IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS COMMITTEE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civil Action No.: 1:04CV00007 (JDB)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Kean for Congress Committee ("Kean Committee") respectfully submits the instant Opposition to Defendant Federal Election Commission's ("FEC" or "Commission") Motion to Dismiss or, in the alternative, for Summary Judgment ("Motion"). At bottom, the FEC argues that the Kean Committee lacks standing because this Court "[cannot] offer any relief that would change the outcome of the long ago concluded New Jersey Republican primary election and thus redress the Committee's alleged political injury." Memorandum of Points and Authorities in Support of Motion ("Mem.") at 11. But the courts have rejected this very argument because it would effectively insulate FEC actions from judicial review. See infra Part II. Here, the FEC admits that "[t]he Committee filed its administrative complaint . . . before the 2000 New Jersey congressional primary campaign ended, and the Commission did not dismiss the complaint until the campaign was long over." Mem. At 11. Hence, if the FEC's standing

challenge were accepted, the Commission could immunize itself from any review of its actions simply by delaying resolution of duly-filed administrative complaints, as occurred repeatedly in this case. The FEC cannot defeat the Kean Committee's action on such a self-serving theory.

As the FEC admits (Mem. at 12), "the Supreme Court [has] held that an allegation of informational injury satisfie[s] Article III's injury-in-fact requirement," see Federal Election Comm'n v. Akins, 524 U.S. 11 (1998). Here, the Kean Committee seeks disclosure of specific information under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq. ("FECA"), for the purposes articulated in detail in Plaintiff's First Amended Complaint. Courts under analogous circumstances have repeatedly found standing to sue the FEC, and Defendant's attempt to cabin the Akins holding to cases filed by voters is unavailing. Accordingly, the FEC's Motion to Dismiss or, in the alternative, for Summary Judgment for lack of subject matter jurisdiction, should be denied.

BACKGROUND

A. Nature of the Action

Plaintiff Kean Committee is an unincorporated political association that is registered with the FEC pursuant to 11 C.F.R. § 102.1(a). First Amended Complaint for Declaratory and Injunctive Relief ("Compl.") ¶ 10; Defendant Federal Election Commission's Statement of Material Facts as to which There Is No Genuine Issue ("Def's SMF") ¶ 2. The Kean Committee was designated by Thomas H. Kean, Jr. as his principal campaign committee for his campaign for the United States House of Representatives from New Jersey's Seventh Congressional District in the 2000 elections. Compl. ¶ 20; Def's SMF ¶ 1.

Plaintiff seeks review under 2 U.S.C. § 437g(a)(8)(B) of the FEC's dismissal of the Kean Committee's administrative complaint dated May 31, 2000, which challenged the actions of a

Virginia corporation known as the Council for Responsible Government, and its so-called "Accountability Project" (collectively, "CRG"). In particular, the Kean Committee's complaint alleged that CRG secretly funded mailings that attempted to influence the Republican primary, in violation of federal law. Compl. ¶ 2; see also Def's SMF ¶ 12.

By letter dated November 10, 2003, counsel for the FEC advised that it "was equally divided on whether to find reason to believe the Counsel for Responsible Government, Inc. & its Accountability Project violated the Federal Election Campaign Act of 1971, as amended," and that, "[a]ccordingly, on November 4, 2003, the Commission closed the file in this matter"; that "[a] Statement of Reasons providing a basis for the Commission's decision will follow," and that "dispositive portions of the file will be placed on the public record within 30 days." The FEC failed to provide the basis for the Commission's decision or dispositive portions of the file within the 30-day period, which expired on December 10, 2003. Compl. ¶¶ 3-4; see also Def's SMF ¶ 14.

On January 5, 2004, Plaintiff filed the Complaint initiating this action. Two weeks later, on or about January 16, 2004, the Commission released its Statement of Reasons ("SOR") indicating that, in a 3-3 vote — at least four of the six FEC Commissioners must agree in order to take any action — it had failed to find reason to believe ("RTB") that the CRG or William "Bill" Wilson or Gary Glenn, members of CRG's Board of Directors, had violated the FECA.

Accordingly, by its First Amended Complaint, Plaintiff seeks a judicial determination and declaration that the FEC's dismissal of the Kean Committee's complaint, its failure to find RTB that CRG or its Board members violated the FECA, its failure to approve discovery to investigate the Kean Committee's allegations, and its controlling SOR for its actions, were arbitrary, capricious, an abuse of discretion, and otherwise contrary to law. Plaintiff further

seeks an order requiring the FEC to conform to that declaration within 30 days. See 2 U.S.C. § 437g(a)(8)(C).

B. Factual and Procedural History

1. The 2000 New Jersey Congressional Republican Primary

In 2000, Tom Kean, Jr. ran in the New Jersey Congressional Seventh Republican primary against Mike Ferguson, among other candidates. The New Jersey primary election was held on June 6, 2000. Compl. ¶ 12; see also Def's SMF ¶ 3.

