ORAL ARGUMENT NOT YET SCHEDULED

No. 06-5014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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APPELLEE FEDERAL ELECTION COMMISSION'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the Federal Election Commission ("the Commission") hereby submits its Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici. Citizens for Responsibility and Ethics in Washington ("CREW") was the plaintiff below and is the appellant in this Court. The Commission was the defendant below and is the appellee in this Court. There were no amici curiae or intervenors in the district court, and there are none thus far in this Court.

(B) Rulings Under Review. Citizens for Responsibility and Ethics in Washington appeals the November 14, 2005, decision of the United States District Court for the District of Columbia (Bates, J.) granting the Commission's motion for summary judgment for lack of jurisdiction in this case brought under 2 U.S.C. 437g(a)(8). The district court's order and memorandum opinion are reproduced at pages 58-73 of the Joint Appendix and are reported at 401 F. Supp. 2d 115 (D.D.C. 2005).

(C) Related Cases. This case has not previously been before this Court or any court other than the district court below. The Commission knows of no "related cases" as that term is defined in D.C. Cir. R. 28(a)(1)(C).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

---

* Authorities upon which we chiefly rely are marked with asterisks.

CASES cont'd **Page**

CASES cont'd **Page**

STATUTES

STATUTES cont'd **Page**

MISCELLANEOUS **Page**

GLOSSARY

AIPAC	American Israel Public Affairs Committee
Alliance I	Alliance for Democracy v. FEC, 335 F.Supp.2d 39 (D.D.C. 2004)
Alliance II	Alliance for Democracy v. FEC, 362 F.Supp.2d 138 (D.D.C. 2005)
ATR	Americans for Tax Reform, Inc.
CREW	Citizens for Responsibility and Ethics in Washington
FECA	Federal Election Campaign Act
FOIA	Freedom of Information Act
Judicial Watch I	Judicial Watch v. FEC, 180 F.3d 277 (D.C. Cir. 1999)
Judicial Watch II	Judicial Watch v. FEC, 293 F.Supp.2d 41 (D.D.C. 2003)

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COUNTERSTATEMENT OF JURISDICTION

Citizens for Responsibility and Ethics in Washington ("CREW") alleged that the district court had jurisdiction under 2 U.S.C. 437g and 28 U.S.C. 1331 to review the Federal Election Commission's dismissal of an administrative complaint CREW had filed (J.A. 6 ¶5).[1] However, on November 14, 2005, the district court, dismissing the case, held that it did not have jurisdiction because CREW lacked standing to seek review of the dismissal (J.A. 58, 60-72). On

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[1] "J.A. __" references are to the consecutively numbered pages of the Joint Appendix filed with CREW's brief.

January 9, 2006, CREW filed a timely notice of appeal from that final judgment (J.A. 74). This Court has jurisdiction of CREW's appeal under 2 U.S.C. 437g(a)(9) and 28 U.S.C. 1291, 1294(1).

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether CREW — a nonprofit, tax-exempt organization without members that does not engage in electoral activity — has standing under the Constitution and 2 U.S.C. 437g(a)(8) to seek judicial review of the dismissal of its administrative complaint by the Federal Election Commission.

APPLICABLE STATUTES

Relevant provisions of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), codified at 2 U.S.C. 431-455, and other law are reproduced in an addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

CREW appeals the November 14, 2005, final judgment of the United States District Court for the District of Columbia granting summary judgment to the Federal Election Commission ("the Commission" or "FEC") in this suit under 2 U.S.C. 437g(a)(8) seeking judicial review of the Commission's dismissal of an administrative complaint filed by CREW. The district court held that CREW lacks standing to bring the suit (J.A. 58, 60-72). To support its standing claim, CREW had relied on an alleged informational injury: lack of information as to the precise monetary value of a supposed "master contact list" that the president of Americans for Tax Reform, Inc. ("ATR"), gave to the campaign manager for Bush-Cheney '04, the authorized campaign committee for President Bush and Vice President Cheney in their 2004 re-election campaign (J.A. 8-9).

COUNTERSTATEMENT OF THE FACTS

A. The Federal Election Commission and the Act's Administrative Framework

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the FECA. See 2 U.S.C. 437c(b)(1), 437d(e), 437(g). Any person may allege a violation of the FECA by filing a complaint with the Commission. 2 U.S.C. 437g(a)(1). On the basis of the allegations in the administrative complaint and any responses filed by the administrative respondents, the Commission votes on whether there is "reason to believe" that a violation of the Act has occurred. 2 U.S.C. 437g(a)(2). If at least four of the Commission's six members find "reason to believe," the Commission may then conduct an investigation. Id.

After completing the investigation, the Commission may vote on a recommendation by its General Counsel to determine whether there is "probable cause" to believe that a violation of the Act has occurred. 2 U.S.C. 437g(a)(4)(A)(i). If a majority of Commissioners find "probable cause," the Commission may then vote to institute a civil suit to enforce the Act, 2 U.S.C. 437g(a)(6), but only after attempting to reach a voluntary conciliation agreement with the alleged violator. 2 U.S.C. 437g(a)(4)(A)(i). At any point in this administrative process, the Commission may exercise its prosecutorial discretion to dismiss the administrative complaint. FEC v. Akins, 524 U.S. 11, 25 (1998).

If the Commission dismisses the administrative complaint, an "aggrieved" complainant may file a petition seeking judicial review of the Commission's action in the United States District Court for the District of Columbia. 2 U.S.C. 437g(a)(8)(A). If the court declares that the Commission's dismissal of the administrative complaint was "contrary to law," it may order the Commission to conform to the declaration within 30 days. 2 U.S.C. 437g(a)(8)(C). If the

Commission fails to comply with such an order, the complainant may then bring a private civil action against the administrative respondent. Id.

B. CREW

CREW is a nonprofit corporation organized in 2002 under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3) (J.A. 7 ¶6; 92 ¶2). CREW has no members, does not participate in political campaigns, does not contribute to, or otherwise support, political campaigns, and is legally foreclosed from doing so as a section 501(c)(3) entity (J.A. 46-47 ¶¶2-3; 60). A self-styled "good-government watchdog organization" (Br. 17), CREW describes its core mission as "protect[ing] the right of citizens to be informed about the activities of government officials" and ensuring such officials' integrity (J.A. 7 ¶6; J.A. 18 ¶2).

C. The Administrative Proceedings

On February 4, 2004, CREW filed an administrative complaint with the Commission against ATR, Grover Norquist, ATR's president, Bush-Cheney '04, and Ken Mehlman, campaign manager for Bush-Cheney '04 (J.A. 18-23). Relying on a Washington Post news story (J.A. 19 ¶7; 20 ¶8), the administrative complaint alleged that Norquist gave Mehlman a "master contact list" of conservative activists in 37 states. The complaint further asserted that the list was an illegal in-kind contribution "with a substantial market value" to Bush-Cheney '04 (J.A. 20 ¶11).

In particular, CREW alleged (Count One) that the alleged in-kind contribution violated the FECA's ban on corporate contributions to federal campaigns, 2 U.S.C. 441b(a), because Norquist donated the list on behalf of ATR, a nonprofit corporation (J.A. 21 ¶13). In the alternative (Count Two), CREW alleged (J.A. 21 ¶14) that if Norquist donated the list on his own behalf, and not on behalf of ATR, the contribution exceeded the Act's $2,000 limit on

individual contributions. 2 U.S.C. 441a(a)(1)(A). Finally, CREW alleged (Count Three) that Norquist, ATR, and Bush-Cheney '04 violated 2 U.S.C. 434(a)-(b) "by failing to report to the FEC the master contact list as a contribution made and received, respectively, in a federal election" (J.A. 22 ¶15).

