IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREE SPEECH FOR PEOPLE,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 19-1722 (APM)

Oral Argument Requested

MEMORANDUM IN OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

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INTRODUCTION

This case arises from an illicit campaign finance transaction involving at least two, and possibly four, private parties not before the Court.

In 2018, plaintiff Free Speech For People ("FSFP") filed an administrative complaint requesting a Federal Election Commission ("FEC") investigation into allegations that American Media, Inc. ("AMI"), Donald J. Trump for President, Inc. ("Trump Campaign"), Donald J. Trump, and Michael Cohen (collectively, "Respondents"), had made and/or facilitated "hush money" payments to Karen McDougal (Trump's former mistress) for the purpose of influencing the 2016 election, thus violating the Federal Election Campaign Act ("FECA"). As of this date, the FEC has not conducted an investigation, and open factual questions remain about the transaction. Among those open questions are the involvement of Trump himself and the Trump Campaign, both of which have explicitly denied any involvement.

FSFP seeks an FEC investigation to determine, among other open questions, ***whether (and how) Trump and/or the Trump Campaign were involved in the unlawful transaction***. In other words, FSFP is seeking information that Respondents were required to disclose to the FEC concerning the substance of their financial dealings. It is the responsibility of the FEC to respond to FSFP's administrative complaint alleging that FSFP has been denied access to complete and accurate information concerning alleged campaign expenditures.

Because the FEC has failed to act on the administrative complaint within the 120-day statutory period (in fact, over a year has passed), FSFP was entitled to file

this action declaring that delay unlawful. 52 U.S.C. § 30109(a)(8)(A). FSFP has suffered a concrete informational injury because the FEC's unlawful delay has deprived FSFP of information (in particular, whether and how Trump and/or the Trump Campaign were involved) that FSFP needs for its programmatic activities and to which it is statutorily entitled.

The FEC's motion to dismiss mischaracterizes FSFP's interest as a desire to "get the bad guys." Defendant Federal Election Commission's Motion to Dismiss, ECF No. 7 ("FEC MTD"), at 7. To the contrary, FSFP's interest is to *obtain information* regarding the nature of the payment, including in particular whether two parties—Trump and the Trump Campaign—were involved in making an unlawful payment (as some information appears to suggest) or not (as they insist). Unfortunately, the FEC's year-long delay has deprived FSFP of this information. This is a classic informational injury for Article III standing purposes, and the FEC's motion to dismiss should be denied.

STATEMENT OF FACTS

Plaintiff FSFP filed an administrative complaint with the FEC on February 16, 2018 against Respondents AMI and the Trump Campaign, and subsequently filed amendments to the administrative complaint on April 26, 2018 and July 26, 2018 respectively, alleging additional facts and naming Cohen and Trump as individual Respondents (collectively, the "Amended Administrative Complaint"). *See* Complaint for Declaratory and Injunctive Relief, ECF No. 1 (the "Complaint"), ¶¶ 14, 16, 18. The Amended Administrative Complaint alleged that, for the purposes of influencing the

2016 elections, (i) AMI paid Ms. McDougal $150,000 for the rights to her life story, including an account of her alleged affair with Mr. Trump; (ii) Mr. Cohen, as an agent for the Trump Campaign, facilitated these negotiations between AMI and Ms. McDougal; and (iii) Mr. Trump, on behalf of the Trump Campaign, instructed Mr. Cohen to facilitate these negotiations between AMI and Ms. McDougal. *Id.* ¶ 15. Thus, the Amended Administrative Complaint requested that the FEC investigate six separate potential violations of FECA by four separate respondents.

FSFP received letters from the FEC acknowledging receipt of the original administrative complaint and the two amendments on March 1, 2018, May 1, 2018, and August 9, 2018, respectively. Compl. ¶¶ 17, 19. In the first letter, the FEC designated the administrative complaint as matter under review ("MUR") 7332. To date, the FEC has failed to take final action on the Amended Administrative Complaint.