In a May 24, 2000 Star-Ledger newspaper article, Gary Glenn is identified as a CRG Board member and quoted as stating that "[t]he very purpose of our group is to influence the outcome of elections . . . . The outcome we hope to bring about is the election of a congressman whose values are consistent with our philosophy. Clearly, we believe Mr. Ferguson is a candidate whose record and philosophy is consistent with our philosophy." According to other newspaper reports, CRG spent over $100,000 "to hurt the chances of . . . Kean in June 6 primary, while boosting the chances of Warren Township educator Mike Ferguson." Compl. ¶ 13.

In or about May of 2000, the CRG disseminated numerous advertisements advocating the defeat of Tom Kean. The Kean Committee submitted two such advertisements, each consisting of two pages, with its administrative complaint. Superimposed against of photograph of Mr. Kean wearing a "Tom Kean Jr. for Congress" campaign button in the first advertisement is the following statement:

TOM KEAN, JR.
No experience. Hasn't lived in New Jersey for 10 years.
It takes more than a name to get things done.

The second page of the advertisement contains the following statement:

> **NEVER.** Never worked in New Jersey. Never ran for office. Never held a job in the private sector. Never paid New Jersey property taxes. Tom Kean

> Jr. may be a nice young man and you may have liked his dad a lot — but he needs more experience dealing with local issues and concerns. For the last 5 years he has lived in Boston while attending college. Before that, he lived in Washington. New Jersey faces some tough issues. We can't afford on-the-job training. Tell Tom Kean Jr. . . . **New Jersey needs New Jersey leaders.**

In the second advertisement, superimposed against the same photograph of Mr. Kean is the following statement:

> For the last 5 years Tom Kean Jr. has lived in Massachusetts. Before that, he lived in Washington, D.C. And all the time Tom Kean lived in Massachusetts and Washington, he never held a job in the private sector. And until he decided to run for Congress — Tom never paid property taxes. No experience. **TOM KEAN MOVED TO NEW JERSEY TO RUN FOR CONGRESS.** New Jersey faces some difficult problems. Improving schools, keeping taxes down, fighting overdevelopment and congestion. Pat Morrisey has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Kean Jr. . . . **NEW JERSEY NEEDS NEW JERSEY LEADERS.**

The second page of the advertisement shows photographs of the following: former basketball player Larry Bird, Senator Ted Kennedy, what appears to be a statute of a Revolutionary War "Minuteman," and the same photograph of Tom Kean Jr. that appears elsewhere in the advertisements. Superimposed over the four photographs is the statement, "What do all of these things have in common? They all have homes in Massachusetts." Compl. ¶¶ 14-15.

Mike Ferguson won the election and presently holds the Congressional seat sought by Mr. Kean. Mr. Kean lost the Republican primary by less than 3,400 votes. Id. ¶ 16; Def's SMF ¶ 3.

2. The Kean Committee's Administrative Complaint

On or about May 31, 2000, the Kean Committee filed with the FEC a sworn administrative complaint pursuant to 2 U.S.C. § 437g(a) alleging that the campaign mailings

disseminated by the CRG violated numerous provisions of the FECA. The FEC designated the administrative complaint matter under review ("MUR") 5024. Compl. ¶ 17.

The FECA prohibits contributions or expenditures by corporations in federal elections. 2 U.S.C. § 441b(a). The federal election laws also require that independent expenditures in support of, or in opposition to, a federal candidate and costing in excess of $250 be publicly disclosed in a filing with the FEC, 2 U.S.C. § 434(c); 11 C.F.R. § 109.2; and that any group of persons whose principal purpose is to influence federal elections register with the FEC as a federal political committee and disclose its contributions and expenditures, see 2 U.S.C. §§ 431(4)(a), 433, 434. The federal election laws further require that any communication advocating the election or defeat of a clearly-identified candidate contain a disclaimer stating whether the communication was authorized by any candidate, see id. § 441d(a); 11 C.F.R. § 110.11(a)(1). The Kean Committee's administrative complaint alleged that the challenged communications by the CRG, which was formed in or about May of 2000 for the express purpose of making political expenditures, violated each of these legal requirements. Compl. ¶ 18.

The FECA also provides that expenditures made by any person in cooperation, consultation, or concert with, or at the suggestion of, a candidate, the candidate's authorized political committees, or their agents, shall be considered a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B)(i). The administrative complaint further alleged that CRG may have coordinated its expenditures with other federal candidates, such that the challenged communications may have constituted corporate contributions subject to disclosure. Compl. ¶ 19.

As a committee that is registered with the FEC and regularly files reports with the FEC, the Kean Committee is established and operated to participate in federal elections. Accordingly, by its administrative complaint, Plaintiff urged the FEC to take any and all action within its power to correct and prevent the illegal activities of the CRG, including requirements that it register with the FEC, that it report its contributions and expenditures, that it comply with all limitations as to source and amount of funds used to influence federal elections, and that it identify in any future campaign communications whether they were authorized by any candidate. Id. ¶ 22.

