

No. 23-5216

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BARBARA W. PALMER,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

**FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY AFFIRMANCE**

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GLOSSARY

Add. Addendum

FEC Federal Election Commission

FECA Federal Election Campaign Act

INTRODUCTION

This Court should summarily affirm the district court's order dismissing appellant Barbara Palmer's complaint for lack of Article III standing. In its Motion, the Federal Election Commission ("FEC" or "Commission") demonstrated that Palmer failed to establish any personalized injury arising from her allegation that grants distributed during the 2020 election by a non-profit corporation gave rise to violations of the Federal Election Campaign Act ("FECA"). Rather, Palmer merely asserted a general interest in seeing the agency enforce the law against others in the way that she desires, which is insufficient to establish a concrete and particularized injury in fact to confer standing.

In her Response to the Commission's Motion for Summary Affirmance ("Resp."), Palmer makes two main arguments in an attempt to sidestep the concrete-injury requirement, both of which fail to rebut the Commission's Motion. First, Palmer argues that the Commission does not "meet the standard" for summary affirmance, and that the standard set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), is somehow inapplicable. In addition to misapprehending *Lujan*, Palmer provides no argument that she has established an injury in fact necessary for constitutional standing. Instead, she points to claims made in her administrative complaint with the agency that she alleges should have been investigated. However, as the district court found, it is not enough for Palmer

to allege violations of FECA that the Commission declined to pursue. Rather, Palmer must instead identify some concrete and particularized injury that is fairly traceable to the Commission and redressable by this Court. Palmer fails to establish any personalized injury.

Second, Palmer asserts that the district court erred in dismissing her complaint because it purportedly did not have access to Palmer's administrative record. Palmer claims that because the Commission moved to defer transmission of the certified administrative record to the district court prior to the court ruling on the Commission's motion to dismiss, that the district court lacked the ability to dismiss her complaint. Palmer's assertions are simply wrong. The necessary record documents were provided to Palmer, publicly available on the Commission's website, and were indeed relied upon by the district court in its opinion. As such, Palmer's claim that these documents were not available is without merit. Nor does Palmer point to any record evidence that she claims would have altered the district court's determination that she lacked standing.

Because Palmer cannot show any basis for Article III standing, there is no jurisdiction for Palmer's claims. This Court should summarily affirm.

ARGUMENT

I. PALMER LACKS ARTICLE III STANDING

A. Summary Affirmance is Appropriate

As an initial matter, Appellant misconstrues the standard for summary affirmance. Summary affirmance is appropriate where “[t]he merits of the parties’ positions are so clear as to warrant summary action.” *Hassan v. FEC*, No. 12-5335, 2013 WL 1164506, at *1 (D.C. Cir. Mar 11, 2003) (*per curiam*). Where a “sound basis” exists for summary disposition, parties are “particularly encouraged to file dispositive motions,” since the “result can be a major savings of time, effort, and resources for the parties, counsel, and the Court.” *D.C. Circuit Handbook of Practice and Internal Procedures* 28 (Mar. 16, 2021).

Appellant relatedly asserts, without support, that the Supreme Court’s seminal decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which outlines the requirements for Article III standing “is not applicable in this case” because “*Lujan* did not involve constitutional issues of due process or the fundamental right to vote.” (Resp. at 14, 15.) Although Appellant might take issue with the requirements of Article III standing that the Supreme Court defined in *Lujan*, Appellant provides no basis for her argument to disregard *Lujan* and it is nevertheless applicable here. Indeed, all plaintiffs must demonstrate that they have suffered an injury in fact that have caused an injury “in a personal and individual

way.” *Lujan*, 504 U.S. at 560 n.1. 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). The injury, in short, must be specific to the plaintiff. And as the district court explained, Palmer alleged no such personalized interest. In fact, Palmer “failed to plead any personal stake affected by, or a close relationship to any harm resulting from, the FEC dismissal” of her administrative complaint.

(Add. 11.)

