UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AB PAC, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 22-2139 (TJK) REPLY MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS

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

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INTRODUCTION

Plaintiff AB PAC alleges that an administrative complaint it filed with the Federal Election Commission ("FEC" or "Commission") asserted that former president Donald J. Trump violated the Federal Election Campaign Act ("FECA") in the following ways: (1) by making expenditures to advance his 2024 presidential campaign without filing a statement of candidacy with the FEC or disclosing those expenditures, and (2) by accepting excessive contributions from his leadership Political Action Committee, or PAC, and a joint fundraising Committee in violation of 52 U.S.C. § 30116(f). Plaintiff's Amended Complaint (Docket No. 14) seeks relief from this Court pursuant to 52 U.S.C. § 30109(a)(8) for the Commission's alleged failure to act on this administrative complaint.

As the Commission demonstrated in its Memorandum of Points and Authorities in Support of Its Partial Motion to Dismiss Plaintiff's Amended Complaint ("Mem.") (Docket 16-1), however, AB PAC cannot show any concrete or particularized injury to obtain relief on its claim that Trump accepted excessive contributions because AB PAC is not a competitor of Trump. Furthermore, because AB PAC only identified Trump as a respondent in its administrative complaint, there is no jurisdiction to consider any allegations about other PACs, and any claim that the FEC's lack of enforcement against Trump on the alleged excessive contribution claims increased competition from other PACs is too remote and speculative to support Article III standing.

Plaintiff's Memorandum of Points and Authorities in Opposition to the FEC's Partial Motion to Dismiss ("Opp.") (Docket No. 17) makes two arguments, both of which fail to rebut the Commission's Motion. First, AB PAC incorrectly asserts that the FEC's alleged failure to act on its administrative complaint is all that the Court must consider for standing purposes and

that the administrative complaint's allegations of excessive contributions are irrelevant to determining AB PAC's standing. Contrary to plaintiff's assertion, AB PAC merely asserts a general interest in seeing the agency enforce the law promptly. A concrete and particularized injury, rather than a mere right to sue, is required for Article III purposes. Second, AB PAC separately argues that even if the excessive contribution allegations are considered, AB PAC has standing because it has sufficiently alleged a competitor and informational injury. It has not. AB PAC, an organization unable to run for office, does not compete with Trump in any election and, therefore, cannot establish competitor standing as to him. It also cannot establish that any competition with non-respondent PACs supports standing here, because no fine against Trump would remedy the allegedly excessive fundraising that has gone to those entities. Nor has AB PAC set forth a cognizable informational injury that would support its pursuit of relief related to its excessive contribution claim. Even were the Commission to pursue enforcement of the claim that Trump has accepted excessive contributions, AB PAC would not obtain any additional information to which it claims it is entitled.

At bottom, to the extent AB PAC seeks an order compelling the Commission to act on the excessive contributions claim, the Amended Complaint reveals an interest only in making the Commission comply with FECA's requirements. This is insufficient for Article III standing, and the FEC's Partial Motion to Dismiss should be granted.

ARGUMENT

I. TRUMP'S ALLEGED REPORTING VIOLATIONS DO NOT ESTABLISH AB PAC'S STANDING TO PURSUE AN EXCESSIVE CONTRIBUTION CLAIM

A. The Commission's Alleged Failure to Act on an Administrative Complaint Within 120 Days is Not a Sufficient Injury under Article III

In its Partial Motion, the Commission explained that AB PAC lacks Article III standing to compel the Commission to act on its excessive contribution claim. (Mem. at 6-12.) In

response, plaintiff asserts that because AB PAC does not seek an order directing the FEC to act on this specific allegation in its administrative complaint, as opposed to the entire administrative complaint as a whole, the FEC's alleged inaction alone confers standing sufficient for Article III purposes. (Opp. at 7.) Plaintiff claims that "[t]his Court's standing inquiry therefore begins and ends with determining whether AB PAC has standing to press this [delay] claim and obtain this relief." (*Id.*) However, the theory plaintiff articulates has already been rejected by clear Circuit precedent.

52 U.S.C. §§ 30109(a)(8)(A) and (C) allow "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed" to file a lawsuit arguing that the Commission's dismissal or delay is "contrary to law." *Id.* However, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). 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 v. Defs. of Wildlife*, 504 U.S. 555, 573 n.8 (1992) (rejecting claims of Article III standing grounded solely on "a 'procedural right' unconnected to the plaintiff's own concrete harm").