The FEC failed to act on the administrative complaint within 120 days. Accordingly, as an aggrieved party, the Kean Committee challenged the Commission's inaction under 2 U.S.C. § 437(g)(1), by filing a Complaint with this Court on September 18, 2001. See Kean for Congress Comm. v. Federal Election Comm'n, Civ. No. 01-1979 (JDB). Thereafter, upon consultation with counsel for the FEC regarding the status of the administrative complaint, the Kean Committee filed an unopposed Notice of Dismissal of the Complaint in Civ. No. 01-1979 on February 4, 2002. Compl. ¶ 23.

3. The Commission's Dismissal of the Administrative Complaint

By letter dated November 10, 2003, the FEC advised that the Commission was "equally divided" on whether to find reason to believe the CRG violated the FECA, and closed the file on November 4, 2003. As of the filing of the Complaint initiating this action on January 5, 2004, however, the FEC had failed to provide a SOR setting forth a basis for the Commission's decision, in violation of FEC regulations. See 11 C.F.R. § 5.4(a)(4). Compl. ¶ 24.

On or about January 16, 2004, the FEC released its SOR reflecting a 3-3 split on whether to find RTB that CRG and two of its Board members had violated the FECA, whether to approve

the First General Counsel's Report dated September 3, 2003 ("GC's Report"), and whether to approve discovery on CRG and its Board members. Compl. ¶ 25.

The GC's Report recommended in pertinent part that the Commission: (i) find RTB that CRG violated 2 U.S.C. §§ 434, 434, 441b(a), and 441d(a); (ii) find RTB that two of CRG's Board members, Bill Wilson and Gary Glenn, violated 2 U.S.C. § 441b(a); and (iii) approve a document subpoena to CRG, deposition subpoenas to CRG and its Board members, and written questions to CRG and its Board members. The CG's Report noted that Messrs. Wilson and Glenn were not made respondents at the time of the administrative complaint, but were internally generated as respondents by the FEC. Compl. ¶ 26.

"[W]hen the Commission deadlocks and consequently dismisses a complaint, the 'declining-to-go-ahead' Commissioners are a 'controlling group' for purposes of the Commission's decision to dismiss the complaint." Common Cause v. Federal Election Comm'n, 108 F.3d 413, 415 (D.C. Cir. 1997). After the vote of 3-3 on the recommendations made in the GC's Report, the Commission dismissed the matter on a vote of 6-0. Compl. ¶ 27.

The non-controlling group of Commissioners included Chair Ellen L. Weintraub, Commissioner Scott E. Thomas, and Commissioner Danny Lee McDonald. In its SOR dated December 16, 2003, the non-controlling group agreed with the legal analysis and recommendations contained in the GC's Report, which concluded — based upon applicable law and the Commission's regulations — that the communications at issue contained express advocacy and were made in violation of 2 U.S.C. § 441b, stating: "We agreed with the General Counsel's recommendations and have no doubt that the brochures satisfy the tests for express advocacy laid out at both 11 C.F.R. § 100.22(a) and 100.22(b). It also supported the General Counsel's view that CRG failed to include an adequate disclaimer in the communications under

2 U.S.C. § 441d, and failed to register and report as a political committee with the FEC under 2 U.S.C. §§ 433 and 434. Compl. ¶ 28.

The controlling group of Commissioners included Chairman Bradley A. Smith, Commissioner David M. Mason and Michael E. Toner. Completely disregarding as "unconstitutional" portions of the applicable FEC regulation regarding express advocacy, see 11 C.F.R. § 100.22(b), the controlling group concluded in its SOR dated January 13, 2004 that the communications at issue did not contain express advocacy, and therefore were not expenditures in violation of the FECA. The controlling group further found that its conclusion regarding express advocacy required that the Commission reject the Kean Committee's contention that CRG should be forced to register with the Commission, disclose its donors, and observe the FECA's contribution limits and prohibitions as a political committee. The controlling group's SOR concluded that "[t]he Commission thus rightly did not approve the Office of the General Counsel's request to conduct what could be an extensive investigation into the corporation's activity, including interrogatories, document subpoenas, and depositions to pursue this untenable theory, and closed the file on the matter." The controlling group's SOR failed to address the Kean Committee's allegation that CRG might have coordinated its expenditures with other federal candidates. Compl. ¶ 29.

The controlling group of Commissioners attached copies of the challenged communications to its SOR. No additional materials from the administrative record were released with the SOR on January 16, notwithstanding the FEC's statement in early November that dispositive portions of the record would be made public within 30 days. Id. ¶¶ 30, 3.

After dismissing Plaintiff's administrative complaint on November 4, 2003, the Commission revised its policy concerning public disclosure of materials from closed

administrative matters. See 68 Fed. Reg. 70,426 (Dec. 18, 2003). Plaintiff's counsel asked the Commission to comply with the policy in this case, and on March 1, 2004, FEC counsel released additional administrative records, including CRG's written response to the Kean Committee's administrative complaint, its articles of incorporation, and a redacted version of the GC's Report. Compl. ¶ 31.

