a Commission dismissal or failure to act was "contrary to law," it may order the Commission to conform to the court's decision within 30 days. 52 U.S.C. § 30109(a)(8)(C); *see In re Nat'l Cong. Club*, Nos. 84-5701, 84-5719, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984) (*per curiam*); *Rose*, 806 F.2d at 1084. If the Commission fails to conform within that time period, the administrative complainant may bring a civil action to remedy the violation alleged in the 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).

D. Plaintiff CRF's Claims in This Matter

CRF states that it is a "501(c)(3) non-profit organization organized under the law of, and headquartered in, Virginia." (Compl. ¶ 10.) Plaintiff's court complaint alleges that on August 1, 2018, CRF filed an administrative complaint with the FEC. (Compl. ¶ 12.) The court complaint refers to the administrative complaint as Exhibit 1 (Compl. ¶¶ 14, 20-21), but plaintiff has not filed it with this court.

According to the court complaint, the administrative complaint alleged that Hillary for America ("HFA"), the authorized committee for Hillary Clinton's 2016 Presidential campaign, and the Democratic National Committee ("DNC"), a national party committee, paid Christopher Steele and others to conduct opposition research on then-presidential candidate Donald Trump. (Compl. ¶¶ 1-3, 20.) The administrative complaint reportedly alleged that the payments by HFA and the DNC were "funneled" through "their law firm, Perkins Coie," which allegedly hired and paid over $1 million to Fusion GPS ("Fusion"), which then paid at least $168,000 to Steele, a foreign national and director of a London-based firm Orbis Business Intelligence Ltd. ("Orbis"), to gather information about alleged connections between then-candidate Trump and Russia. (Compl. ¶¶ 19-23.) CRF says the administrative complaint further alleges that Steele "solicited

foreign nationals . . . to provide valuable information, evidence, files, documents, records, electronic storage media, or other things relating to Trump." (Compl. ¶¶ 23-24.)

CRF asserts that Counts I and II of the administrative complaint allege that HFA and the DNC unlawfully filed false campaign finance reports by describing the purposes of their payments to Perkins Coie as for "Legal Services" and by not identifying Fusion, Orbis, or Steele as recipients of the funds. (*See* Compl. ¶¶ 26-27.) Count III reportedly alleges that Perkins Coie "aided and abetted HFA's and the DNC's false campaign finance reporting." (Compl. ¶ 28.) CRF's court complaint says Court IV of the administrative complaint alleges that Steele violated the Act and FEC regulations by soliciting foreign nationals for "things of value" while acting as an agent of HFA and the DNC (Compl. ¶ 29), and Count VI alleges Steele illegally made an in-kind contribution to HFA and the DNC by providing his opposition research (the so-called "Steele Dossier") to the website *Mother Jones* "with the intent of influencing the 2016 election by securing Trump's defeat" (Compl. ¶ 31). Finally, CRF states that Count V alleges that HFA "substantially assist[ed] Steele in his solicitation of foreign nationals" in violation of FEC regulations (Compl. ¶ 30), and Count VII alleges that the DNC, HFA, and Steele unlawfully "allow[ed] a foreign national, Steele, to participate in the election-related activities and decisionmaking of the DNC and HFA." (Compl. ¶ 32.)[3]

On May 22, 2019, less than 10 months after filing its administrative complaint, CRF filed this civil suit seeking declaratory and injunctive relief against the FEC. (Docket No. 1.) Plaintiff asks the Court to declare that the FEC's failure to act on its administrative complaint within 120

[3] Plaintiff does not represent that its administrative complaint alleges any violations by Fusion or Orbis. (*See* Compl. ¶¶ 19-32.) Plaintiff states that the administrative complaint does refer to a named individual, a partner of Perkins Coie who was also general counsel to HFA, but plaintiff says it did not separately identify him as an intended respondent. (*See* Compl. at 4 n.1.)

days was contrary to law under 52 U.S.C. § 30109(a)(8)(A). (Compl. ¶¶ 43-48.) Plaintiff also asks the Court to order the FEC to vote within thirty days after the Court's order on whether there is reason to believe that the administrative respondents have violated FECA, and, in the event of a reason-to-believe finding, to proceed with enforcement "without unreasonable delay." (Compl., Prayer for Relief ¶ 2.)