Accordingly, as the FEC previously explained, the statutory 120-day period is simply a jurisdictional threshold before which suit may not be brought, not a timetable within which the Commission must resolve an administrative complaint. (*See* Mem. at 7-8); *Stockman v. FEC*, 138 F.3d 144, 152 (5th Cir. 1998) (FECA "does not create a deadline in which the FEC must act" on administrative complaints). For example, in *Common Cause v. FEC*, the plaintiff claimed that the FEC's failure to provide "a prompt and lawful resolution of the complaint" deprived the plaintiff of "a statutorily promised benefit that is personal to the complainant." 108 F.3d 413, 418 (D.C. Cir. 1997) (per curiam). The D.C. Circuit rejected that argument for standing, explaining that it paralleled the kind of "procedural injury" that *Lujan* had found insufficient. *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." *Jud. Watch v. FEC*, 293 F. Supp. 2d 41, 48 (D.D.C. 2003) (emphasis in original). Thus, the provision "confers a right to sue upon parties *who otherwise already have standing*." *Id*. (quoting *Common Cause*, 108 F. 3d at 419) (emphasis added by *Judicial Watch*). Applying *Common Cause,* the *Judicial Watch* court 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). As this precedent establishes, AB PAC's argument that the administrative complaint's allegations of excessive contributions to Trump are thus "irrelevant" to AB PAC's standing in a failure to act case, (Opp. at 9.), is misplaced.

Plaintiff also cites *Campaign Legal Ctr. v. FEC*, 31 F.4th 781 (D.C. Cir. 2022) "*CLC II*" to argue that a "plaintiff had standing to pursue its enforcement action against the FEC alleging that the FEC had improperly dismissed the plaintiffs' administrative complaint based on

informational injury alone," and that "[n]othing in that decision suggests that the plaintiff must demonstrate a separate injury-in-fact for each of its underlying administrative allegations as opposed to the claim actually filed in the district court." (Opp. at 10.) As an initial matter, the Commission did not appear in this case and therefore did not itself assert a partial lack of standing as it has in the instant matter. However, more to the point, AB PAC must demonstrate standing to sue beyond mere inaction.[1] Section 30109(a)(8)(A) did not create a substantive right; a plaintiff must still demonstrate that it has suffered a discrete, underlying injury separate and apart from any mere procedural violation stemming from a dismissal or failure to act.

B. AB PAC Must Establish Standing for Each Administrative Claim on which it Asserts the Commission has Unlawfully Failed to Act

The fact that AB PAC may have an informational injury with respect to its separate claim in its administrative complaint to the FEC that Trump should have earlier declared his candidacy and filed required reports does not mean it also has standing to seek a court order compelling the Commission to act on *other* administrative claims for which it lacks constitutional injury. Though its court complaint asserts a single cause of action, that does not eliminate AB PAC's requirement to demonstrate jurisdiction over each portion of its single claim. For example, courts regularly dismiss portions of claims that have jurisdictional defects, while permitting the plaintiff to pursue other portions of those same claims. *See Finca Santa Elena, Inc. v. U.S. Army Corps. of Eng'rs*, 873 F. Supp. 2d 363, 371 (D.D.C. 2012) (granting motion to dismiss claims as unripe only "to the extent those claims" challenge a certain aspect of a project).

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[1] As further explained *infra* pp. 10-11, AB PAC has not set forth an informational injury on its excessive contribution claim. This is distinct from its disclosure claim, for which the FEC has not contested standing. Thus, plaintiff's claim that it has been deprived of "filings detailing Mr. Trump's campaign committee organization and its activities," which has caused plaintiff an "informational injury" (Opp. at 7), is relevant as to the latter not the former.

AB PAC's argument that it need only demonstrate that any single portion of its administrative complaint establishes sufficient constitutional injury (*see* Opp. at 9-10) proves far too much. Following AB PAC's line of reasoning, an administrative complainant could evade the standing rule for at least some allegations through artful pleading of disparate violations. The Commission's procedures for submitting administrative complaints contain no rules limiting the joinder of disparate claims. *See* 11 C.F.R. § 111.4. Under AB PAC's approach, a savvy litigant could strategically allege any reporting violation to join with a claim over which no informational injury exists and obtain access to judicial review of both as a result. Such a rule would also apply with equal logical force to a claim that a Commission dismissal was contrary to law. The same statutory provision — 52 U.S.C. § 30109(a)(8) — creates both failure to act and dismissal claims against the Commission. Similar to a failure to act case (*see* Opp. at 9-10), that provision provides a cause of action to challenge "an order of the Commission dismissing *a complaint*." 52 U.S.C. § 30109(a)(8)(A) (emphasis added). It similarly limits the available relief in such a case to a declaration "that the dismissal *of the complaint* . . . is contrary to law," not any specific underlying alleged claims. *Id.* at § 30109(a)(8)(C) (emphasis added). If AB PAC's argument is correct, then administrative complainants would be entitled to judicial review of every violation asserted in a multi-count administrative complaint by establishing an injury on any small part.