Nor is it the case that, as Appellant states, the Commission has “disavowed federal courts’ jurisdiction to hear challenges to its pre-investigation dismissals of administrative complaints” and that courts can “arbitrarily dismiss cases seeking judicial review” of Commission decisions as a result of *Lujan*. (Resp. at 15, 16.) Constitutional standing requirements derive from the grant of jurisdiction in the United States Constitution to federal courts over “actual cases and controversies,” U.S. Const. art. III; *Lujan*, 504 U.S. at 560. The standing requirement “confine[s] the federal courts to a properly judicial role.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Furthermore, Appellant, as “[t]he party invoking federal jurisdiction

bears the burden of establishing these elements” of standing. *Lujan*, 504 U.S. at 561.

B. Palmer Fails to Show a Concrete and Particularized Injury

Appellant’s response falls far short of establishing the essential elements of constitutional standing. Although Palmer does not dispute that she bears the burden of showing that she has standing, or that she must show “a discrete injury flowing from the alleged violation of FECA,” *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (internal quotation marks omitted), Palmer appears to erroneously focus on the citizen-suit provision in FECA as a mechanism to provide Article III standing. (Resp. at 18.).¹

Palmer filed her complaint in the district court under 52 U.S.C. § 30109(a)(8)(A), (C) of FECA, which provides a cause of action for a “party aggrieved by an order of the Commission dismissing [an administrative] complaint filed by such a party,” for a determination that the Commission’s dismissal was

¹ Appellant also voices a concern with “tie-votes,” and the Commission’s use of “prosecutorial discretion,” in the Commission’s review of administrative complaints, referring to the D.C. Circuit’s opinion in *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880 (“*New Models*”) (D.C. Cir. 2021). (Resp. at 19.) This is irrelevant. There was no “tie vote” or use of prosecutorial discretion in this matter. As explained by the district court, the Commission determined by a unanimous vote of 6-0 that there was no reason to believe a violation of FECA had occurred and dismissed Palmer’s administrative complaint. (Add. 9 (citing FEC, MUR 7946 Certification, https://www.fec.gov/files/legal/murs/7946/7946_23.pdf)).

“contrary to law.” *Id.* However, as the district court determined, “FECA’s citizen-suit provision ‘confers a right to sue upon parties who otherwise already have standing.’” (Add. 10) (quoting *Common Cause*, 108 F.3d at 419). Thus, “Article III standing requires a concrete injury even in the context of a statutory violation.” *Spokeo, Inc.*, 578 U.S. at 341. And “[t]he Supreme Court has ruled repeatedly that the ‘deprivation of a procedural right’ alone, like an agency’s failure to process an administrative complaint, ‘is insufficient to create Article III standing.’”

Campaign Legal Ctr. v. FEC, 860 F. App’x 1, 4 (D.C. Cir. 2021) (per curiam) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). Instead, the plaintiff must identify “some concrete interest that is affected by the [procedural] deprivation[.]” *Id.* (alterations in original); *see also Spokeo, Inc.*, 578 U.S. at 342 (a plaintiff “cannot satisfy the demands of Article III by alleging a bare procedural violation.”); *Lujan*, 504 U.S. at 573 n.8 (rejecting claims of Article III standing grounded solely on “a ‘procedural right’ unconnected to the plaintiff’s own concrete harm”). Therefore, although Palmer argues that the Commission allegedly “failed to investigate” certain claims against respondents made in her administrative complaint (Resp. at 20), Palmer has no Article III right to seek “a legal conclusion that carries certain law enforcement consequences” for others absent a showing of a personalized injury. *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001). *See also Lujan*, 504 U.S. at 556 (“This Court has

consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy.”)

II. THE FEC PUBLICLY DISCLOSED ALL NECESSARY DOCUMENTS RELATED TO PALMER’S ADMINISTRATIVE COMPLAINT ON ITS WEBSITE.

Appellant’s next argument is that summary affirmance is inappropriate because “there was no record produced for the lower court to be able to reach the merits of Palmer’s claims,” and “[t]here is, therefore, no record for this Court to review the merits of Appellee’s arguments.” (Resp. at 1.) Here too, Appellant is mistaken.

