UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS COMMITTEE,	)	
Plaintiff,	)	
v.	)	Case Number 1:04cv00007 (JDB)
FEDERAL ELECTION COMMISSION,	)	REPLY
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Federal Election Commission ("Commission" or "FEC") has shown that the Kean for Congress Committee ("Kean Committee" or "Committee") lacks Article III standing to bring this suit. The Commission has identified two key deficiencies. First, the Committee's claimed informational injury is entirely speculative because it rests upon the completely unproven suggestion that Tom Kean, Jr., has any intention ever to run for federal office again; it thus does not even rise to the level of the "some day" predictions that the courts have uniformly found insufficient to support constitutional standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992); FEC's Memorandum of Points and Authorities in Support of Its Motion to Dismiss or, in the Alternative, for Summary Judgment ("FEC Mem.") at 13-15. Second, as an inactive political committee, limited by law to serving as the principal campaign committee of Tom Kean, Jr., in his bid to become a congressman in the 2000 elections, the Kean Committee has no legally cognizable stake in obtaining the redress it seeks. See FEC Mem. at 13-17. These

deficiencies are particularly glaring and suspicious in light of the Committee's unsupported assertion that it is "the alter ego" of Mr. Kean (Opposition ("Opp.") at 13 n.1), coupled with the simultaneous total silence of Mr. Kean himself in both the underlying administrative proceedings and the pleadings and evidence before this Court.

The Committee's Opposition to the Commission's motion does not eliminate these weaknesses but instead multiplies them. The Committee misreads the applicable law and the Commission's opening memorandum; ignores salient facts; relies on speculation and rumor to support the claim of future injury; conflates Article III standing and prudential standing; confuses standing and mootness; and tries to establish standing to seek prospective equitable relief by relying in part on past injuries unaccompanied by any present or imminent harm.

The sheer number and magnitude of these deficiencies strongly suggest that the Committee is not primarily interested in obtaining information but in "getting the bad guys." However, such an interest cannot support standing to sue under 2 U.S.C. 437g(a)(8). Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997). See also Wertheimer v. FEC, 268 F.3d 1070, 1075 (D.C. Cir. 2001) (no standing where plaintiffs "really" sought only the legal determination that certain transactions violated the FECA).[1]

II. LEGAL STANDARDS

The Kean Committee bears the burden to demonstrate that it has Article III standing. Lujan, 504 U.S. at 561; FEC Mem. at 7. A plaintiff "must allege in his pleading the facts

[1] The Kean Committee also addresses the merits of its challenge to the dismissal of its administrative complaint. Opp. at 9. The Commission will dispute those views if this case proceeds to the merits, but the merits are not now properly before this Court. Rather, the issue is the threshold one of whether the Kean Committee has Article III standing to contest the Commission's decision. See, e.g., Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101-02 (1998); The Grand Council of the Crees v. FERC, 198 F.3d 950, 954 (D.C. Cir. 2000) ("Article III standing must be established before any decision is made on the merits.").

essential to show jurisdiction," McNutt v. General Motors Acceptance Corp. of Indiana, Inc., 298 U.S. 178, 189 (1936), and "the necessary factual predicate may not be gleaned from the briefs and arguments." FW/PBS, Inc. v. Dallas, 493 U.S. 215, 235 (1990) (citation omitted). Moreover,

> [s]ince [the elements of Article III standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation…. In response to a summary judgment motion[,] … the plaintiff can no longer rest on … "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e) ….

Lujan, 504 U.S. at 561. See also Democratic Senatorial Campaign Comm. v. FEC, 139 F.3d 951, 952 (D.C. Cir. 1998) (at summary judgment stage, "evidence there must be") (citing Lujan, 504 U.S. at 561). Since the Commission has moved in the alternative for summary judgment, the Kean Committee is required to provide evidence of "specific facts" to demonstrate its standing.

In addition, because the Kean Committee is challenging the dismissal of its administrative complaint, its "standing to sue … must be based upon an injury stemming from the FEC's dismissal" of that complaint. Judicial Watch, Inc. v. FEC, 180 F.3d 277, 277 (D.C. Cir. 1999) (emphasis added). This is simply a particularized version of the more general constitutional requirement that a plaintiff must show that his injury is "fairly trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party." Lujan, 504 U.S. at 560 (internal quotation marks and citation omitted).