CREW "request[ed] that the Federal Election Commission conduct an investigation into these allegations, declare the respondents to have violated the federal campaign finance laws, impose sanctions appropriate to these violations and take such further action as may be appropriate" (J.A. 22). CREW did not specifically request the Commission to require the administrative respondents to report the value of the contact list.

The respondents denied that they had violated the Act. They asserted that the materials Norquist provided to Bush-Cheney '04 were not confidential, could be gathered from publicly available sources (including ATR's website), and were not a "contribution" under the Act because they had no market value (J.A. 84-89).

The Commission's General Counsel asked the administrative respondents to provide the materials in question to the FEC. In response, Bush-Cheney '04 and Mehlman provided what they described as "a copy of the materials" requested by the General Counsel (J.A. 87). ATR and Norquist explained that they "did not keep a copy of the [documentation] in exactly the same form in which [it] was furnished to Mr. Mehlman, because the information is updated regularly" (J.A. 87). However, they provided the General Counsel with some "memoranda" that they believed they had given to Bush-Cheney '04, as well as additional materials from ATR's website (id.). As a result, the General Counsel received two sets of similar, but not identical materials (J.A. 27 n.2).

The materials submitted do not resemble a commercially marketable "mailing list" or even constitute a single list, but are a mixed variety of written documents (J.A. 33 n.13). As summarized by the General Counsel in a report to the Commission, the materials include a map identifying the states in which a "Center-Right Coalition" had held or was scheduled to hold meetings; documents concerning state legislative resolutions supporting President Bush's "national agenda"; a list of the names of state officials who had signed ATR's "Taxpayer Protection Pledge"; an ATR memorandum to Mehlman about a Swedish citizen who wanted "to work for GWB"; and descriptions of Coalition meetings in a number of states and accompanying lists of the names of the attendees and, for some of those attendees, contact information (J.A. 28-29). In his report to the Commission, the General Counsel noted that, of the submitted materials, the descriptions of the "Center-Right Coalition" meetings and the accompanying lists of attendees most closely resemble the "contact list" that CREW referred to in its administrative complaint (J.A. 29-31).

After reviewing the submitted materials and the rest of the file, the General Counsel made several substantive recommendations to the Commission. He recommended (J.A. 34, 36) that the Commission find "reason to believe" that ATR made a prohibited in-kind corporate contribution, that Norquist consented to the contribution, and that Bush-Cheney '04, its treasurer, and its campaign manager accepted the contribution, all in violation of 2 U.S.C. 441b(a). He also recommended (J.A. 34, 36) that the Commission find no "reason to believe" that Norquist made or that Bush-Cheney '04 and its treasurer accepted an excessive individual contribution because it appeared that ATR, rather than Norquist in his individual capacity, donated the materials to Bush-Cheney '04. Finally, the General Counsel recommended (J.A. 35, 36) that the Commission find "reason to believe" that Bush-Cheney '04 and its treasurer violated 2 U.S.C.

434 by failing to report the contribution it received from ATR. The General Counsel noted (J.A. 35) that the Act imposes no corresponding reporting obligation on ATR or Norquist.

Although the General Counsel concluded that the donated materials may have constituted "something of value" subject to the Act's complete ban on corporate contributions, 2 U.S.C. 441b(a) and 431(8)(A)(i), he also concluded that "the materials would seem to constitute only a limited contribution to the [Bush-Cheney '04] Committee" (J.A. 34). (See also J.A.27 ("the contribution appears to be limited in size and impact"); J.A. 36 ("apparently small value of the materials provided")). First, these materials would be of little help in organizing Bush-Cheney '04's conservative base because the individuals and organizations identified in the materials were conservative activists likely to be aware of, and probably already supportive of, the Bush-Cheney campaign (J.A. 35). Second, with minor exceptions, the meeting materials focused on state and local issues and did not discuss Bush-Cheney '04 or the 2004 presidential election (id.). Third, Bush-Cheney '04 already had some of the information that ATR supplied to it, and representatives from the Bush-Cheney campaign actually attended some of the meetings (id.). Finally, to the extent that some of the materials were publicly available on ATR's website, that prior availability limited the value of Norquist's providing them to the campaign (id.). Accordingly, the General Counsel recommended that the Commission dismiss the administrative complaint as a matter of prosecutorial discretion in order to devote the Commission's limited resources to more significant cases (J.A. 36).

On October 19, 2004, the Commission voted to adopt the General Counsel's recommendations (J.A. 90-91). It also voted to close the file and take no further action (id.).[2]

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[2] The General Counsel's Report (J.A. 25-37) serves as the basis for the Commission's decision because the five Commissioners who voted to follow the General Counsel's

The Commission has since posted several documents in this matter on its website, www.fec.gov, including the letters and some of the underlying donated documents that the administrative respondents provided to the Commission.[3]

D. District Court Proceedings

On December 13, 2004, CREW filed the present action seeking judicial review under 2 U.S.C. 437g(a)(8) of the Commission's decision to dismiss the administrative complaint. In its court complaint, CREW explained (J.A. 6 ¶4) that it was seeking an order to compel the FEC to act "[b]ecause the FEC has failed to enforce 2 U.S.C. §§ 441b(a) and 434(b) and impose sanctions." (See also J.A. 5 ¶1.) In that complaint, CREW alleged for the first time that it was seeking "information" and asserted that the Act entitles it to information about the "value" of the so-called "master contact list" (J.A. 7-9, 12). In its answer, the Commission denied subject-matter jurisdiction (J.A. 39 ¶ 5; 44) and subsequently moved for summary judgment on the ground that CREW lacks standing to litigate its claims (J.A. 2, Item 6). CREW submitted only one exhibit in support of its opposition to the motion, a declaration by CREW's Executive Director, Melanie Sloan (J.A. 3, Item 8; J.A. 92-95).

On November 14, 2005, the district court granted the Commission's motion for summary judgment and dismissed the case (J.A. 58-73). CREW, the court held (J.A. 72), "has failed to carry its burden of establishing it has standing to pursue this action under Article III." The court explained that the "injury in fact component of the standing inquiry is often difficult for organizational plaintiffs like CREW to satisfy" (J.A. 67). An organizational plaintiff must show

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recommendation to find reason to believe and to close the file did not issue a separate statement of reasons. See FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 38 n.19 (1981).

[3] To retrieve the public file in this matter from the FEC's website, click on the link for "Enforcement Matters," then click on the link for "Enforcement Query System," and type in the case number, 5409. Alternatively, it is possible to go directly to the FEC's enforcement query system search engine by typing in the URL address http://eqs.sdrdc.com/eqs/searcheqs.

that it "has suffered a 'concrete and demonstrable injury' to its organizational activities" (id.), but "to satisfy the informational standing doctrine, …[such a] plaintiff must show a more targeted, concrete injury than that suffered by CREW" (J.A. 72). Indeed, the court concluded, "there are a multitude of '"reason[s] to doubt" the asserted justification' for the information sought" (J.A. 68 (internal citation omitted)).

First, as a § 501(c)(3) organization "foreclosed from participating in the … political election and campaign process" (J.A. 68), CREW cannot use the information in voting, and that fact by itself, the court stated (id.), distinguishes CREW's suit from FEC v. Akins, 524 U.S. 11 (1998). Moreover, because CREW has no "members who participate in the political process" (J.A. 68), "CREW is really asserting a derivative harm — an alleged inability to help others (participants in the political process) realize that they may have been deprived of information. But … one cannot piggyback [Article III standing] on the injuries of wholly unaffiliated parties" (id. (emphasis in original)). Accordingly, the court concluded (id. at 68-69), "CREW is simply the wrong party to seek redress for the injury that has allegedly been suffered."