Concurrent with the Commission’s motion to dismiss, the Commission filed with the district court a motion to defer transmission of the administrative record and the filing of a certified list of the same. (*See* Federal Election Commission’s Motion to Defer Transmission of the Administrative Record and Filing of Certified List, *Palmer v. FEC*, 22-2876 (D.D.C. Jan. 3, 2023) (Docket No. 7).)² As the Commission explained, the district court could appropriately determine the threshold issue of Palmer’s Article III standing based on her judicial complaint, the

² In cases seeking judicial review of administrative actions such as this, the district court’s Local Rules generally require an agency to file a certified list of the contents of the administrative record contemporaneously with the filing of a dispositive motion, “unless otherwise ordered by the Court.” U.S. Dist. Ct. for the Dist. of Columbia Local Civ. R. 7(n)(1).

documents incorporated by reference, and publicly available documents on the FEC's website upon which Palmer's complaint necessarily relies. *See, e.g., Wisc. Elec. Power Co. v. Dep't of Energy*, No. 99-1342, 1999 WL 1125165, at *1 (D.C. Cir. Nov. 24, 1999) (per curiam) (granting motion to defer filing the certified index pending resolution of motion to dismiss); *see also Dynegy Power Mktg., Inc. v. FERC*, Nos. 04-1034, *et al.*, 2004 WL 1920775, at *1 (D.C. Cir. Aug. 26, 2004) (per curiam) (granting motion to defer filing the certified index after appellants moved to dismiss). The district court granted the Commission's motion to dismiss, and therefore determined that production of the certified list of the administrative record was not necessary to resolve Palmer's lack of standing. Thus, it denied the Commission's motion to defer transmission of the administrative record as moot. (Add. 7.)

Palmer claims that, "[t]he FEC did not provide any of the supporting documents for its decision to Appellant in September, 2022," (Resp. at 3), however, the documents were provided to Appellant within 30 days of the closing of her administrative case, pursuant to the Commission's standard disclosure policy. The Commission discloses documents determined to be "integral to [the FEC's] decision making process." FEC, *Disclosure of Certain Documents in Enf't and Other Matters*, 81 Fed. Reg. 50702, 50703 (Aug. 2, 2016). Such documents include, *inter alia*, FEC General Counsel's Reports that make recommendations

regarding whether there is reason to believe or probable cause to believe violations occurred, memoranda and reports from the Office of General Counsel prepared in connection with a specific Matter Under Review and formally circulated for Commission consideration and deliberation, and statements of reasons issued by the Commissioners. *Id.* at 50702. All such documents related to Palmer's enforcement matter were disclosed on the FEC's website, and indeed the district court specifically referred to them in its opinion. (Add. 8-9.) *See also* Closed Matters Under Review, MUR 7946, <https://www.fec.gov/data/legal/matter-under-review/7946/>.

Palmer separately refers to an “improvident” letter that the Commission mailed to the United States Election Assistance Commission (“EAC”), and she quibbles with the Commission “combin[ing]” her enforcement matter with another similar matter under review during the Commission's review process. (*See Resp.* at 6, 7.) Both points are irrelevant and without merit. The notification letter that the Commission mailed to Palmer did explain that the EAC and its employees were not proper respondents under FECA, and that therefore the Commission made no findings related to them. (*Resp. Ex. B, Doc. No. 2034655, at ECF 53 n.1.*) And in any event, the letter that the Commission sent to the EAC noting that they were not proper respondents was separately provided to Appellant. Additionally, the fact that the Commission reviewed the allegations in Palmer's administrative complaint

along with allegations against some of the same respondents in a separate complaint, does not alter the Commission's unanimous decision finding no reason to believe that a violation of FECA occurred. More to the point, Palmer does not assert how either of her concerns would have altered the district court's standing determination, or otherwise demonstrate a concrete and particularized injury. Instead, Appellant appears to have wanted the district court to delve into the underlying factual claims she made before the agency in her administrative complaint. Yet, as explained above, this is not what the constitutional standing question addresses.

CONCLUSION

The Commission's Motion demonstrated that Palmer fails to establish a concrete and particularized injury sufficient for article III standing, and Appellant's response does not plausibly dispute this. For the foregoing reasons, this Court should summarily affirm the district court's order granting the Commission's motion to dismiss Palmer's complaint.

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Respectfully submitted,

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I hereby certify, on this 16th day of January, 2024, that:

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I hereby certify that on this 16th day of January 2024, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Shaina Ward

Shaina Ward