This Court is not required to credit a plaintiff's speculative predictions about the future. The D.C. Circuit has explained that Fed. R. Civ. P. 12(b)(1)'s requirement that a court "must accept as true all material allegations of the complaint … might appear to be in tension with the Court's further admonition that an allegation of injury or of redressability that is too speculative

will not suffice to invoke the federal judicial power." United Transp. Union v. ICC, 891 F.2d 908, 911-12 (D.C. Cir. 1989) (quotation marks omitted), cert. denied, 497 U.S. 1024 (1990). The court explained that "this ostensible tension is reconciled by distinguishing allegations of facts, either historical or otherwise demonstrable, from allegations that are really predictions." Id. Since the Kean Committee's claim for relief is entirely prospective, the Committee bears the burden of demonstrating with specific facts that it faces a concrete and imminent injury.

III. THIS SUIT SHOULD BE DISMISSED BECAUSE THE KEAN COMMITTEE HAS FAILED TO ESTABLISH ARTICLE III STANDING

The injury-in-fact required by Article III is an invasion of a legally protected interest that is "concrete and particularized" as well as "actual or imminent," rather than "conjectural" or "hypothetical." Lujan, 504 U.S. at 560 (citations omitted). Although the Kean Committee claims that information about CRG's finances and activities will be useful in future elections, it has failed to show that it will suffer a "particularized" or "imminent" injury if it does not obtain that information. The Committee's future political participation depends entirely on Mr. Kean – whether he will decide to run for federal office again and, if so, whether he will redesignate the Committee as his principal campaign committee (if the Committee is even in existence at that future time). But the Committee has provided no evidence that it continues to be politically active in any way (beyond instituting this lawsuit), and it has offered only vague speculation, unsupported by any evidence, of Mr. Kean's intentions.

The Committee has only one other allegation of injury on which it attempts to base Article III standing: the allegation that CRG caused it political and informational injury in the 2000 primary campaign and election. However, where, as here, a plaintiff seeks no damages, only prospective equitable relief, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing,

present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). Accord, KERM, Inc. v. FCC, 353 F.3d 57, 61 (D.C. Cir. 2004) ("single, past violation of the [statute]" insufficient to establish Article III injury); American Soc. for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334, 336 (D.C. Cir. 2003) (Plaintiff must "show some present or imminent injury"). See also City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (although plaintiff likely had standing to pursue damages, he lacked standing to pursue prospective equitable relief). Since the Committee is unable to show any present adverse effects or imminent injury, it cannot meet Article III's requirements.

A. The Committee Has Offered Only Vague Speculation that Tom Kean, Jr., Might Run Again for Federal Office, and It Has Provided No Evidence to Cure This Deficiency

As the plaintiff invoking federal court jurisdiction, the Committee bears the burden of establishing its standing under Article III of the Constitution. The Commission need only show that the plaintiff has failed to carry its burden, see Lujan, 504 U.S. at 561, and this the Commission has done. The Committee asserts that "the FEC has provided no reason to doubt the Kean Committee's contention[ ] … that Mr. Kean may run again for federal office" (Opp. at 16), but this is nothing more than an attempt to shift its burden to the Commission. It is simply not sufficient under Article III to assert that Mr. Kean "may run again" as a candidate for federal office.

The Commission has explained that the Committee's own description of Mr. Kean's future in federal electoral politics is couched in the most indeterminate and speculative terms: "Mr. Kean has run for federal office in the past, and may do so again in the future — he is still relatively young and political life is famously difficult to predict." First Amended Complaint ¶ 21; FEC Mem. at 14-15. See Lujan, 504 U.S. at 564 n.2 ("soon" does not mean "in this

lifetime"). The Opposition provides additional examples: "Mr. Kean might or might not run again" (Opp. at 15); "Tom Kean, Jr. may well run for Congress again" (id.); "if Tom Kean, Jr. were to run for Congress again"(id.; note the subjunctive); "Mr. Kean may run again for federal office" (id. at 16). As the courts have repeatedly held, vague statements of mere possibilities like these are inadequate to support Article III standing. See, e.g., Lujan, 504 U.S. at 564 n.2 (future injury must be "at least imminent," in the sense that it is "certainly impending") (internal quotation marks omitted; emphases in original). "[T]he underlying purpose of the imminence requirement is to ensure that the court in which suit is brought does not render an advisory opinion in 'a case in which no injury would have occurred at all.'" Animal Legal Defense Fund v. Espy, 23 F.3d 496, 500 (D.C. Cir. 1994) (quoting Lujan, 504 U.S. at 564 n.2).