Second, regardless of the list's precise value, the public already knows that an "illegal in-kind contribution took place," that the list included contact information about conservative activists, that the Commission found the list's value to be small, and that individuals associated with ATR and the Bush-Cheney campaign were involved in the transaction (J.A. 69). In these circumstances, the court was "not convinced that the precise dollar value of the list is 'useful in voting' at all, even to the participants in the political process" (id. (emphasis in original)).

Third, the court noted that, even if CREW were entitled to have the FEC obtain a monetary value of the list from the administrative respondents, "this has already been done. … [They] have stated that the list has a dollar value of zero" (J.A. 69). The court found it pointless

to "require the FEC to go through the motions of a process that has already been completed when doing so would yield no new or useful information" (J.A. 70). This case rests ultimately, the court found (id.), on the fact that "CREW disagrees with the FEC's determination that the list has 'limited' value." However, the court held (id.), "this mere difference of opinion is insufficient, without more, to confer standing under Article III."

Fourth, in its proposed remedy, CREW did "not seek to know the precise dollar value of the list. Rather, it wants the FEC to hold the administrative [respondents] accountable" for their alleged violations (J.A. 71). "Hence, CREW stands in the shoes of the Common Cause plaintiff — it desires to do no more than 'get the bad guys'" (id., citing Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997)). However, the court stated, "[i]t is axiomatic that standing cannot rest on a plaintiff's alleged interest in having the law enforced" (J.A. 70-71).

Fifth, the court found (J.A. 71) that CREW "has never specified any programmatic concerns that have been concretely and directly impacted adversely by the FEC's actions." Rather, "[e]ssentially, CREW has only articulated a 'setback to [its] … abstract social interests," which is not sufficient under Article III (J.A. 72, quoting Common Cause, 108 F.3d at 417).

Finally, the court rejected as "legally infirm" (J.A. 72) the allegation by CREW that its resources have been drained by its litigation to pursue the value of the contact list. "[B]ootstrapped harms do not suffice to establish standing" (id.).

SUMMARY OF ARGUMENT

As the district court held, CREW lacks Article III standing to seek judicial review of the dismissal of its administrative complaint by the Commission. See 2 U.S.C. 437g(a)(8). CREW's asserted basis for standing is an alleged informational injury stemming from the Commission's dismissing the complaint without requiring Bush-Cheney '04 formally to report,

as an in-kind contribution, the precise monetary value of a so-called "master contact list" of conservative activists that the campaign received from ATR president Norquist. However, suing on its own behalf, CREW has provided no evidence to meet its burden of demonstrating how the Commission's action has caused it any direct and concrete informational injury.

To demonstrate organizational standing under Article III, CREW must present evidence that its "discrete programmatic concerns are being directly and adversely affected" by the lack of the precise monetary value of the contact list. Common Cause v. FEC, 108 F.3d 413, 417 (D.C. Cir. 1997). However, CREW did not even allege or describe any discrete programmatic activities in which it was engaged when it filed suit. In addition, although it claims to have a mission of exposing unethical and illegal conduct and empowering citizens, these kinds of abstract and vague social goals are legally insufficient to ground standing.

CREW's administrative complaint is indistinguishable from the one in Common Cause, where this Court found a nominal allegation of reporting violations to be insufficient to establish Article III standing. In fact, in the administrative proceedings before the Commission, CREW never even requested that the monetary value of the contact list be disclosed. Rather, it simply sought a declaration from the Commission that Bush-Cheney '04 and the other administrative respondents violated the law, and asked the Commission to impose sanctions against them. This desire to "get the bad guys" is simply insufficient to establish constitutional standing. Common Cause, 108 F.3d at 418.

Although CREW asserts that FEC v. Akins, 524 U.S. 11 (1998), implicitly overturns Common Cause, those two decisions, as well as this Court's en banc decision in Akins, actually share the same view of informational standing for plaintiffs suing under 2 U.S.C. 437g(a)(8). All three decisions state that voters have informational standing where they can show that the

information sought is useful to them in voting and required by statute to be disclosed. Moreover, this Court has continued after Akins to rely upon Common Cause as precedent.

Even if CREW's request for relief in its administrative complaint had included more than a nominal reference to reporting violations, CREW cannot show that the information it belatedly seeks is useful in voting or in furthering its alleged mission. As a tax-exempt 501(c)(3) corporation, CREW cannot participate in partisan politics, and it has no members. CREW offers only conclusory assertions that the precise market value of the contact list would be of any use to the voting public, especially since President Bush is constitutionally barred from seeking a third term, Vice President Cheney has publicly stated that he will not run for the presidency (or any other office), and CREW already has a great deal of information about ATR's donation of the list to Bush-Cheney '04 and the role of ATR and Norquist in conservative politics.

In any event, CREW already has the information it proclaims to seek — and then some. In response to CREW's administrative complaint, Bush-Cheney '04 and the other administrative respondents expressed their view that the "contact list" — which is really a compilation of meeting materials, including the names and contact information for some attendees — had no market value because much of the information in it was publicly available. During the administrative proceedings, the Commission, through its General Counsel's Report, categorized and summarized the underlying documents and assessed the value of the list as "limited." CREW now has access to many of the underlying documents and to those assessments, and this information about the list is far more than Bush-Cheney '04 ever would have been required under the Act to report to the FEC. Although CREW disagrees with Bush-Cheney '04's assessment and characterizes the list's value as "substantial," this disagreement only highlights

the fact that CREW has not suffered an informational injury, since it obviously has enough information to form an opinion about the list's value.

CREW also lacks prudential standing, a requirement that the Supreme Court in Akins did not eliminate in cases under 2 U.S.C. 437g(a)(8). CREW's organizational mission falls outside the "zone of interests" that section 437g(a)(8) was intended to protect or regulate. Moreover, CREW has no members and cannot achieve prudential standing by seeking to vindicate the alleged interests of the general public or unidentified voters or other persons whose interests might come within the zone of interests.

ARGUMENT

I. CREW LACKS ARTICLE III STANDING TO SEEK JUDICIAL REVIEW OF THE DISMISSAL OF ITS ADMINISTRATIVE COMPLAINT

A. Standard of Review

This Court reviews the district court's grant of summary judgment for lack of standing de novo, applying the same standard the district court did. Navegar, Inc. v. United States, 103 F.3d 994, 997 (D.C. Cir. 1997); Tao v. Freeh, 27 F.3d 635, 638 (D.C. Cir. 1994). Consequently, although this Court must give CREW the benefit of all favorable inferences from the evidence, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), the Court must also find that summary judgment was appropriate if CREW failed to offer "evidence on which the jury could reasonably find for [it]." Id. at 252. See also id. at 249-50. Accord, e.g., Holbrook v. Reno, 196 F.3d 255, 259-60 (D.C. Cir. 1999). In contrast, the FEC needs only to point to the absence of probative evidence proffered by CREW to satisfy its burden to demonstrate standing. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

B. The Legal Requirements to Demonstrate Article III Standing

Because the federal courts "presume that … [they] lack jurisdiction unless the contrary appears affirmatively from the record, … the party asserting federal jurisdiction when it is challenged has the burden of establishing it." DaimlerChrysler Corp. v. Cuno, 126 S.Ct. 1854, 1861 n.3 (2006) (internal quotation marks and citation omitted). "Section 437g(a)(8) does not confer standing; it confers a right to sue upon parties who otherwise already have standing." Common Cause, 108 F.3d 413, 419 (D.C. Cir. 1997). Therefore, as the party invoking federal jurisdiction, CREW is required to show that it satisfies the three elements that constitute the "irreducible constitutional minimum" required for standing: an injury in fact that is (1) "concrete," "distinct and palpable," and "actual or imminent"; (2) fairly traceable to the Commission's dismissal of its administrative complaint and not to the actions of a third party; and (3) "substantial[ly] likel[y]" to be redressed by the requested relief. McConnell v. FEC, 540 U.S. 93, 225-26 (2003) (internal quotation marks and citation omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

The elements of standing are not "mere pleading requirements but rather an indispensable part of the plaintiff's case" that must be supported with the same manner and degree of evidence required to prove the merits of the plaintiff's claims at each successive stage of litigation. Lujan, 504 U.S. at 561. Because the Commission moved for summary judgment, CREW could not rely simply on "general factual allegations of injury" in the district court. Id. Instead, to support its jurisdictional allegations, CREW had to produce evidence of "specific facts" demonstrating that it indeed satisfied the requirements for Article III standing. Id.