On March 15, 2004, the FEC filed its Motion to Dismiss or, in the alternative, for Summary Judgment for lack of subject matter jurisdiction. The FEC simultaneously filed an "Objection to Related Case Designation," asserting that the LCvR 40.3 "requires that this matter be returned to the Calendar Committee for random assignment." Defendant Federal Election Commission's Objection to Related Case Designation at 6. On April 9, 2004, this Court ordered that the instant case retain its current assignment as related to Civ. No. 01-1979.

ARGUMENT

I. THE KEAN COMMITTEE HAS STANDING TO BRING THIS ACTION BECAUSE IT SEEKS DISCLOSURE OF SPECIFIC INFORMATION UNDER FEC v. AKINS

"Article III, of course, limits Congress' grant of judicial power to 'cases' or 'controversies.'" Federal Election Comm'n v. Akins, 524 U.S. 11, 20 (1998). Thus, to satisfy Article III's standing requirements, plaintiffs must show (1) an "injury in fact," (2) a causal connection between the alleged injury and conduct that is "fairly traceable" to the defendant, and (3) a likelihood that the injury will be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). As Plaintiff meets all three requirements, Defendant's Motion should be denied.

As a threshold matter, it bears emphasis that the Supreme Court has indicated that courts should broadly construe standing to bring actions under the FECA. In addressing whether a

challenge to the FECA presented a "case or controversy" within the meaning of Article III, the Supreme Court in the seminal decision of Buckley v. Valeo, 424 U.S. 1 (1976), concluded with little fanfare that the complaint "demonstrates that at least some of the appellants have a sufficient 'personal stake' in a determination of the constitutional validity of each of the challenged provisions to present a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Id. at 12 (quotation omitted).

Later, in Akins, the Court observed that "Congress has specifically provided in FECA that '[a]ny person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission," 524 U.S. at 19 (quoting 2 U.S.C. § 437g(a)(1)), and that "'[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition' in district court seeking review of that dismissal," id. (quoting § 437g(a)(8)(A)). The Court thus concluded that "[h]istory associates the word 'aggrieved' with a *congressional intent to cast the standing net broadly,"* and it rejected the FEC's attempt to defeat voters' challenge to the FEC's dismissal of their administrative complaint which claimed that an organization was a "political committee" subject to the FECA's registration and reporting requirements. Id. (emphasis added).

Here too, the Kean Committee brings an action under § 437g(a)(8)(A) that "present[s] a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Buckley, 424 U.S. at 12. The pertinent facts are not hypothetical, but are clearly set forth in both the First Amended Complaint and in the SOR dismissing the Kean Committee's administrative complaint. The FEC's dismissal presents a real and substantial controversy

between the Kean Committee and the FEC, and Plaintiff seeks specific relief authorized under the FECA.

But even more to the point, not unlike the instant case, Akins arose from an administrative complaint urging the FEC to find that an organization was in fact a "political committee" in violation of the FECA, and to order that the organization make public the information that FECA demands from all political committees. The Akins Court specifically held that the injury complained of — "the[] failure to obtain relevant information — is injury of a kind that FECA seeks to address." Id. at 20 (citing Buckley, 424 U.S. at 66-67). The information sought in Akins included "lists of . . . donors, and campaign-related contributions and expenditures . . . that, on [plaintiffs'] review of the law, the statute requires that [the alleged political committee] make public." Id. The Court found that the inability to obtain such information constituted an "injury in fact" that was "concrete and particular," as it "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 22 (citing Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982)).

In this case, the Kean Committee similarly urged the FEC to require that CRG register as a federal political committee, disclose its contributions and expenditures, comply with all limitations as to source and amount of funds used to influence federal elections, and identify in any future campaign communications whether they were authorized by any candidate. Compl. ¶ 22. The Kean Committee's informational deprivation is precisely the type of injury recognized in Akins, and is hardly the abstract "interest in seeking that the law is obeyed" that would

otherwise "prevent[] a plaintiff from obtaining what would, in effect, amount to an advisory opinion." 524 U.S. at 24.