Should the Court in this matter ultimately rule in this case that the Commission's handling of the administrative complaint was contrary to law, the practical import of this standing dispute is to affect the scope of conduct the Commission could be required to address under court order. *See* 52 U.S.C. § 30109(a)(8)(C). Allowing section 30109(a)(8) complainants

to establish standing in gross would have the downstream effect of broadening the allegations the agency would be under order to address beyond Article III powers.

In sum, even if delay suits are authorized by FECA, an allegation of a failure to act under § 30109(a)(8) alone does not provide a plaintiff with Article III standing. AB PAC must instead show how the Commission's alleged delay has caused particularized injury. Because AB PAC has shown no concrete or particularized injury on its excessive contribution claim, it lacks standing as to that claim.

II. AB PAC CANNOT CLAIM STANDING DUE TO COMPETITOR OR INFORMATIONAL INJURY

As explained above, AB PAC must demonstrate Article III standing independent of the FEC's alleged failure to act on its excessive contribution claim. AB PAC alternatively relies on two grounds for standing: competitor and informational standing. (Opp. at 10.) But plaintiff has neither under binding D.C. Circuit precedent.

A. Plaintiff Lacks Competitor Standing

AB PAC asserts that it "has competitor standing because FEC's failure to act on its complaint has infringed on its right to participate in a fair competitive environment." (Opp. at 11.) Plaintiff principally relies on *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), but that case explains that "*candidates*" are those who "suffer[] more directly when political rivals get elected using illegal financing[.]" *Id.* at 83 (emphasis added); *see also id.* at 85 (finding standing for members of Congress who challenged FEC regulations applicable to candidates and political parties). *Shays* does not stand for the broad proposition that Article III standing can be established for non-candidates for the alleged campaign-finance violations of others. *See Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) ("Only another candidate could make such a claim" of competitor standing.); *Fulani v. Brady*, 935 F.2d 1324, 1327-28 (D.C. Cir. 1991)

(finding a minor party candidate lacked standing where she was not in competition for alleged benefit). Indeed, plaintiff does not offer a single case in which a non-candidate suffered a cognizable injury because a hypothetical candidate it intends to support will be at a fundraising disadvantage. *See Gottlieb*, 143 F.3d at 621 (a plaintiff must "show that he personally competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit") (internal quotation marks and citation omitted).

Plaintiff also cites *Natural Law Party v. FEC*, for its contention that "political parties" have competitor standing to challenge "the exclusion of the candidates they support from presidential debates." (Opp. at 12 (*citing* 111 F. Supp. 2d 33, 45-47 (D.D.C. 2000)).) But the plaintiffs in *Natural Law Party* "directly competed for the alleged benefit of participating in the presidential debates." *Id.* at 47. AB PAC, in contrast, is not subject to the contribution limits it alleges should be enforced against Trump. (*See* Mem. 10-11.) The *Natural Law Party* court also noted that the party plaintiffs were "direct 'competitors' of the Republican and Democratic parties and their nominees, and therefore, they are unlike the plaintiffs in *Fulani* and *Gottlieb*." *Id.* Here, however, AB PAC is a hybrid PAC independent of any party or candidate. The only circumstance courts in this Circuit have recognized competitor standing involved candidates or entities tied directly to candidates; none recognize a cognizable injury for non-candidates in the manner suggested by AB PAC.

AB PAC alternatively argues that it has competitor standing because it competes with "Super PACs supporting Mr. Trump" that would have received unlawfully raised funds prior to Trump announcing his candidacy when he was "not required to comply with the strict limits that apply to candidates when they fundraise for Super PACs." (Opp. at 13.) But as the Commission has explained, AB PAC lacks standing to assert any injury stemming from lack of enforcement