On June 13, 2019, FSFP filed this action under 52 U.S.C. § 30109(a)(8)(A),[1] which provides: "Any 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

[1] The Complaint alleges a single cause of action, citing 52 U.S.C. § 30109(a)(8)(A), and entitled "FECA—Failure to Act, 52 U.S.C. § 30109(a)(8)(A)." Compl. ¶¶ 26-29. The FEC's motion to dismiss, however, devotes four pages to seeking dismissal of a phantom second claim under the Administrative Procedure Act that FSFP never alleged. *See* FEC MTD at 22-25. The apparent basis for the FEC's misunderstanding is that FSFP alleged subject matter jurisdiction and venue under 5 U.S.C. §§ 702-03 in the alternative. Compl. ¶¶ 4-5. To the extent that the FEC concedes, and this Court concludes, that 52 U.S.C. § 30109(a)(8)(A) confers subject matter jurisdiction over FSFP's Section 30109 claim, it is unnecessary for the Court to reach the issue of whether 5 U.S.C. § 702 also confers subject matter jurisdiction over FSFP's Section 30109 claim.

complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia."

In the Complaint, FSFP challenged the FEC's failure to take action on its Amended Administrative Complaint, noting that "FSFP still lacks essential information about the financing of the 2016 election as a result of the FEC's failure to act." Compl. ¶ 22. For example, FSFP acknowledged that "many facts suggest that Mr. Cohen acted as an agent of the Trump Campaign and in consultation with Mr. Trump himself in facilitating the payment from AMI to Ms. McDougal," but noted that, on the other hand, "spokespeople and counsel for the Trump Campaign and Mr. Trump have repeatedly denied contemporaneous knowledge of, or involvement with, that payment." *Id.* Consequently, FSFP alleged that "[a]n FEC investigation and determination of Mr. Trump and the Trump Campaign's role in AMI's payment . . . is essential to clarifying the nature of Mr. Trump's and/or the Trump Campaign's involvement." *Id.* ¶ 24.

STANDARD OF REVIEW

In evaluating a defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the Court must find that the plaintiff has "establish[ed] the [C]ourt's jurisdiction over the subject matter [at issue] by a preponderance of the evidence." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 243 F. Supp. 3d 91, 97 (D.C. Cir. 2017) ("*CREW I*") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "The [C]ourt must accept as true all uncontroverted material factual allegations contained in the complaint and construe the complaint liberally, granting

plaintiff the benefit of all inferences that can be derived from the facts alleged and upon such facts determine jurisdictional questions." *CREW I* at 97 (citation omitted). The Court may consider materials outside the pleadings in order to determine subject-matter jurisdiction. *Kean for Cong. Comm. v. FEC*, 398 F. Supp. 2d 26, 31 (D.D.C. 2005).

In evaluating a defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must find that the "complaint . . . contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wood v. Moss*, 572 U.S. 744, 757-58 (2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "In considering a motion to dismiss for failure to plead a claim on which relief can be granted, the [C]ourt must consider the complaint in its entirety, accepting all factual allegations in the complaint as true, 'even if doubtful in fact.'" *CREW I* at 98 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (remaining citations omitted)). The Court may examine other sources "when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 123 (D.D.C. 2017) ("*CLC*") (citing *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Lujan*, 504 U.S. at 560-61). On a motion to dismiss, a plaintiff

only needs to "'state[ ] a plausible claim' that each element of standing is satisfied." *Ashcroft*, 556 U.S. at 678-79. In determining standing, "the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007). Thus, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (citation omitted). Finally, "[t]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 560.

ARGUMENT

I. FSFP Has Article III Standing

A. FSFP Has Suffered an Informational Injury

The Supreme Court has held that a plaintiff "suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998); *Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."). In particular, as *Akins* and subsequent cases in the D.C. Circuit and this court have reaffirmed, denial of information about campaign financing under the Federal Election Campaign Act can

constitute an informational injury. *See, e.g.*, *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("Here, as in *Akins*, Shays's injury in fact is the denial of information he believes the law entitles him to."); *CLC* at 127 ("Under FECA, plaintiffs have 'a right to truthful information regarding campaign contributions and expenditures.'") (quoting *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 39, 144 (D.D.C. 2004)); *Kean*, 398 F. Supp. 2d at 26 ("[T]he FEC misconstrues the holding of *Akins*. There the injury-in-fact was the failure to obtain information that, by statute, the plaintiffs had a right to have.").