The FEC fully admits that in Akins "the Supreme Court held that an allegation of informational injury satisfied Article III's injury-in-fact requirement." Mem. at 12. It tries to distinguish Akins, however, on the grounds that there the "plaintiffs were individuals suing in their capacity as voters, and the Court's holding squarely rested on their voter standing." Id. But the Court in Akins did no such thing. The Court held without caveat that the FECA "seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities." 524 U.S. at 22. And it "found nothing in the Act that suggests Congress intended to exclude voters from the benefits of these provisions or *otherwise to restrict standing, say, to* political parties, candidates, or *their committees.*" Id. at 20 (emphasis added). Contrary to the FEC's attempted distinction, therefore, the Supreme Court in Akins assumed that the standing of candidates and their committees was *more obvious,* not *less obvious,* than the standing of voters. The Court presumed that a candidate's committee — such as the Kean Committee — would naturally have standing to seek information under the FECA, and it simply rejected the notion that voters should be entitled to any less.[1]

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[1] The FEC's reliance on Becker v. Federal Election Comm'n, 230 F.3d 381 (1st Cir. 2000), in this regard is sorely misplaced. The Becker decision expressly held that the decision in Akins "did *not* rest merely on the fact that the voters there had suffered a 'voting related' injury." Id. at 389 (emphasis added). By the same token, the FEC's suggestion that the Kean Committee is an "artificial entity" is a red herring. Mem. at 13. The FEC itself avers that "the Kean Committee is a special kind of political committee under the [FECA]," whose sole purpose is to support Mr. Kean's candidacy for federal office. Def's SMF ¶ 2. The Kean Committee's interests are thus identical to those of Mr. Kean himself — Plaintiff is, in effect, the alter ego of the candidate. See Compl. ¶ 20; Declaration of Matthew McDermott, filed herewith [hereinafter "McDermott Decl."], ¶ 4.

The Court in Akins viewed as "[t]he FEC's strongest argument . . . its contention that this lawsuit involves only a 'generalized grievance,'" id. at 23, but it nevertheless determined that the plaintiffs had standing. The fact that informational injury inflicted on voters "is widely shared," the Court concluded, did not "deprive Congress of constitutional power to authorize its vindication in the federal courts." Id. at 25. Plaintiff's possession of standing follows *a fortiori* in the present case. Far from involving a "generalized grievance" or an injury that is "widely shared," the informational injury alleged by Plaintiff here is particularized to Mr. Kean and his Committee. In short, because the "FEC's strongest argument" in Akins is not even available to it here, the Kean Committee is on more — not less — solid footing than the Akins plaintiffs themselves. See also Buchanan v. Federal Election Comm'n, 112 F. Supp. 2d 58, 67 (D.D.C. 2000) (Roberts, J.) (finding standing to sue FEC under Akins where administrative complaint of third party candidate and supporters "not only alleged more than a 'nominal' violation of the FECA's registration and reporting requirements, but also requested that the FEC take action to correct that violation").[2]

Without any citation to legal authority, the FEC argues that "[b]y law, the Kean Committee only serves functions arising from a specific election cycle for a specific candidate,"

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[2] The cases the Commission relies upon are readily distinguishable, as they involved no attempt to secure disclosure of information under the FECA. Cf. Judicial Watch, Inc. v. Federal Election Comm'n, 180 F.3d 277, 278 (D.C. Cir. 1999) (finding no standing where plaintiff "has not even made a nominal allegation of reporting violations . . . or suggest[ed] that it desired documents that the alleged violators were required to disclose"); Natural Res. Defense Council v. Pena, 147 F.3d 1012, 1023 (D.C. Cir. 1998) (remanding case to consider amending complaint as plaintiffs "plainly have standing to request injunctive relief directing the Department to make . . . documents and records available to the full extent permitted by [the Federal Advisory Committee Act]") (citations omitted); Common Cause v. Federal Election Comm'n, 108 F.3d 413, 418 (D.C. Cir. 1997) (finding no standing where complaint merely sought to "'get the bad guys,' rather than disclose information," but recognizing that if plaintiff had "assert[ed] an interest in knowing how much money a candidate spent in an election, infringement of such an interest may, under Akins, constitute a legally cognizable injury in fact").

and thus "has no ongoing stake in the outcome of this case." Mem. at 13, 14. But Tom Kean, Jr. may well run for Congress again, and, as the FEC recognizes (id. at 15 n.10), the Kean Committee would be redesignated as his representative in that election, see McDermott Decl. ¶ 4. The Kean Committee thus stands in exactly the same position as the voters in Akins. The Supreme Court held that those voters had standing because "there [was] no reason to doubt" their claim that the information sought "would help them (and others to whom they would communicate it) to evaluate candidates for federal office, especially candidates who received assistance" from the challenged organization. 524 U.S. at 21. Such information would also help the plaintiffs "to evaluate the role that [the alleged political committee's] financial assistance might play in a specific election." Id. The Kean Committee seeks the information at issue here for precisely analogous reasons: to help evaluate the saliency of candidates that CRG might in future support, and to evaluate the role that CRG and its board members might play if Tom Kean, Jr. were to run for Congress again. In fact, Mr. Kean might or might not run again, just as the voters in Akins might or might not vote again. Cf. McDermott Decl. ¶ 6 and Exh. A. But the Supreme Court in Akins gave no indication that such indeterminacy concerning future elections has any role to play in the standing inquiry.