II. THIS CASE SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(1) BECAUSE CRF LACKS ARTICLE III STANDING

A. Standard of Review

"Article III, section 2 of the Constitution limits federal courts to deciding actual ongoing controversies." *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (internal quotation marks and citations omitted). There is no such controversy when a plaintiff lacks standing. Plaintiff CRF bears the burden of establishing this Court's subject matter jurisdiction, including showing that it has constitutional standing. *See Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 231 (1990) (citations and internal quotation marks omitted).

To survive the FEC's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the 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)). A plaintiff "must allege in his pleading the facts essential to show jurisdiction," *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936), and "the necessary factual predicate may not be gleaned from the briefs and arguments," *FW/PBS*, 493 U.S. at 235 (internal quotation marks omitted). However, this

Court "may look beyond the allegations contained in the complaint" to "materials outside the pleadings" to determine whether a plaintiff can show 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).

To demonstrate Article III standing, a plaintiff must specifically establish that: "(1) [the plaintiff] 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)).

Particularized means that "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. And when, 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 establish. *Id*. at 562. *Accord Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997); *see also Linda R.S. v. Richard D. and Texas*, 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)). Thus, courts "may not entertain suits alleging generalized grievances that agencies have failed to adhere to the law." *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 415 (D.C. Cir. 1994). A plaintiff must demonstrate "that he has 'a personal stake in the outcome,' . . . distinct from a 'generally available grievance about government.'" *Gill v. Whitford*, 138 S. Ct.

1916, 1923 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962) and *Lance v. Coffman*, 549 U.S. 437, 439 (2009)).

Furthermore, Article III standing is a constitutional requirement that cannot be altered by Congress. Despite the fact that Congress passed section 30109(a)(8)(A)'s failure-to-act provision, "[i]t makes no difference that the procedural right has been accorded by Congress." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Although passage of such a right "can loosen the strictures of the redressability prong" of the standing inquiry, "the requirement of injury in fact is a hard floor of Article III jurisdiction *that cannot be removed by statute*." *Id.* (emphasis added). Plaintiffs bringing citizen suits must show that they are injured "in a concrete and personal way"; actions that seek "to vindicate the public's nonconcrete interest in the proper administration of the laws" which are "at the behest of Congress" but without "any showing of concrete injury" would "exceed Article III's limitations." *Id.* (internal quotations omitted). Thus, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement" because "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

B. CRF's Effort to Compel the FEC to Determine that Other Parties Violated the Law Does Not Present a Legally Cognizable Injury to CRF

Plaintiff CRF cannot establish Article III standing because the only purported injury it has alleged is a generalized desire to see the FEC apply the law against others. CRF fails to show that it has suffered any concrete or particularized injury from the allegedly illegal activity by the four administrative respondents CRF has identified (HFA, the DNC, Perkins Coie, and Steele). Rather, CRF simply wants this Court to compel the FEC to enforce the law against the alleged violators. Such concerns cannot be the basis for standing because there is no "justiciable

interest in having the Executive Branch act in a lawful manner." *Common Cause*, 108 F.3d at 419.