C. CREW Has Not Suffered an Injury In Fact

1. CREW Cannot Satisfy the Article III Requirements for Organizational Standing

Organizations may demonstrate Article III standing on two different grounds. First, 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. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). Second, an organization may sue on its own behalf. As this Court held in Common Cause,

> In those cases where an organization is suing 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.... Indeed, [t]he organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action."

108 F.3d at 417 (quoting National Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1433 (D.C. Cir. 1995)). See also Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (requirements for organizational standing); Association of Community Orgs. for Reform Now v. Fowler, 178 F.3d 350, 360-62 (5th Cir. 1999) (relying in part on D.C. Circuit law).

Because CREW has no members and is not a trade association, it cannot demonstrate standing in any representative or associational capacity. CREW is suing on its own behalf and is required, therefore, to demonstrate that its "discrete programmatic concerns are being directly and adversely affected by" the dismissal of its administrative complaint. Common Cause, 108 F.3d at 417. As explained below, because CREW cannot show that its not obtaining

another, more specific value of the donated list satisfies that requirement, this failure by itself suffices to defeat CREW's claim to have standing.[4]

a. CREW Cannot Show that Its Programmatic Activities Are Directly and Adversely Affected by the FEC's Action

CREW is not a voter, candidate, or political committee. Rather, it is a nonprofit organization with no members (J.A. 47 ¶3; 53 ¶3; 60). In its court complaint, CREW alleged that it "is committed to the protection of the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials" (J.A. 7 ¶6). CREW "seeks to expose unethical and illegal conduct of those involved in government" (id. at ¶7). CREW allegedly pursues this vague and abstract "mission" through "a combination of research, litigation, advocacy, and public education" (id. at ¶6). CREW has not refined this very general list of methods it allegedly uses nor has it given examples to flesh out the list, except to assert that the organization files complaints with the Commission and publicizes the results (id. at ¶7).

In particular, CREW did not identify in either its court complaint or the declaration of its Executive Director a single discrete programmatic activity in which it was engaged when it filed suit, the crucial time for determining standing. See Lujan, 504 U.S. at 571 n.4. Executive

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[4] No court that has analyzed the Article III standing of a nonprofit organization such as CREW has found that the organization has standing to bring suit under section 437g(a)(8). See Judicial Watch v. FEC ("Judicial Watch I"), 180 F.3d 277, 278 (D.C. Cir. 1999); Common Cause, 108 F.3d at 418; Alliance for Democracy v. FEC ("Alliance I"), 335 F.Supp.2d 39, 47-48 (D.D.C. 2004); Alliance for Democracy v. FEC ("Alliance II"), 362 F.Supp.2d 138, 145 (D.D.C. 2005); Judicial Watch v. FEC ("Judicial Watch II"), 293 F.Supp.2d 41, 45-48 (D.D.C. 2003). In cases where standing has been found, the plaintiffs were either voters or political actors who had a direct stake in federal elections. See, e.g., FEC v. Akins, 524 U.S. 11, 15 (1998) (suit brought by "a group of voters"); Buchanan v. FEC, 112 F. Supp.2d 58, 60 & n.1 (D.D.C. 2000) (suit brought by presidential candidate, his campaign committee, the Reform Party, and two registered voters); Natural Law Party of the United States v. FEC, 111 F. Supp.2d 33, 36 (D.D.C. 2000) (suit brought by the Natural Law Party and its 1996 presidential and vice-presidential candidates).

Director Sloan's declaration — the only evidence CREW submitted to the district court — offers only abstract generalities without specifying any public education and outreach activities the Commission's actions might have hindered. (See, e.g., J.A. 93 ¶3.) Indeed, Sloan does not even state that CREW has publicized or plans to publicize the abundant information it has already received from the Commission about the contact list transaction. Cf. Ethyl Corp. v. EPA, 306 F.3d 1144, 1148 (D.C. Cir. 2002) (plaintiff had standing to sue where it provided a "fairly detailed description of how the information … would prove useful to it").[5]

Although CREW cannot as a matter of law establish its standing by relying upon facts presented only in its briefs and argument, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 235 (1990), its brief before this Court also contains no description whatsoever of any concrete programs or activities. Rather, CREW's brief relies upon conclusory generalities about the organization's mission and goals. It argues, for example, that its "purpose in seeking public disclosure of the value of the contribution" is "[t]o advance its mission as a good-government watchdog organization," and that it "believes this kind of information would assist the public to understand the role and influence of entities and individuals like ATR and Grover Norquist on President Bush and his policies" (CREW Br. 17). Thus, by providing no evidence at all about any programs or daily operations, CREW has not even attempted to show that the alleged lack of

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[5] Although CREW "denies that it does not systematically collect or disseminate campaign finance data or literature" (J.A. 53 ¶5) (Plaintiff's Response to FEC's Statement of Material Facts (citing Sloan Decl. ¶7 (J.A. 94 ¶7)), Sloan's two proffered examples of such activity hardly qualify as routine or programmatic. To the contrary, they show that CREW has engaged in such activity only sporadically in the form of special reports. Moreover, CREW filed its complaint in this case months before it initiated the two special projects identified by Sloan (J.A. 94 ¶7). Because, as noted above, federal jurisdiction ordinarily depends on the facts "as they exist when the complaint is filed," Lujan, 504 U.S. at 571 n.4 (internal quotation marks and citation omitted), CREW may not rely on those activities to support its standing to seek judicial review of the Commission's dismissal. As far as the record shows, when CREW filed this suit it had never produced a public report of the sort mentioned by Sloan.

information about the value of the list has "directly and adversely affected" any "discrete programmatic concerns." Common Cause, 108 F.3d at 417. See also Akins v. FEC, 101 F.3d 731, 735 (D.C. Cir. 1996) (en banc) ("impinge[s] on [its] daily operations or make[s] normal operations infeasible"), vacated on other grounds, 524 U.S. 11 (1998). Cf. Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (plaintiff organization had standing to sue where "routine information-dispensing, counseling, and referral activities," carried out as part of its "daily operations," were inhibited), vacated and remanded on other grounds, 494 U.S. 1001 (1990).[6]

In sum, CREW has utterly failed to provide evidence of any "discrete programmatic concerns," let alone demonstrate that they are being directly and adversely affected by the organization's purported lack of information about the precise monetary value of the "master contact list." This failure by itself suffices to show that CREW cannot demonstrate it has Article III standing.

b. CREW Cannot Ground Its Organizational Standing on Vague Allegations of Harm to Its Abstract Social Interests

Having failed to show that it engages in discrete programmatic activities that are stymied by the lack of a precise value of the "master contact list," CREW is left at best with vague

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[6] The complaint also alleges that "CREW's resources have been drained by the denial of the information" because "CREW has expended both time and money in attempting to learn the value of the list" (J.A. 7 ¶9). CREW has abandoned this allegation by not addressing it in its appellate brief. Moreover, CREW has not alleged or provided evidence that it expended any resources to learn more about the list other than whatever expenses it has incurred to file its administrative complaint and pursue this litigation. "An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit." National Taxpayers Union, 68 F.3d at 1434 (internal quotation marks and citation omitted). In addition, CREW conceded in the district court that the Commission's dismissal of the administrative complaint has not hindered CREW's ability to file such complaints (J.A. 3, Item 8, at 18 ("CREW is not alleging … that it has been 'hindered in filing administrative complaints.'")).

allegations of harm to its abstract policy interests in "empowering citizens," "inform[ing] them about the activities of government officials," and "ensuring the integrity of government officials" (J.A. 7 ¶6). As a matter of law, these abstract social policy interests are insufficient to support standing. See, e.g., Lujan, 504 U.S. at 573-77; Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 (1976) ("an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III"); Common Cause, 108 F.3d at 417; Becker v. FEC, 230 F.3d 381, 389 (1st Cir. 2000) ("the harm done to the general public by corruption of the political process is not a sufficiently concrete, personalized injury to establish standing").