Here, FSFP has been deprived of specific information, subject to disclosure under FECA, regarding the true nature of the alleged campaign expenditures by Respondents. Because FECA "requires that the information be publicly disclosed and there is no reason to doubt [plaintiff's] claim that the information would help them," FSFP has suffered informational injury, which establishes standing to pursue this claim. *CLC* at 124-25 (citing *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040–41 (D.C. Cir. 2016) (remaining citations omitted)); *see also Citizens for Responsibility & Ethics in Wash.*, 316 F. Supp. 3d 349, 364 (D.D.C. 2018) ("[T]he denial of information [a plaintiff] believes the law entitles him to constitutes an injury in fact.") (citations omitted).

The FEC argues that because FSFP's "administrative complaint already identifies" the source and amount of the money transfer, FSFP "would not learn any new factual information that is required to be disclosed." FEC MTD at 15. This is incorrect, and a misrepresentation of the Complaint.

In support of its argument, the FEC represents that "[a]s FSFP concedes in its court complaint, FSFP is already aware of 'many facts suggest[ing]' the alleged source, recipient, and amount of the $150,000 payment that its administrative complaint claims took place." FEC MTD at 1. However, this is a partial quote from a dependent clause in the Complaint which entirely omits the context:

> 23. For example, while many facts suggest that Mr. Cohen acted as an agent of the Trump Campaign and in consultation with Mr. Trump himself in facilitating the payment from AMI to Ms. McDougal, **spokespeople and counsel for the Trump Campaign and Mr. Trump have repeatedly denied contemporaneous knowledge of, or involvement with, that payment**.
>
> 24. **FSFP's lack of information regarding the nature of the involvement of the Trump Campaign and/or Mr. Trump in AMI's payment** is due in significant part to the FEC's delays in investigating MUR 7332. An FEC investigation and **determination of Mr. Trump and the Trump Campaign's role in AMI's payment**, through an investigative process in which Mr. Trump and the Trump Campaign have the opportunity to provide a detailed written response to all allegations, is essential to **clarifying the nature of Mr. Trump's and/or the Trump Campaign's involvement**.

Compl. ¶¶ 23-24 (emphases added).[2]

Thus, the Complaint specifically states that there are open factual questions as to whether Mr. Cohen's actions were (1) on behalf of the Trump Campaign, and/or (2) in consultation with Trump himself. The importance of this information is obvious. Under one scenario (suggested by the denials from Trump and the Trump Campaign),

[2] The second amendment to the administrative complaint added Trump as a respondent to Counts I, II, IV, and VI of the original and first amended complaint.

Cohen arranged a payment from AMI to McDougal without any involvement from Trump or the Trump Campaign. But if in fact (as an FEC investigation could determine) the Trump Campaign (and perhaps Trump himself, as its agent) actively *directed or facilitated* the payment, then that information would be of substantial value to FSFP in determining and implementing its programmatic activities. Yet without an FEC investigation to answer that question, FSFP does not have the complete factual picture, and is thus lacking "key information" required under FECA. *See* FEC MTD at 16. In other words, FSFP has been "denied access to complete and accurate information" concerning the alleged campaign expenditures identified in its Amended Administrative Complaint. *CLC* at 125 (finding informational standing when local media reported a possible connection between political contributions and the respondent to the administrative complaint).

The court in *CLC* disagreed with the FEC when the FEC set forth the same argument it does here, namely arguing that plaintiffs lacked informational injury because "they already possess all the information they claim to seek in this action." *CLC* at 119. The *CLC* court recognized that plaintiffs did incur informational injuries in connection with three of their five administrative complaints, which alleged that the "true source[s]" of contributions made to super PACs had not been confirmed by the FEC. *Id.* at 123. Although media reports had reported a possible link between the corporate entities that made the contributions and the suspected "true source," those reports were not deemed to be "conclusive proof" that those sources, and only those sources, were behind the super PAC contributions. *Id.* at 127. Thus, the *CLC* court

found that "plaintiffs have 'espouse[d] a view of the law' under which entities regulated by the Commission are 'obligated to disclose certain information' that plaintiffs have not received but have a right to obtain." *Id.* at 127 (citing *Am. Soc. for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011); *Kean*, 398 F. Supp. 2d at 34-35).