CRF's court complaint also makes no effort to show a connection between CRF and the illegal activity alleged in its administrative complaint, despite the jurisdictional requirement that a complaint must include such information. *See supra* Part II.A. CRF simply describes itself as a "non-profit organization organized under the law of, and headquartered in, Virginia" that "is aggrieved by the Commission's failure to act on its Administrative Complaint." (Compl. ¶¶ 10, 46.) CRF has entirely failed, however, to allege any discrete injury that affects CRF "in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. The court complaint does not explain what CRF does or how its objectives are hindered by the FEC's alleged failure to act in this matter. This is not a situation where a plaintiff asserts a conjectural or hypothetical injury-in-fact; here, CRF's court complaint makes no allegation at all that it has suffered any injury, and thus CRF cannot obtain any "tangible benefit from winning" this suit. *Herron for Congress v. FEC*, 903 F. Supp. 2d 9, 16 (D.D.C. 2012); *see also Citizens for Responsibility and Ethics in Wash. ("CREW") v. FEC*, 267 F. Supp. 3d 50, 53 (D.D.C. 2017) ("easily" dismissing claims because plaintiffs "have not alleged any injury in fact arising from [the alleged wrongdoing]").

What CRF does seek is "a legal conclusion that carries certain law enforcement consequences" for others. *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001). But "[w]hile 'Congress can create a legal right . . . the interference with which will create an Article III injury,' . . . Congress cannot . . . create standing by conferring 'upon *all* persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law.'" *Common Cause*, 108 F.3d at 418 (quoting *Lujan*, 504 U.S. at 573) (emphasis in original; internal citation omitted). CRF's court complaint seeks only to have the FEC pursue

the administrative respondents. That is not enough to establish standing. "The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill*, 138 S. Ct. at 1933.

Moreover, as the D.C. Circuit has confirmed, a plaintiff cannot "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 (explaining that such a holding "would be tantamount to recognizing a justiciable interest in the enforcement of the law"). "[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; *see also Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 46 (D.D.C. 2003) (stating that "an injury that occurs when a person is deprived of information that a law has been violated" is not legally cognizable). In sum, what a plaintiff in such cases really "desires is for the Commission to 'get the bad guys,' rather than disclose information. [Plaintiff] has no standing to sue for such relief." *Common Cause*, 108 F.3d at 418.

The fact that this case involves the Commission's alleged failure to act on an administrative complaint rather than the dismissal of an administrative complaint does not change the analysis of whether CRF has standing. In *Judicial Watch*, 293 F. Supp. 2d 41, plaintiffs brought suit against the Commission pursuant to section 30109(a)(8) (which was then codified as 2 U.S.C. § 437g(a)(8)), alleging that the agency had failed to timely respond to or investigate an administrative complaint within 120 days. Addressing one plaintiff's "claim that the Commission's delay in responding to his claim is, in and of itself, an injury in fact . . . separate from informational injury," the court found "no basis in the law for this position." *Id.* at 48. Noting that the claim amounted to an assertion that the FEC's "delinquency in acting on [the

administrative] complaint deprived [plaintiff] of the benefit of FECA's timetable for processing complaints," *id*., the court evaluated the claim in light of the D.C. Circuit's guidance in *Common Cause*, 108 F.3d at 418-19, in which "a similar situation was presented," *Judicial Watch*, 293 F. Supp. 2d at 48. The *Common Cause* plaintiff had claimed that the FEC's failure to provide "a prompt and lawful resolution of the complaint" had deprived the plaintiff of "a statutorily promised benefit that is personal to the complainant," but the D.C. Circuit rejected that argument for standing. *Id*. "The [D.C. Circuit] made clear that while the FEC's failure [to] act within the 120-day period of [section 30109(a)(8)(A)] conferred *a right to sue*, it did not also confer standing." *Judicial Watch*, 293 F. Supp. 2d at 48. Instead, the provision "confers a right to sue upon parties *who otherwise already have standing*." *Id*. (quoting *Common Cause*, 108 F. 3d at 419). Applying *Common Cause*, the *Judicial Watch* court thus concluded that the plaintiff before it had presented only a "procedural injury" and that an administrative complainant could not "establish standing merely by asserting that the FEC failed to process its complaint in accordance with law." *Id*. (quoting *Common Cause*, 108 F.3d at 419).