Even if harm to CREW's abstract interests were a constitutionally sufficient injury, CREW has failed to show how information about the precise value of the list would help it "empower citizens" or "ensure the integrity of government officials." In light of the information already available to the public about the transaction between ATR and Bush-Cheney '04, see infra pp.28-29, the bald assertion that requiring Bush-Cheney '04 to provide another, different estimation of the list's monetary value would make any difference in accomplishing those goals is simply not credible.

2. Under Common Cause, the Denial of CREW's Nominal Request for Information in Its Administrative Complaint Cannot Establish an Injury In Fact

In its prayer for relief in its administrative complaint, CREW did not ask for information regarding the value of the documents ATR gave to Bush-Cheney '04 — information that it now claims is its central objective. Rather, CREW simply (J.A. 22)

> request[ed] that the Federal Election Commission conduct an investigation into these allegations, declare the respondents to have violated the federal campaign finance laws, impose sanctions appropriate to these violations and take such further action as may be appropriate.

On its face, CREW's prayer for relief asks the FEC to declare a violation of law and punish the administrative respondents, not obtain information from them. Thus, CREW's administrative complaint is indistinguishable from the administrative complaint this Court addressed in Common Cause, and the same result is required here.

Common Cause is a nonprofit, nonpartisan "good government" organization similar to CREW.[7] And like CREW, Common Cause alleged in its administrative complaint to the Commission (J.A. 98 ¶7) a reporting violation under 2 U.S.C. 434 that was derivative of Common Cause's "primar[y]" allegations concerning excessive contributions and expenditures. Common Cause, 108 F.3d at 418. The very first sentence of Common Cause's administrative complaint read (J.A. 96 ¶1 (emphasis added)):

> This Complaint charges that the National Republican Senatorial Committee ("NRSC") has knowingly and willfully violated the Federal Election Campaign Act, 2 U.S.C. § 431, et seq., as amended ("FECA"), by making contributions and expenditures in connection with the 1998 Montana U.S. Senate campaign of Conrad Burns in excess of the NRSC's contribution and expenditure limits, and by failing to report those contributions and expenditures accurately[.]

Although Common Cause expressly alleged that the respondents failed to report "accurately" the contributions alleged in that case, and included additional paragraphs dealing with this alleged reporting violation in its administrative complaint (e.g., J.A. 98 ¶7; 103 ¶20; 106 ¶26; 107

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[7] The stated purposes of these two organizations are strikingly similar. "Common Cause promotes … open, honest, and effective government and political representation" (J.A. 97 ¶2). It "seeks to … mak[e] government more responsive to the needs and demands of citizens." Id. CREW is committed to "ensuring the integrity of government officials" and "dedicated to empowering citizens to have an influential voice in government decisions and in the governmental decision making process" (J.A. 7 ¶ 6).

¶¶ 27-29), this Court held that Common Cause's reporting allegation was "nominal" and insufficient to support standing. Common Cause, 108 F.3d at 418. "More importantly," according to the Court,

> [t]he relief requested by Common Cause consisted entirely of the investigation and imposition of monetary penalties .... In other words, what Common Cause desire[d] [was] for the Commission to "get the bad guys," rather than disclose information.

Id. Thus, this Court held that "Common Cause ha[d] no standing to sue for such relief." Id.

As the district court here concluded (J.A. 71-72), Common Cause controls this case, for CREW's administrative complaint (J.A. 22 ¶15) was even less focused on obtaining the precise value of the allegedly unlawful contribution than was Common Cause's complaint. In fact, CREW did not state any interest in obtaining information about the monetary value of the list until CREW filed its court complaint. Even in the district court, CREW indicated that its real interests do not lie in learning the value of the list. As the district court noted,

> Tellingly, CREW's counsel conceded at the summary judgment hearing that CREW would still have filed this lawsuit even if the FEC had provided a ballpark dollar figure for the list's value. This is consistent with CREW's approach at the administrative level, as CREW's administrative complaint never requested the release of the information for which it now claims an urgent need.

(J.A. 70; see also id. at 71 n.3.)[8]

In sum, the real focus of CREW's administrative complaint was on punishing the respondents, not gaining new information about the monetary value of the list contributed by ATR to Bush-Cheney '04. However, CREW's interest in obtaining sanctions against the administrative respondents for their alleged violations of the Act is, like Common Cause's

[8] The transcript of the summary judgment hearing is part of the district court record (J.A. 4, Item 13).

identical interest, precisely the sort of general "interest in the enforcement of the law" that does not support standing to sue under section 437g(a)(8). Common Cause, 108 F.3d at 418.

3. Common Cause Is Consistent with Akins and Remains the Law of This Circuit

Apparently recognizing the inadequacy of its attempt to distinguish Common Cause from this case, CREW asks this Court (Br. 22-24) to overrule that decision. The Court, however, "is bound to follow circuit precedent until it is overruled either by an en banc court or the Supreme Court." Maxwell v. Snow, 409 F.3d 354, 358 (D.C. Cir. 2005). Although CREW asserts (Br. 22) that the Supreme Court's decision in Akins implicitly overturns Common Cause, the Supreme Court in Akins and this Court in Akins and Common Cause actually shared the same view of standing. Accordingly, Common Cause remains the law of this Circuit.

CREW points out (Br. 22) that this Court decided Common Cause before the Supreme Court issued its opinion in Akins. But this Court decided Common Cause after its en banc decision in Akins, which was vacated on other grounds not relevant here and which reached the same conclusion about standing as the Supreme Court later did. See infra p.23. Indeed, Common Cause discusses and follows the en banc Akins decision. 108 F.3d at 417-18. Equally as important, this Court has continued to cite Common Cause as D.C. Circuit precedent after the Supreme Court ruled in Akins — including on the very point at issue here. See, e.g., Judicial Watch, Inc. v. FEC, 180 F.3d 277, 278 (D.C. Cir. 1999) ("Where the plaintiff's complaint only nominally alleged a reporting violation, we concluded that what the plaintiff desired was 'for the Commission to "get the bad guys," rather than disclose information'") (quoting Common Cause, 108 F.3d at 418).

Although Akins recognized "informational injury" as a basis for Article III standing in a suit brought under section 437g(a)(8), the decision includes a lengthy discussion about the

information that was allegedly withheld, the plaintiffs' interest in that information, and the nature of the alleged injury. See 524 U.S. at 21-25. Specifically, the Court explained that the plaintiffs in Akins were a group of registered voters who asserted that the American Israel Public Affairs Committee ("AIPAC") — an organization whose views the plaintiffs had long opposed — should be required to register and report as a political committee. See 524 U.S. at 15-16. AIPAC's failure to do so denied the plaintiffs access to any of the information about the organization's receipts and disbursements that political committees must disclose, pursuant to 2 U.S.C. 434. Without such disclosure, the Akins plaintiffs, as voters, had no way to determine which candidates were supported by AIPAC and to what extent. See 524 U.S. at 16, 20-21; see also Akins, 101 F.3d 733-34, 737-38. That factual context led the Court to conclude (524 U.S. at 21) that "[t]here is no reason to doubt [plaintiffs'] claim 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." The Court then held that, because there was "no reason to doubt" the usefulness of this information to those plaintiffs, "consequently" the plaintiffs had suffered a concrete and particularized injury. 524 U.S. at 21 (emphasis added). See also id. at 24-25 ("the informational injury … here, directly related to voting, … is sufficiently concrete and specific").[9]

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[9] Similarly, this Court en banc in Akins stated:

> Congress clearly intended voters to have access to the information political committees were obliged to report. The whole theory of the statute is that voters are benefited insofar as they can determine who is contributing what to whom. … [W]e conclude that appellants have standing as affected [registered] voters.