Moreover, taken to its logical extreme, the FEC's argument would mean that *no* candidate would ever have standing to bring a lawsuit in connection with FECA violations related to a campaign. The brief window during which the FEC would apparently concede standing would be after an individual declared his or her candidacy but prior to the election itself. This timeframe could be as short of a couple months up to a year. Given that it took three years and repeated prodding by the Kean Committee for the FEC to act on the administrative complaint in this case, if the FEC's standing argument is correct, virtually no candidate for

federal election would be able to invoke § 437g's provisions for judicial review. By the same token, the FEC's position conveniently insulates itself from any judicial review, an outcome which — as discussed further below — courts have already properly rejected as unacceptable because it would nullify the statute itself.

In this case, the FEC has provided no reason to doubt the Kean Committee's contentions (1) that Mr. Kean may run again for federal office; (2) that one of the issues to be considered in any decision concerning participation in another campaign is whether CRG could again spend unlimited funds for mailers attacking him; (3) that the information sought here would assist the Kean Committee in determining whether CRG is an organization that enjoys wide support by multiple donors or has relatively few funding sources; (4) that such information would reveal whether CRG's support comes primarily from in-state or out-of-state contributers/voters; (5) that such information would enable the Kean Committee to evaluate CRG's funding and activities in 2000 and thus its ability to influence federal elections; or (6) that the required disclosures would ensure that any activity CRG undertakes against the Kean Committee and its candidate in any future federal elections is not funded by illegal contributions. Compl. ¶¶ 21, 22; McDermott Decl. ¶¶ 6-7 & Exh. A. Under the governing standards, Plaintiff's injury is sufficiently concrete to satisfy Article III.[3]

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[3] The FEC suggests that Mr. Kean himself must somehow promise to run for federal office again as a prerequisite to challenging the FEC's dismissal of the administrative complaint in this case. See Mem. at 14-15. The Commission cites no case establishing such a requirement, and it would make no sense whatever. An individual's decisions about future electoral participation will depend on numerous variables, including the adequacy of his own funding sources and the magnitude of opponents' funding sources — the very issue about which the Kean Committee seeks information here. See Becker v. Federal Election Comm'n, 230 F.3d 381, 387 (1st Cir. 2000) (cited by FEC at 13-14) (observing that "we do not think it proper to second-guess a candidate's reasonable assessment of his own campaign," as "[t]o probe any further into these situations would require the clairvoyance of campaign consultants or political pundits — guises

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II. THE CHALLENGED FEC ACTION IS NOT IMMUNE FROM JUDICIAL REVIEW MERELY BECAUSE IT RELATES TO A PAST ELECTION

The FEC's main attack on the Kean Committee's standing is the assertion that "the only relief the Committee seeks is to have the Commission require the CRG to provide information, but that relief cannot now affect the 2000 election." Mem. at 10. Because the 2000 election is over, the Commission reasons, "the claimed past injury cannot serve as the injury-in-fact necessary for the Committee to have Article III standing now," and this Court "cannot . . . redress the Committee's alleged political injury." Id. at 10, 11. But as courts have repeatedly found, this argument proves too much, because it would enable the FEC to secure immunity from judicial review simply by slowing down its decision-making process. Any such result would render § 437 a nullity.

In both Buchanan v. Federal Election Comm'n, 112 F. Supp. 2d 58 (D.D.C. 2000), and Natural Law Party v. Federal Election Comm'n, 111 F. Supp. 2d 33 (D.D.C. 2000) (Huvelle, J.), plaintiffs filed FEC complaints challenging the candidate selection criteria used by the "Commission on Presidential Debates" in prior elections. In Buchanan, the court flatly rejected the FEC's standing-related assertion that "there is not enough time as a practical matter for the plaintiffs to obtain the relief they seek from the FEC," noting that "[t]he FEC's argument assumes that it would take the maximum amount of time allowed under the FECA to process plaintiffs' claim." 112 F. Supp. 2d at 69. "[F]undamentally," the court found, "if the FEC's own enforcement procedures could frustrate the plaintiffs from challenging the agency's decision, then the FEC's decisions regarding the propriety of debate criteria or other election-related

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that members of the apolitical branch should be especially hesitant to assume"). Neither McConnell v. FEC, 124 S. Ct. 619, 708 (2003), Renne v. Geary, 501 U.S. 312, 321 (1991), nor Golden v. Zwickler, 394 U.S. 103, 109-10 (1969), were informational standing cases.

matters often would be unreviewable." Id. (citing Akins v. Federal Election Comm'n, 101 F.3d 731, 738 n.7 (D.C. Cir. 1997) (en banc) (noting that political action committee's alleged failure to disclose past contributions and expenditures would affect future voters and that "if such injury were not redressable, once an election ended virtually all electoral conduct would be beyond review"), vacated and remanded on other grounds, Federal Election Comm'n v. Akins, 524 U.S. 11 (1998)). The court concluded that "[s]uch as result would read FECA's judicial review provision out of the statute without any constitutionally sound rationale." Id.