In so holding, the *CLC* court relied on *FEC v. Akins*, 524 U.S. 11 (1998), in which the FEC had also contested the standing of a group of voters who filed an administrative complaint with the FEC disputing the FEC's determination that a specific organization was not a "political committee," and therefore not subject to the FEC's disclosure requirements. The Supreme Court disagreed with the FEC and held that standing was satisfied because respondents had suffered a genuine "injury in fact" which "consist[ed] of their inability to obtain information," including a list of donor members of the organization, as well as its campaign-related contributions and expenditures. *Id.* at 20-21. The Supreme Court further noted that "[r]espondents' injury consequently seems concrete and particular, Indeed, this Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id.* at 21 (citing *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 449 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982)).

The FEC cites *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41 (D.D.C. 2003), *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997), and *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39 (D.D.C. 2004) in support of its argument that FSFP has not

suffered injury in fact. FEC MTD at 11-13. First, all those cases were decided prior to *Shays*, in which the D.C. Circuit held that the plaintiff suffered injury in fact due to "the denial of information he believes the law entitles him to" under campaign finance law. *Shays*, 528 F.3d at 923. Thus, *Shays* should control. Second, each case is distinguishable on its facts. In *Judicial Watch*, the plaintiff, an individual donor, filed an administrative complaint requesting an investigation into his ***own*** alleged contributions to a presidential campaign because the campaign failed to report the contributions. In holding that there was no standing, the court noted that "[plaintiff] is already aware of the facts underlying his own alleged contributions to Senator Clinton's campaign." In *Common Cause*, the court, noting that "the nature of the information allegedly withheld is ***critical*** to the standing analysis" (emphasis added), found that there was no injury in fact because the information requested was "simply the fact that a violation of FECA has occurred," and not information that was required to be disclosed to the public under FECA. *Common Cause*, 108 F.3d at 417. In so holding, the court specifically noted that under *Akins*, a "particularized injury sufficient to create standing" was found in "cases where the information denied is both useful in voting and required by Congress to be disclosed." *Id.* at 417-18. Finally, in *Alliance for Democracy*, at the time of the decision the FEC had responded to plaintiffs' administrative complaint, conducted an investigation, and found probable cause to believe FECA had been violated, and thus the plaintiffs had obtained the information requested. 335 F. Supp. 2d at 42. The *Alliance* court, citing *Akins*, stated

that "[h]ad the agency found no violation and dismissed the complaint, then it seems that plaintiffs may be entitled to the information they seek." *Id.* at 48.

The FEC quotes *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), for the proposition that complainants cannot "automatically satisfy the injury-in-fact requirement" via statute because "Article III standing requires a concrete injury even in the context of a statutory violation." FEC MTD at 9. However, the FEC omits that the *Spokeo* court then went on to specifically state that **"[t]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact**; in such a case, a plaintiff need not allege any *additional* harm beyond the one identified by Congress." *Spokeo*, 136 S. Ct. at 1544 (citing *Akins*, 524 U.S. at 20-25) (emphasis in original). Congress has constitutional power to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* at 1549 (quoting *Lujan*, 504 U.S. at 578).

This is such a case; FECA granted a procedural right to FSFP, and the FEC's inaction constitutes a legally cognizable injury. As in *CLC* and *Akins*, FSFP has been deprived of accurate and complete information regarding the true nature of the "hush money" payments made to Ms. McDougal. Thus, FSFP has suffered an informational injury, and has Article III standing to pursue its Complaint.