101 F.3d at 737, 738 (first two emphases added).

Thus, the requirement in Common Cause that a plaintiff suing under 2 U.S.C. 437g(a)(8) must show that the information it seeks "is both useful in voting and required by Congress to be disclosed," 108 F.3d at 418 (emphasis added), is entirely consistent with the rationale stated by the Supreme Court for its standing decision in Akins. See also Becker, 230 F.3d at 389 ("what was important [about Akins] was that voters had been denied access to information that would have helped them evaluate candidates for office"); Judicial Watch II, 293 F.Supp.2d at 47 n.10. While CREW wants this Court to ignore the rationale for the Supreme Court's holding in Akins, that rationale is as binding on lower courts as is the holding itself. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound"). Accordingly, Common Cause still represents the law of the D.C. Circuit.

CREW's claim (Br. 23) that Akins requires courts to "take at face value" every self-serving assertion by a plaintiff that "information would be helpful" to it in some vague or unproven way would render the Supreme Court's entire discussion about the plaintiffs and the information at stake in Akins entirely superfluous. According to CREW's argument, Akins essentially held that any plaintiff who alleges a violation of the Act that involves even a derivative reporting violation would automatically have Article III standing if the Commission has dismissed that plaintiff's administrative complaint. That reasoning is nowhere to be found in the Supreme Court's actual analysis of the Akins plaintiffs' standing. Moreover, it is also directly at odds with the Court's explicit statement that its holding that the Akins plaintiffs had a concrete and particular injury was based upon ("consequently") the factual conclusion that there

was no reason to doubt the usefulness of the information for those voter plaintiffs.[10] Here, in striking contrast, as the district court found (J.A. 68) and as we show in this brief, the vague and abstract assertions offered by CREW give every reason to doubt that the additional information CREW belatedly seeks would be of any real use in the organization's programmatic activities.

For the same reason, CREW's reliance upon Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989), and later cases following its holding is misplaced. Public Citizen explained that under the Freedom of Information Act ("FOIA") and the Federal Advisory Committee Act — statutes very different from 2 U.S.C. 437g(a)(8) — a plaintiff can demonstrate standing without having to show more than that it "sought and w[as] denied specific agency records," 491 U.S. at 449. In contrast, the Supreme Court in Akins found standing under the FECA only after the Court was satisfied that the information at issue would be helpful to the plaintiffs in connection with voting. Moreover, unlike the statutes discussed in Public Citizen, section 437g(a)(8) does not provide any person with a direct right to seek agency records. Rather, it provides an "unusual statutory" right (Akins, 101 F.3d at 734) to seek judicial review, under an abuse-of-discretion standard, of whether the FEC acted contrary to law when it exercised its prosecutorial discretion to dismiss an administrative complaint. Thus, the right Congress created in 2 U.S.C. 437g(a)(8) to bring a federal court action was primarily designed to

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[10] To support its reading of Akins, CREW also relies (Br. 15-16) on American Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536 (6th Cir. 2004). In that case, however, the Sixth Circuit acknowledged that "Akins seems to require some additional 'plus' to make an informational injury cognizable in the federal courts." Id. at 545. But American Canoe also reveals some confusion about Akins, for the Sixth Circuit panel suggested another reading of Akins, one that viewed the Supreme Court as not "firm[ly] requir[ing]" that "a plaintiff must adequately allege more than the withholding of the required information from the citizenry." Id. at 545. Nonetheless, the panel seems ultimately to have based its decision on its "additional 'plus'" interpretation of Akins; it explained that "some additional 'plus' … requirement … [was] easily met in … [the American Canoe] case." Id. at 546. In any event, of course, the reasoning of the Sixth Circuit is not binding on this Court.

allow for limited judicial oversight of the Commission's decisions to decline to prosecute, rather than a direct mechanism for persons to obtain information from the agency's own records, as FOIA, for example, provides.

Finally, even if CREW were correct that Akins requires only a minimal showing of the "usefulness" of the information sought, nothing in Akins could possibly be read to undermine the portion of Common Cause that addresses the requirement, discussed supra pp. 16-18, that organizations like CREW must show a concrete injury to their routine operations.[11] The Akins plaintiffs were individuals, not organizations. Thus, even if it were assumed that the precise monetary value of ATR's donation could be useful in some way to CREW's mission, CREW would still have to demonstrate how it has suffered a programmatic injury in fact.[12]

4. CREW Cannot Demonstrate that the Information It Seeks Is Useful in Voting or in Furthering Its Broad Social Goals

Even if CREW's request for information had been more than nominal, CREW cannot show that the information it seeks is useful in voting or in furthering its alleged mission. CREW is the only plaintiff here, is a section 501(c)(3) corporation, and can neither vote nor otherwise

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[11] Programmatic injury was crucial to the standing of a nonprofit organization that survived a motion to dismiss in Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982), a racial steering case decided under the Fair Housing Act. The Court's analysis focused not on any alleged informational injury to the organization, but on its sufficient allegations of concrete injury to its "ability to provide counseling and referral services for … homeseekers … with [a] consequent drain on the organization's resources." 455 U.S. at 379. See Rainbow/PUSH Coalition v. FCC, 396 F.3d 1235, 1240-41 (D.C. Cir. 2005) (discussing Havens Realty, 455 U.S. at 379). Because CREW has not shown that it has any programmatic activities that are frustrated by its not knowing the precise value of the documents ATR gave Bush-Cheney '04, CREW is not in the same position as the nonprofit organization in Havens Realty was. See Rainbow/PUSH Coalition, 396 F.3d at 1241 (distinguishing Havens on this basis).

[12] Even American Canoe, upon which CREW relies, applied the programmatic injury requirement and explained that the lack of information sought by the plaintiffs "stymied" their "operations … to the extent that they can no longer honor their own monitoring and reporting obligations to their members." 389 F.3d at 546. As explained above, however, CREW has no members and has not even tried to describe any of its own programs or how they have been affected by a lack of the precise monetary value of ATR's donation.

engage in partisan politics. See 26 U.S.C. 501(c)(3); Association of the Bar of the City of New York v. Commissioner of Internal Revenue, 858 F.2d 876, 881 (2d Cir. 1988). It also has no members, so it cannot claim to seek information that would be useful to such individuals in voting. Instead, CREW argues (Br. 11, 16-17) only that it is enough that "its mission as a good-government watchdog organization" includes "educating and empowering the public," both during the electoral process and afterwards (Br. 17-18). (See also J.A. 93 ¶5 (Sloan Decl.).)[13]

An abstract and undifferentiated public interest in the monetary value of the documents ATR contributed to the Bush-Cheney campaign, such as CREW asserts, would be the sort of "generalized grievance" that is insufficient to support standing. In Akins, the Supreme Court found the plaintiffs' alleged injury to be "sufficiently concrete and specific" to support standing because the plaintiffs were voters and their alleged informational injury was "directly related to voting, the most basic of political rights." 524 U.S. at 24-25. Because CREW is not a voter and cannot support or oppose electoral candidates (see supra pp.4, 26), it cannot claim that it has a concrete political use for the information like that of the Akins plaintiffs.