Later cases from this District that address standing to bring delay suits pursuant to section 30109(a)(8) reflect agreement with the analysis in *Judicial Watch*. In *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39 (D.D.C. 2004), the court held, *inter alia*, that plaintiffs had failed to establish informational injury sufficient to support standing for claims that the FEC had failed to act on their administrative complaint. The court added that "under Article III, it is not enough for [a plaintiff] to allege that it was injured because the Commission unlawfully delayed the investigation; plaintiffs must show a 'discrete injury flowing from' such alleged delay." *Id*. at 48 (citing *Common Cause*, 108 F.3d at 418 (quoting *Lujan*, 504 U.S. at 572)). And in the later dismissal action related to the 2004 *Alliance for Democracy* decision, the court relied heavily on

the *Judicial Watch* analysis in finding that a lack of informational injury precluded standing to challenge the dismissal of an administrative complaint, showing that the injury analysis is in fact comparable in the delay and dismissal contexts. *All. for Democracy v. FEC*, 362 F. Supp. 2d 138, 147-49 (D.D.C. 2005).

In sum, even though delay suits are authorized by FECA, the cases above make clear that CRF cannot argue that an allegation of a failure to act under section 30109(a)(8) alone gives it standing. CRF must instead show how the Commission's alleged delay has caused it particularized injury. But CRF has failed to do so.

C. CRF Does Not and Cannot Claim Standing Due to Informational Injury

An Article III injury can arise when a statute 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)), but CRF cannot establish standing on that basis. "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)). However, "[n]othing in the FECA requires that information concerning a violation of the Act as such be disclosed to the public." *All. for Democracy*, 362 F. Supp. 2d at 148. As explained above, courts in comparable FEC cases have repeatedly emphasized that plaintiffs seeking only determinations of illegality lack standing to maintain their claims. *See, e.g., Wertheimer*, 268 F.3d at 1075 (holding that plaintiffs lacked standing to seek a legal determination that certain transactions

constitute coordinated expenditures); *CREW*, 267 F. Supp. 3d at 54 (holding that advocacy group lacked standing to challenge FEC dismissal of alleged violation of FECA's "prohibition on pass-through contributions" because "nothing in the statute or regulatory regime" would have required the alleged violator to disclose information); *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). And such legal determinations are what CRF seeks in this case.

Alleged violations of FECA's reporting requirements can in some cases provide an informational injury sufficient to support standing, *see, e.g.*, *FEC v. Akins*, 524 U.S. 11 (1998), and CRF does allege reporting violations by HFA and the DNC. But they amount to claims that already disclosed disbursements to Perkins Coie should have been reported in a different way (*i.e.* listing a different or additional recipients, and/or providing a different purpose), not that any such disbursements failed to be disclosed by HFA and the DNC. Thus, according to its own pleading, CRF has already received information about the specific disbursements made by HFA and the DNC directly from the mandatory FEC disclosure reports filed by those committees. (*See* Compl. ¶¶ 18-25.)

Plaintiff alleges that HFA and the DNC "avoid[ed] publicly reporting" their disbursements to Fusion, Orbis, and Steele "to prevent the public from learning their role" in the Steele dossier. (Compl. ¶¶ 2-3.) However, with respect to alleged payments by Perkins Coie to the subsequent recipients, CRF's complaint states that it already knows those recipients' identities. (*See, e.g., id.* ¶ 27.) Similarly, CRF alleges that HFA falsely reported that its payments to Perkins Coie were for legal services (*id.* ¶ 21), but CRF states that it is already aware that those payments were for "opposition research," (*id.* ¶¶ 21, 26). Even assuming that

the allegations in the complaint that the subsequent recipients should have been reported with a different purpose ascribed are true, CRF has no cognizable injury at this time due to the information it already possesses. *All. for Democracy*, 362 F. Supp. 2d at 147.