Similarly, in Natural Law Party, the FEC made the identical argument it presses here — "that plaintiffs have not established a 'concrete and particularized' injury sufficient to meet the requirements of Article III standing because . . . the 1996 election w[as] 'long over' when the FEC denied plaintiffs' complaint in 1998 . . . and nothing can be done by the Court today to redress such past injuries." 111 F. Supp. 2d at 41-42. Observing that "[t]his delay was due to the FEC's own protracted review process," id. at 41 n.4, the court "reject[ed] these arguments, for the acceptance of the FEC's overly narrow construction of 'injury in fact' would be tantamount to shielding from judicial review many, if not all, election cases." Id. at 42.[4]

Although the administrative complaint in this case was filed prior to the 2000 election, the FEC did not get around to addressing it until more than *three years later*. And this occurred only after Plaintiff filed suit under the FECA to prompt the FEC to act on the administrative complaint. Even when the FEC finally dismissed Plaintiff's action in November 2003, it did not

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[4] The FEC's suggestion here that "the endless number of diverse factors contributing to the outcome of elections" forecloses a redressibility finding is also meritless. Mem. at 10 n.7 (quotation omitted). As the court in Natural Law Party observed, "[i]n reviewing a petitioner's challenge to the FEC's determination that an organization was not a 'political committee' as defined under the FECA, the D.C. Circuit addressed this very issue. It called the argument a 'breathtaking attack on the legitimacy of virtually all judicial review of agency action.'" 111 F. Supp. 2d at 50 (quoting Akins, 101 F.3d at 738)).

issue its SOR until *after* Plaintiff filed the instant lawsuit, long after the requisite 30-day period for doing so. As the court in Natural Law Party observed, "if pre-election conduct cannot satisfy the injury-in-fact requirement for standing to challenge a post-election decision by the FEC, then given the 120 day time frame for administrative exhaustion required by the FECA, as a practical matter, the FEC could virtually insulate its decisions from judicial review by failing to take action on any complaint prior to the expiration of 120 days." Id. In short, the FEC's argument "leav[es] plaintiffs trapped in a procedural catch-22." Id. at 43. "Whether cast as a mootness or standing argument, the logical result of the FEC's reasoning would be to render § 437g(a)(1) meaningless and to permit harms capable of repetition yet evading review." Id.

Precisely the same reasoning supports plaintiff's standing to sue here. The gravamen of the instant complaint challenges "pre-election conduct," 111 F. Supp.2d at 42, — namely, allegedly improper expenditures by CRG intended help to defeat Mr. Kean and to assist his opponent in the 2000 Congressional primary. As a result of this challenged conduct, Mr. Kean and his Committee plainly suffered an "injury in fact." Indeed, it can scarcely be doubted that plaintiff possessed standing at the time it filed its complaint with the FEC in May 2000. In challenging Plaintiff's standing now, the FEC is arguing, in essence, that the controversy has become moot because the 2000 election is over.[5] But as noted above, the courts have repeatedly

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[5] Although the Commission couches its argument as relating to redressibility, see Mem. at 11, some courts consider "this . . . problem [a]s one of mootness, not standing." Becker, 230 F.3d at 389 (addressing argument that "[n]ow that the 2000 presidential debates are over, . . . relief is no longer available"). In Becker, however, the FEC conceded that the conclusion of an election does not render a case challenging its actions moot. Ralph Nader, his party, and his campaign committee challenged the FEC's debate regulations allowing corporate funding of debate staging organizations. "[T]he FEC conceded at oral argument that Nader's case is not moot" merely because the debates were over, because "[a]s other courts have held in similar cases, this sort of case qualifies for the exception to mootness for disputes 'capable of repetition yet evading review': corporate sponsorship of the debates is sure to be challenged again in

(Continued...)

rejected this argument, correctly recognizing that any such rationale would effectively immunize the FEC's actions from any judicial review. The FEC's challenge to plaintiff's standing must therefore be rejected.

III. THE FEC DOES NOT DISPUTE THAT PLAINTIFF'S INFORMATIONAL INJURY IS "FAIRLY TRACEABLE" TO THE FEC'S OWN ACTIONS

While the FEC's arguments under the "injury-in-fact" and redressibility prongs of the standing inquiry are unavailing, its claim that the Kean Committee's injury is not "fairly traceable" to its dismissal of the administrative complaint borders on the spurious. The FEC's argument is premised on the notion that the Kean Committee's core injury is the loss of the 2000 election.[6] See Mem. at 10-11. The FEC contends that Plaintiff cannot show that Mr. Kean lost

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(...Continued)
future elections, yet, as here, the short length of the campaign season will make a timely resolution difficult." Id. (citations omitted); see also Johnson v. Federal Communications Comm'n, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987) (in minority candidates' challenge to Federal Communication Commission's denial of complaint seeking to prohibit televising of debate, court found that "[e]ven though the 1984 election is now over, no one has suggested that the case is moot, and we are satisfied that it is not. The issues properly presented, and their effects on minor-party candidacies, will persist in future elections, and within a time frame too short to allow resolution through litigation.") (citations omitted). That the FEC prefers to cast its argument in terms of "standing" rather than "mootness" is unsurprising, as any mootness attack would clearly fail because the conduct Plaintiff challenges is "capable of repetition but evading review" and, in any event, the informational injury suffered by Plaintiff persists irregardless of the conclusion of the 2000 election.