In any event, CREW has offered only conclusory assertions that the precise monetary value of the contact list would be of any use to the voting public. The 2004 presidential election

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[13] A few lower-court judges have found Akins applicable to the informational interest not only of voters, as the Supreme Court found, but of other political actors. See supra n.4 and Kean for Congress Comm. v. FEC, 398 F.Supp.2d 26 (D.D.C. 2005) (Bates, J.) (campaign committee of unsuccessful former congressional candidate held to have informational standing under Akins to litigate section 437g(a)(8) wrongful dismissal action). But, as Judge Bates explained in the present case, "[t]he common thread" among parties held to have standing under that theory is that they "are participants in the political election and campaign process" (J.A. 68). Although the district court correctly found (id.) that its decision in Kean is readily distinguishable from CREW's case, in our view Kean was wrongly decided. The court should have found that the Kean for Congress Committee lacked standing because there was ample "reason to doubt" its claim that the information it sought about an independent advocacy group would be of continuing political use to it: The committee was the sole plaintiff, and it was debt-ridden, inactive politically, and limited by law to functioning only as the candidate's authorized committee for a past primary election that ended years before the litigation was initiated.

is long over, and President Bush — the only candidate whose campaign committee is implicated by CREW's charges — is constitutionally barred from seeking a third term. See U.S. CONST. amend. XXII. In addition, Vice President Cheney has publicly stated that he will not run for the presidency. See, e.g., Transcript of Fox News Sunday (Feb. 7, 2005), available at http://www.foxnews.com/ story/0,2933,146546,00.html. Furthermore, the monetary value of the contact list would not be helpful to the public in voting for candidates for Congress since none were involved in the list's transfer between ATR and the Bush campaign. See Alliance for Democracy v. FEC ("Alliance I"), 335 F.Supp.2d 39, 48 (D.D.C. 2004) (action under 2 U.S.C. 437g(a)(8) dismissed for lack of standing because the plaintiffs "failed to show how information about the precise value of a mailing list … could have a concrete effect on plaintiffs' voting in future elections involving different candidates"); Alliance for Democracy v. FEC ("Alliance II"), 362 F.Supp.2d 138, 144-45 (D.D.C. 2005) (same).

Even if the precise value of the contact list were relevant to CREW's purported goal of assisting the public in "evaluat[ing] the role of ATR and Grover Norquist on President Bush and his policies" (Br. 16; J.A. 93 ¶5), the Commission has already disclosed so much about ATR's contribution that another appraisal of the list's value would be of trivial import at best. For example, when CREW filed its court complaint, it claimed it already knew from various sources, including the General Counsel's Report, the following:

1. Norquist is "actively involved in creating a conservative grass roots movement," and he met personally with Ken Mehlman, the campaign manager for Bush-Cheney '04 (J.A. 18 ¶3; 19 ¶7). ATR also seeks to "advance the conservative agenda" (J.A. 19 ¶4).

2. When Norquist met with Mehlman, he gave Mehlman various materials, including (a) a memorandum identifying many attendees at "Center-Right Coalition" meetings in more than 30 states, and (b) descriptions of Coalition meetings in 22 states and, in most cases, lists of attendees (J.A. 9 ¶¶17-18; 20 ¶9; 28).

3. Norquist assisted in organizing these state coalitions, and holds his own weekly strategy sessions with conservative activists that include senior Republican leaders (J.A. 19 ¶4).

4. The state Coalition meetings organized by Norquist are typically attended by individuals from an array of business, social, and political groups, representing taxpayers, gun owners, social conservatives, college republicans, non-union contractors, the Republican Party, and elected officials (J.A. 29). Representatives from Bush-Cheney '04 attended some of these state coalition meetings (J.A. 29; 85).

Thus, partly as a result of the Commission's administrative proceeding, CREW now has far more information concerning the contact list than Bush-Cheney '04 ever would have been required to provide on a single line of a disclosure report to the Commission.[14] During the course of the administrative proceedings, Bush-Cheney '04 not only provided its view of the value of the contact list, but also produced the actual meeting materials that comprised this "contact list" to the Commission. These raw documents are categorized and described in the General Counsel's Report (J.A. 28-31), and some of them are even reproduced on the FEC's website.[15] This information is more than sufficient to inform the public that ATR and Norquist have supported President Bush and his policies, and specifically how they have supported him. CREW has never been able to explain how requiring the Bush-Cheney campaign to provide a different estimate, or to itemize the contribution on an FEC disclosure report, in addition to the General Counsel's discussion of the contribution in his Report, would serve any useful purpose

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[14] The FECA's reporting requirements only direct candidates to report the "amount" of contributions, not to provide copies of underlying documents that have value as in-kind contributions, such as the materials at issue here. See 2 U.S.C. 434(b). It now appears to be undisputed that the Act does not require Norquist or ATR to file any disclosure report of the transaction because "no reporting obligation under the Act attaches to persons making political contributions, unless those persons are political committees." (J.A. 35 (citing 2 U.S.C. 434).)

[15] The Commission is precluded by law and its own published statement of policy from placing on the public record all of the materials that the administrative respondents submitted to it. See AFL-CIO v. FEC, 333 F.3d 168 (D.C. Cir. 2003); Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426-27 (2003).

for the voting public, much less for CREW's own organizational activities. See Wertheimer v. FEC, 268 F.3d 1070, 1075 (D.C. Cir. 2001) (nonprofit organizations lacked informational standing because, inter alia, they "only seek the same information from a different source"); Alliance II, 362 F.Supp.2d at 145 ("The information available to the plaintiffs far exceeds what would normally be reported by political committees that transfer mailing lists.").

5. CREW Already Has the Information It Claims to Lack, and the "Contact List" Lends Itself to No Precise Monetary Appraisal

CREW also has failed to allege an Article III injury because it already possesses the information it claims to lack. See Alliance I, 335 F.Supp.2d at 48. CREW already knows that the administrative respondents believe the contact list has no monetary value and that the Commission found it has only "limited" value.[16] J.A. 27, 34. Thus, CREW has already been provided with both the respondents' and the Commission's appraisal of the contact list.[17]

Instead of seeking additional factual information regarding something it does not know, CREW is essentially asking for an administrative and judicial declaration of what it already believes — that the list had "substantial market value" (J.A. 20 ¶11). However, CREW's mere disagreement with these appraisals does not give it standing to sue the Commission to seek a different appraisal. See Diamond v. Charles, 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). And to the extent CREW is seeking to have the Court determine the value of

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[16] The Commission is under no legal obligation to provide its own appraisal of the list. See Alliance II, 362 F.Supp.2d at 145 ("[T]he FECA does not require the FEC to determine the 'monetary value of the mailing list.' … [R]equiring the FEC to quantify the value of the list would place an obligation on the FEC beyond what is required by the FECA."). Furthermore, because 2 U.S.C. 441b(a) prohibits corporate contributions of any size, the Commission had no need to determine the precise value of the list to find "reason to believe" that the FECA was violated.

[17] Contrary to CREW's assertion (Br. 19), the district court did not assess the list's value. Rather, the court only discussed the appraisals by the respondents and the Commission.

the list and order the Commission to order the respondents to report that value, then CREW is not really seeking information, but only what it considers the proper enforcement of the law, which is not a basis for Article III standing. See Lujan, 504 U.S. at 573-74. See also Wertheimer, 268 F.3d at 1074-75 (informational injury will not be found if plaintiff cannot show that the legal ruling sought "might lead to additional factual information" or if what plaintiff "really seek[s]" is a "legal determination" about the nature of certain transactions); Judicial Watch II, 293 F.Supp.2d at 47.