1. CRF's Administrative Complaint Seeks a Legal Determination, Not to Uncover New Factual Information

CRF does not claim that an FEC investigation in this matter would provide it with any additional factual information that could support standing. CRF alleges that HFA and the DNC financed Steele's preparation of the dossier, but misreported the purpose and recipients of the disbursements. (Compl. ¶¶ 19-22, 26-27.) In plaintiff's view, rather than disbursements to Perkins Coie for legal services, the payments should have been reported as disbursements to Fusion, Orbis, and Steele for opposition research or investigation. (*Id.*) But CRF's administrative complaint already identifies sources of the transfers of money and dollar amounts. (*See* Compl. ¶¶ 19-32.) Thus, even if the FEC were to investigate plaintiff's allegations and agree with CRF that HFA and the DNC should have reported its payments to Perkins Coie as disbursements to Fusion, Orbis, and Steele for opposition research, CRF would not learn any new factual information that is required to be disclosed.[4]

In circumstances like this, where any information claimants purport to seek is already available to them, those claimants lack standing to maintain their claims. *See, e.g.*, *Judicial Watch*, 293 F. Supp. 2d at 46-47 (holding that a plaintiff who had alleged reporting violations

[4] Even if an investigation were to uncover the precise dates and amounts of the alleged subsequent transfers by Perkins Coie to Fusion, Orbis and Steele, because none of those entities or persons are candidates or political committees required to report their receipts and disbursements to the Commission, HFA and the DNC would at most only amend their existing reports. But CRF already possesses the basic information that it claims to seek and thus does not have any injury that would be redressed from the additional reporting that the Commission could seek if the allegations in the complaint were assumed to be true.

regarding his own contributions to a candidate lacked standing because he was "already aware of the facts underlying his own alleged contributions" and his lawsuit was unlikely to produce additional facts of which he was not already knowledgeable); *CREW v. FEC*, 799 F. Supp. 2d 78, 88-89 (D.D.C. 2011) (holding that plaintiffs lacked a cognizable informational injury where they sought a legal determination that certain expenses were in-kind contributions but failed to "allege any specific *factual information* . . . that [wa]s not already publicly available"); *see also CREW v. FEC*, 475 F.3d 337, 339-40 (D.C. Cir. 2007) (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").

A recent case highlights the difference between seeking missing factual information and simply seeking to have the legality of undisputed, publicly available transactions considered. In *Campaign Legal Center v. FEC*, the court found no informational injury and thus no standing as to complaints that amounted to efforts to have the FEC reclassify known, publicly reported contributions as illegal; that is, to have the FEC make legal determinations. 245 F. Supp. 3d 119, 125-26 (D.D.C. 2017). By contrast, the court found that the plaintiff in that case *did* have standing to pursue other claims seeking the true sources of contributed funds that were required to be reported but were not in any conclusive, public locations — where the plaintiff alleged that it simply did not know where the funds came from. (*Id*. at 127.) That is not the case here, where CRF does not allege that it completely lacks any such key information about the transactions at issue, only that the information has not been identified and labeled correctly.

In this case, CRF may have a general interest in learning whether there was anything unlawful about the transfer of money amongst the entities, but CRP lacks standing to seek that information because there is no general statutory requirement that a violation of the Act be

disclosed as such to the public. CRF's desire "for the Commission to 'get the bad guys'" is not a legally cognizable interest, *Common Cause*, 108 F.3d at 418, and CRF has thus failed to plead or show any particularized injury sufficient to give it standing.

2. To the Extent CRF Does Seek Information, It Fails to Show that Such Information Would Be Useful in Its Voting

Even if CRF's court complaint could be construed to have alleged violations of law that deprived it of information, CRF cannot show that any such information would be useful in its voting, as required to demonstrate informational injury sufficient to support judicial review under 52 U.S.C. § 30109(a)(8). The Supreme Court has made clear that 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] [were] 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 CRF (or its members if it were a membership organization) must be participants in political elections and campaigns. *All. for Democracy*, 335 F. Supp. 2d at 48 (emphasis added); *see also CREW*, 475 F.3d at 339 (finding no standing based on informational injury in part because "CREW cannot vote [and] it has no members who vote"); *CREW*, 401 F. Supp. 2d at 121 ("[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."). 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 120 ("The character of the information sought weighs heavily on the informational standing analysis." (citation omitted)).