[6] The Kean Committee's First Amended Complaint does establish political injury as grounds for standing to bring suit under the FECA in addition to the informational injury caused by the FEC's dismissal of the administrative complaint. See Compl. ¶ 20. "The doctrine of 'competitor standing' has been 'recognized in circumstances where a defendant's actions benefited a plaintiff's competitors, and thereby caused the plaintiff's subsequent disadvantage.'" Buchanan, 112 F. Supp. 2d at 63 (quoting Fulani v. Brady, 935 F.2d 1324, 1327 (D.C. Cir. 1991)). In Buchanan, the court rejected the FEC's attempt to construe competitor standing narrowly, holding that "FECA's statutory scheme was specifically designed to accommodate suits such as plaintiffs' which challenge the FEC's dismissal of an administrative complaint." Id. at 65. Here too, CRG's actions competitively disadvantaged the Kean Committee and its candidate in the 2000 election, which Mr. Kean lost by a slim margin. Compl. ¶ 20; McDermott Decl. ¶ 5.

the election because of anything the FEC did, as any political injury must have been "the result of the independent action of some third party CRG." Mem. at 11 (quotation omitted). The FEC's argument misses the very point of this case. The essential injury the Kean Committee complains of is *informational injury* — the FEC's refusal to require CRG to make disclosures that may affect Mr. Kean's, or his Committee's, decisions about running for Congress in the future. By dismissing Plaintiff's administrative complaint, the FEC acted to keep such information secret. Thus, it can scarcely be disputed that the Kean Committee's informational injury is "fairly traceable" to the FEC's own conduct. It is undeniable that the FEC's dismissal of the Kean Committee's administrative complaint permits CRG's continuing non-compliance with the FECA, and that the FEC's action shields CRG from having to disclose the information Plaintiff seeks. The causation prong of the standing inquiry is therefore amply satisfied.

In any event, the FEC errs in contending that it can simply "wash its hands" of all political injury that CRG's illegal campaign advertisements inflicted on the Kean Committee on the grounds that "it is entirely speculative whether abiding by the Act's requirements would have discouraged CRG from running the advertisements against Kean." Mem. at 11. It is settled law that "injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality." Telephone and Data Sys., Inc. v. Federal Communications Comm'n, 19 F.3d 42, 47 (D.C. Cir. 1994) (citing cases). "Both the Supreme Court and this circuit have repeatedly found causation where a challenged government action *permitted* the third party conduct that allegedly caused a plaintiff injury, when that conduct would have otherwise been illegal." Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 442 (D.C. Cir. 1998) (discussing cases) (emphasis in original). "Indeed, the Akins Court recognized that the plaintiffs had standing despite the fact that they might not ultimately

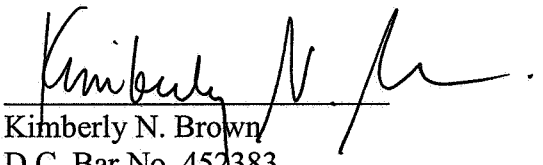
obtain the relief they sought." Buchanan, 112 F. Supp. 2d at 67 (citing 524 U.S. at 25)). Hence, the FEC's dismissal of the administrative complaint, "applying the Act and the Commission's precedent, affirmatively upheld the legality of the very [actions that] inflicted injury on [the Kean Committee, actions] that a contrary holding would have abrogated." Telephone and Data Sys., Inc., 19 F.3d at 47; see also Natural Law Party, 111 F. Supp. 2d at 45 ("If plaintiffs are correct, [the] FEC's ratification of the [unlawful conduct] causes injury to the plaintiffs in the same manner as if the FEC itself imposed the illegal criteria."). By dismissing the Kean Committee's action, the FEC in effect condoned CRG's conduct with an official imprimatur of approval. Hence, under Supreme Court and D.C. Circuit authority, Plaintiff's injury was "fairly traceable" to the challenged FEC action.

The FEC further argues that "the possible effect of the Bipartisan Campaign Reform Act of 2002 on future conduct" renders it "speculative whether a ruling about CRG's past conduct would even have any legal applicability to CRG's future activities." Mem. at 17 n.13. It is equally well-established, however, that "[a] party need not *prove* that the agency action it attacks is unlawful . . . in order to have standing to level that attack." Animal Legal Defense Fund, Inc., 154 F.3d at 441 (quotation omitted) (emphasis in original). Accordingly, this particular nuance to the FEC's causation argument is entirely without merit, as well.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss or, in the alternative, for Summary Judgment for lack of subject matter jurisdiction should be denied.

Respectfully submitted,



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April 22, 2004