In any event, CREW fails to show how a precise monetary value for the "master contact list" can be calculated or objectively ascertained. The documents comprising this "list" do not constitute a commercial mailing list or a refined list of proven donors. (See J.A. 33 n.13.) Indeed, these documents are not a single list at all, but rather a collection of materials, mostly about various "Center-Right Coalition" meetings (J.A. 28-31). Although the materials contain the names and addresses of some individuals, there is no evidence that the information was in a form that could be commercially sold or rented. Nor is there any formula for determining how much the value of such a list should be discounted to take account of the mitigating factors noted in the General Counsel's Report, including the fact that some of the meeting and attendee information already was publicly available for free on ATR's website and that the campaign committee was already familiar with many people on the list (J.A. 35). Because the value of these unrefined materials is inherently subjective, CREW's assertion that there is any existing information about the list's value that has been withheld from it is especially speculative. See Alliance II, 362 F.Supp.2d at 145 & n.8, 146 (Commission could not agree on exact value of an actual, rentable mailing list and "there was no single, objective value that could be attached" to the list).

In sum, CREW already has received an assessment of the list's value by Bush-Cheney '04 and the Commission. In light of everything it already knows about the list, CREW is unable to demonstrate any informational injury at all, much less one that harms its concrete programmatic activities.

II. CREW LACKS PRUDENTIAL STANDING TO BRING THIS ACTION UNDER 2 U.S.C. 437g(a)(8)

A. Standard of Review

See supra p.13.

B. CREW Does Not Satisfy the Zone-of-Interests Test

CREW has not satisfied prudential standing requirements. "[P]rudential standing encompasses the 'general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). Under 2 U.S.C. 437g(a)(8)(A) (emphasis added), "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may seek judicial review of the Commission's decision. A "statutory restriction that a party seeking review be aggrieved … imposes a prudential standing barrier," and CREW's failure to demonstrate prudential standing provides an independent ground for dismissing this suit. Liquid Carbonic Indus. Corp. v. FERC, 29 F.3d 697, 704 (D.C. Cir. 1994). See also Grand Council of the Crees of Quebec v. FERC ("Grand Council") 198 F.3d 950, 954 (D.C. Cir. 2000) (dismissing action on prudential standing grounds, and declining to reach issue of constitutional standing).

"Parties regulated by a statute or those whom it protects fall within its 'zone of interest.'" Liquid Carbonic, 29 F.3d at 704. See also Akins, 524 U.S. at 20. As a "watchdog" 501(c)(3) organization entity without members, CREW is not the kind of entity whose interests come within the FECA's zone of interests. The FECA regulates persons and organizations involved in federal elections — candidates, political parties, and political committees — and those who wish to contribute to them or spend money on their behalf. CREW is not a candidate, political party, or political committee, see 2 U.S.C. 431(2), (4), (16), and the Internal Revenue Code prohibits it from participating in or contributing to political campaigns in any way. See supra pp.4, 16, 26.[18]

CREW cannot achieve prudential standing by seeking to vindicate the alleged interests of the general public or unidentified voters or other persons whose interests might come within the "zone of interests."[19] Reliance on the rights or interests of others contravenes the Supreme Court's first prudential principle that "the plaintiff generally must assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal interests or rights of third parties." Valley Forge Christian College v. Americans United for the Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) (internal citation and quotation marks omitted). Nothing in the language or history of section 437g(a)(8) supports the notion that, in enacting that provision, Congress intended to allow litigants invoking section 437g(a)(8) to assert the rights or interests of others not a party to the litigation; indeed, the requirement that the person seeking judicial review of a Commission dismissal have been an administrative complainant in the matter,

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[18] The district court was "doubtful that CREW would fall within the zone of interests that Congress intended to protect" (J.A. 69 n.1); accordingly, the court opined that "CREW would not be able to satisfy the requirements of prudential standing" (id.).

[19] In its court complaint, CREW refers, for example, to "the right of citizens to be informed about the activities of government officials" (J.A. 7 ¶ 6 (emphasis added)). But CREW also disclaimed reliance on harm to or the denial of information to the general public. (See, e.g., J.A. 3, Item 8, at 18.)

2 U.S.C. 437g(a)(8)(A), strongly cuts against such a notion. See American Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1358 (D.C. Cir. 2000).

At most, CREW asserts a general interest in good government. This interest is not, however, specific to campaign finance law, and even if it were, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ... 'aggrieved.'" Sierra Club v. Morton, 405 U.S. 727, 739 (1972). Therefore, CREW lacks prudential standing.

Contrary to CREW's assertions (Br. 24-25), the Supreme Court in Akins did not eliminate the prudential barrier in section 437g(a)(8) suits. Although the Court suggested (524 U.S. at 19) that Congress "inten[ded] to cast the standing net broadly" when enacting the FECA, the Court then proceeded to apply the zone-of-interest test to the Akins voter-plaintiffs and held that they passed the test. That holding was fact-specific; the Court did not hold that all persons whose administrative complaints include an allegation of a reporting violation have standing to seek judicial review under section 437g(a)(8) if the FEC dismisses their complaint. Indeed, the Court in dicta (524 U.S. at 20) implied that "political parties, candidates, or their committees" — specific classes of electoral actors — would have prudential standing, but it did not include in its list all interest groups or any section 501(c)(3) corporations. Moreover, the Court majority did not dispute Justice Scalia's conclusion in dissent that the Act "does not intend that all persons filing complaints with the Federal Election Commission have the right to seek judicial review of the rejection of their complaints." Akins, 524 U.S. at 30 (Scalia, J., dissenting) (emphasis in original). The Justices instead disagreed about whether the Act is meant to protect voters, and whether voters have prudential standing under section 437g(a)(8). The Court's holding was correspondingly narrow:

> Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of [informational] injury here at issue, intended to authorize this kind of suit. Consequently, respondents satisfy "prudential" standing requirements.

Akins, 524 U.S. at 20.

Subsequent D.C. Circuit case law confirms this interpretation. In Grand Council, 198 F.3d at 954-55, this Court rejected the plaintiffs' contention, premised on Akins, that Congress "dispensed with prudential standing [under the Federal Power Act] by providing that '[a]ny person ... aggrieved by an order issued by the Commission' ... may apply to have the order reheard." Explaining the limited impact of Akins, this Court held that "the purpose of this [Supreme Court] pronouncement [about the word 'aggrieved'] was evidently only to recognize 'person aggrieved' as a congressional means of dispensing with traditional requirements of 'legal right.'" Grand Council, 198 F.3d at 955. It then proceeded to analyze prudential standing and found that the environmental organization in that case lacked standing to sue. Id. at 959. Since the FECA includes similar "party aggrieved" language, the prudential standing requirement is also applicable to the particular facts that CREW presents here.[20] CREW's amorphous mission of ensuring good government and its utter lack of evidence about its programmatic activities are simply not enough to demonstrate that it falls within the FECA's zone of interests.

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[20] CREW also erroneously asserts, without elaboration or legal support, that the FECA is akin to statutes in which Congress has allowed plaintiffs to act as private attorneys general. CREW Br. 25 (quoting dictum in Ozonoff v. Berzak, 744 F.2d 224, 228 (1st Cir. 1984), a case in which the prudential standing of the plaintiff was evident). The FECA, however, provides no general private right of action to anyone. Rather, section 437g(a)(8)(C) allows for a private right of action only after a court has declared the Commission to have acted contrary to law in dismissing an administrative complaint and the Commission fails to conform to such a legal declaration. Moreover, this provision has had no real effect, for in the 30 years since that provision was enacted, there has not been a single judicial decision in such a private action. The other two cases that CREW cites (Br. 25) also involve statutory schemes very different from the FECA, and the Supreme Court vacated one of the cases, Bloom v. NLRB, 153 F.3d 844 (8th Cir. 1998), vacated and remanded, 525 U.S. 1133 (1999).

III. CONCLUSION

Because CREW lacks constitutional and prudential standing to bring the present action, this Court should affirm the judgment of the district court.

Respectfully submitted,

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