against any Trump-supporting PACs because it does not allege it asked the Commission to pursue anyone other than Trump. *See* Mem. at 13 (citing *Citizens for Resp. & Ethics in Washington v. FEC*, 363 F. Supp. 3d 33 (D.D.C. 2018); *Citizens for Resp. & Ethics in Washington v. Am. Action Network*, 410 F. Supp. 3d 1, 20 (D.D.C. 2019), *on reconsideration,* No. 18-CV-945 (CRC), 2022 WL 612655 (D.D.C. Mar. 2, 2022)). AB PAC responds by arguing that its "administrative complaint . . . repeatedly refer[s] directly to AB PAC's rival PACs." (Opp. at 13-14.). But it does not dispute that its administrative complaint did not name anyone other than Trump as a respondent. (*See* Pl.'s Am. Compl. for Declaratory and Injunctive Relief Exh. 1 at 1 (Docket No. 14-2) (listing "Donald J. Trump" as sole respondent).) Similarly, AB PAC's administrative complaint requested the Commission take action only as to Trump, requesting that it compel Mr. Trump to disclose expenditures to further his candidacy, "enjoin Mr. Trump from further violations, and fine Mr. Trump the maximum amount permitted by law." (*Id.* at 11.) In contrast, AB PAC did not ask the Commission to take any action against any other entity. (*See id*.)

Now that Trump has declared his candidacy and filed relevant forms with the FEC, it is even more clear that there is no competitive harm to AB PAC from any rival PAC.[2] AB PAC argues that obtaining the relief it seeks "would prevent Mr. Trump from raising unlimited sums of money for [the PACs] and thus ensure that these PACs can no longer gain an unfair and illegal fundraising advantage over AB PAC." (Opp. at 13.) Whatever the merit of that argument prior to Trump's candidacy announcement, it has no force now that Trump has acknowledged he is subject to FECA's limits on candidates going forward. With respect to funds that these PACs

[2] As AB PAC acknowledges (Opp. at 12 n.3), Trump announced his candidacy and filed a Statement of Candidacy with the FEC on November 15, 2022. *See* Donald J. Trump, Statement of Candidacy (Nov. 15, 2022), https://docquery.fec.gov/cgi-bin/forms/P80001571/1661552/.

allegedly unlawfully raised to date, AB PAC identifies no relief it sought before the Commission that would remedy its alleged competitive disadvantage. The only relief it cites is its request that "the FEC fine *Mr. Trump*" (Opp. at 12 n.3 (emphasis added)), but that relief would not disgorge any money raised *by any PAC* plaintiff could claim as a competitor.[3]

B. Plaintiff Lacks Informational Standing to Pursue its Excessive Contribution Claim

AB PAC also lacks informational standing with respect to its allegations that Trump accepted excessive contributions from his leadership PAC and a joint fundraising committee. (*See, e.g.*, Am. Compl. ¶ 53; Mem. at 8-9.) AB PAC now suggests that Trump's acceptance of excessive contributions caused it to "suffer[] an informational injury" (Opp. at 15), but it fails to link the alleged violation to a deprivation of information. Indeed, the Commission does not dispute that plaintiff has an informational injury with respect to its alleged reporting violations, and the FEC's Partial Motion does not take issue with those allegations for standing purposes. And while it is true that even excessive contributions must also be reported, those are distinct legal violations. *See* 52 U.S.C. § 30116 (establishing limits on contributions); *id.* § 30104 (establishing reporting requirements).

Outside of its reporting violation allegations, all AB PAC seeks is for the Commission to make a legal conclusion as to whether Trump has accepted excessive contributions and impose a fine, which the D.C. Circuit has long held does not give rise to an Article III informational

[3] Plaintiff also cites *LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011) to argue that it need not show that these rival PACs have gained a competitive advantage over plaintiff, but similar to *Shays*, *LaRoque* held only that "*candidates* may have standing to challenge 'illegally structured' campaign environments even if 'the multiplicity of factors bearing on elections' prevents them from establishing 'with any certainty that the challenged rules will disadvantage their ... campaigns.'" *Id.* (citing *Shays*, 414 F.3d at 90-91; *Lujan*, 504 U.S. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.")).

injury. *See Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001); *see also Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 343 (D.D.C. 2020). Even if the Commission acted precisely as AB PAC requests on that portion of its administrative complaint, FECA would not require any additional information to be disclosed. The Commission's alleged delay as to any excessive contribution allegations has not, therefore, caused AB PAC any informational injury.

CONCLUSION

For all the foregoing reasons, the Court should grant the FEC's Partial Motion to Dismiss and dismiss plaintiff's amended complaint to the extent it seeks an order compelling the Commission to act on any administrative complaint alleging Trump accepted excessive contributions in violation of 52 U.S.C. § 30116(f).

Respectfully submitted,

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