In this case, CRF cannot allege that knowing the precise details of the transfers about which it complains would directly and concretely affect *its* voting, because CRF is neither a voter nor does the complaint indicate that it has voting members. And even if CRF had members who voted, the court complaint fails to explain how the information sought would be used to inform their voting choices. Neither Perkins Coie, the DNC, nor any of the Democratic state parties can be an officeholder or future candidate for office, and there is no allegation in the complaint that Hillary Clinton intends to run for elective office again, let alone that foreign nationals would be involved in a potential campaign. In addition, there is no allegation in the complaint that anyone associated with CRF would vote differently depending on whether the specific transfers or reports were unlawful. Indeed, it seems highly unlikely that such information about Democratic Party activities in 2016 would have any bearing on which candidate a hypothetical member of CRF would choose to support in the future.

While there would undoubtedly be some general public interest in a determination that the respondents CRF has identified may have violated the law, CRF must make a particularized showing of personal injury from the alleged FECA violations and the purported missing information in order to have standing. 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 transfers amongst the administrative respondents are already public in reports to the FEC or otherwise available to plaintiff. The court complaint fails to show how any additional information about the conduct alleged here would be useful to CRF in voting, even if the group had members who voted, which it has failed to allege in any event.

In sum, CRF is not a political committee, it cannot vote and the complaint lacks any claim that CRF has members who vote. CRF does not and cannot show that any information it might gain from the relief it seeks here would be useful in voting. Thus, it cannot show injury.

D. CRF Lacks Standing for the Additional Reason that Its Programmatic Activities Are Not Directly and Adversely Affected by Any Alleged Delay

In addition to lacking any legally cognizable informational injury, CRF cannot demonstrate standing in any representative or associational capacity. CRF claims no members and is not a trade association; it is suing on its own behalf. Therefore, it is required to allege a direct and adverse effect on specific programmatic concerns from the FEC's alleged delay to meet Article III's injury requirement. CRF has failed to do so. The complaint nowhere alleges anything that could fairly be read to suggest that CRF's resources have been depleted. Nor does CRF allege concrete and direct harm to its programmatic activities.[5]

[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.'" *Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1434 (quoting *Spann v. Colonial Vill., 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 it

"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). But 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.* ("[T]he organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action."); *Akins v. FEC*, 101 F.3d 731, 735 (D.C. Cir. 1996) (en banc) ("[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."), *vacated on other grounds*, 524 U.S. 11 (1998).

This case is similar to *CREW*, 401 F. Supp. 2d 115, and for the very same reasons identified by the court in that case, plaintiff here has not suffered any injury to its 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*, plaintiff has not "specified any programmatic concerns that have been concretely and directly impacted adversely by the FEC's actions," nor has CRF identified any "particular plan" for using any information it

"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, 65 (1986)).

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 CRF is] already privy to the information" about the transfers of funds that it alleges are unlawful. *Id.*; *see supra* pp. 14-16. CRF 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 and internal quotation marks omitted), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

In sum, CRF has failed to provide evidence of a concrete and particularized injury to any "discrete programmatic concerns" of CRF's, let alone demonstrate that the organization is being directly and adversely affected by its purported lack of information regarding the activity that is the subject of its administrative complaint. This failure is an independent reason CRF cannot demonstrate Article III standing.

III. CONCLUSION

For all the foregoing reasons, plaintiff CRF lacks Article III standing and the Court should dismiss CRF's Complaint.

Respectfully submitted,

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July 29, 2018

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