B. Nonprofits Such As FSFP Can Assert Informational Injuries.

Attempting to further its standing argument, the FEC also argues that FSFP cannot demonstrate standing because FSFP, as a section 501(c)(3) nonprofit, "cannot

vote, ha[s] no members who vote, and cannot engage in partisan political activity." FEC MTD at 17. However, those are not prerequisites under D.C. Circuit case law. Under D.C. Circuit precedent, a plaintiff alleging an informational injury must demonstrate only that "there 'is no reason to doubt their claim that the information would help them.'" *CLC*, 245 F. Supp. 3d at 128 (quoting *Ethyl Corp.*, 306 F.3d 1144, 1148 (D.C. Cir. 2002); *Akins*, 524 U.S. at 21). As the court in *CLC* stated, while this standard can be satisfied by seeking information that is useful in voting itself, "that does not mean that all other proffered uses are legally insufficient." *Id.* at 128. Thus, the *CLC* court found standing where the plaintiffs, Campaign Legal Center and Democracy 21, were both 501(c)(3) nonprofit organizations, and had offered "valid uses, related to their organizational missions, for the information they seek." *Id.* at 129.

When the FEC set forth a similar argument in *Kean*, arguing that Kean, as a candidate, did not have standing as FECA's disclosure requirements were only intended for voters, the *Kean* court disagreed, stating:

> [Citing *Akins*, the FEC argues that] only voters have standing to bring an action based on FECA's disclosure laws. . . . The FEC again misstates *Akins*. . . . *Akins* does not lend itself to such a narrow construction. . . . [T]he reporting requirements in FECA create transparency in the political process by informing the political process of who is giving and who is spending money. . . . **There is nothing in the text of FECA limiting that information to voters, nor would it seem to further the ends of FECA if voters were the only political actors the information was intended to assist.**

Kean, 398 F. Supp. 2d at 37-38 (emphasis added).

In support of its argument, the FEC cites numerous cases in which at least one of the plaintiffs was a nonprofit organization, and standing was denied. *See* FEC MTD at 17-18. However, in only one of those cases did the court actually cite the plaintiff's status as a nonprofit organization as a possible reason for denying standing. *See Citizens for Responsibility & Ethics in Wash.*, 401 F. Supp. 2d 115 (D.D.C. 2005) ("*CREW II*"). In addition, *CREW II* is distinguishable because there, the FEC had already conducted an investigation, instigated by the plaintiffs' administrative complaint, had found "reason to believe" that the 2004 Bush presidential campaign had received an illegal in-kind contribution, and had further determined the value of that contribution. No such investigation nor determination has taken place here.

Pursuant to D.C. Circuit precedent, FSFP has set forth its reasons and prospective uses for the information it seeks from the FEC. *See* Compl. ¶¶ 6, 25. It has therefore proposed "valid uses, related to [its] organizational mission[], for the information [it] seek[s]." *CLC*, 245 F. Supp. 3d at 128-29. This is sufficient to allege informational standing.

C. There Is No Reason to Doubt FSFP's Need for Seeking This Information

The FEC also argues that FSFP cannot demonstrate standing because "its programmatic activities are not directly and adversely affected by the alleged agency delay." FEC MTD at 20-21. This is inapposite for the following two reasons. *First*, if informational standing is established, that is sufficient, and there is no need to establish organizational standing. *CLC,* 245 F. Supp. at 128. *Second*, it is not FSFP's burden at this stage to specify specific programmatic activities or resources that have

been harmed. *See id.* ("[T]he Commission faults plaintiffs for failing to specify a particular litigation, scheduled testimony, or current or looming outreach activity in which they would use the information they seek. . . . But that is not plaintiffs' burden.") (quotations omitted). "The relevant question is simply whether there is no reason to doubt plaintiffs' asserted justification for seeking the information." *Id.* (quoting *Kean*, 398 F. Supp. 2d at 35; *Akins*, 524 U.S. at 21 (quotations omitted)). The FEC has not provided any reason to doubt FSFP's stated need for this information in order to fulfill its organizational goals. Compl. ¶¶ 6, 25.

CONCLUSION

The FEC's inaction for over a year regarding the Amended Administrative Complaint injured FSFP by depriving it of information to which it is entitled by statute. For the foregoing reasons, the FEC's motion to dismiss should be denied.[3]

[3] In the event the Court concludes the Complaint is deficient in any respect, Plaintiff requests leave to file an amended complaint. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend pleadings] when justice so requires"); *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120 (D.C. Cir. 2015).

Dated: September 27, 2019

Respectfully submitted,

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