The Committee is like the former researcher in Animal Legal Defense Fund, who lacked standing to challenge certain regulations covering the treatment of laboratory animals. The plaintiff had not conducted animal research in over six years, her intention to do so in the future was purely speculative, and any possible injuries would take place "at some undefined future time." 23 F.3d at 500. See also id. at 501 (the former researcher "suffers no injury and will not do so unless she makes a further choice to subject herself to it"). The Committee is also like the plaintiffs in Renne v. Geary, 501 U.S. 312 (1991), who were unable to demonstrate "a live controversy," id. at 315, in a challenge to a state prohibition against endorsing candidates in local, nonpartisan elections because they could not allege any concrete plan to endorse any particular candidate in future elections. Id. at 321-22.

In Golden v. Zwickler, 394 U.S. 103 (1969), the Court held that the plaintiff's challenge to the constitutionality of a state statute prohibiting anonymous campaign literature did not present an "actual controversy" under the Declaratory Judgment Act. The plaintiff had

previously distributed anonymous handbills criticizing the views of a particular Congressman who was running for re-election, and the plaintiff intended to distribute handbills again in the upcoming congressional election and later elections. After the plaintiff had filed suit, the Congressman resigned from the House and became a state judge. The plaintiff asserted "in his brief that the former Congressman can be 'a candidate for Congress again.'" Id. at 109. That assertion, the Court found, "is hardly a substitute for evidence that this is a prospect of 'immediacy and reality.'" Id. Similarly, the Committee's assertions that Mr. Kean "may" or "might" become a candidate for federal office again at some unspecified future time are "hardly a substitute for evidence."

Even when the plaintiff is a sitting Member of Congress — rather than, as here, the designated campaign committee of a former candidate for Congress in a single past election — the Supreme Court has required a more definitive statement of intention than the Committee has supplied. Just last year, in the landmark decision of McConnell v. FEC, 124 S.Ct. 619 (2003), the Court held that an incumbent Senator lacked Article III standing to challenge a statutory provision that could not affect him immediately. "Because Senator McConnell's current term does not expire until 2009, the earliest he could be affected by [the challenged provision] is 45 days before the Republican primary in 2008. This alleged injury is too remote temporally to satisfy Article III standing." Id. at 708. See also FEC Mem. at 15.

The Kean Committee relegates McConnell, Renne, and Golden v. Zwickler to one sentence at the end of a footnote (Opp. 16-17 n.3), where it attempts to distinguish them as cases not involving informational standing. But that distinction is irrelevant here; the Constitution requires that all injuries-in-fact be concrete, personal, and immediate, and that requirement therefore applies across the board, regardless of whether the injury consists of a lack of

information or some other kind of harm. See, e.g., Lujan, 504 U.S. at 560-61; FEC v. Akins, 524 U.S. 11, 20-21 (1998). The case law does not support the radical proposition that a plaintiff who bases its standing on an informational injury under the Federal Election Campaign Act is somehow exempt from the full force of the constitutional requirement to prove concrete and immediate harm. In any event, the Kean Committee itself, when it finds it opportune to do so, relies on cases where the plaintiffs' standing did not turn on any informational interests. E.g., Natural Law Party of the United States of America v. FEC, 111 F.Supp.2d 33 (D.D.C. 2000) (Opp. at 17-19, 22); Becker v. FEC, 230 F.3d 381(1st Cir. 2000), cert. denied, 532 U.S. 1007 (2001) (Opp. at 16 n.3, 17, 19 n.5).

The court in Becker unequivocally found that Ralph Nader, the leading plaintiff in that case, "has been and continues to be a significant candidate in the 2000 presidential race. At the time he brought this suit [challenging the FEC's debate regulations], it was a genuinely open question whether he would be invited to the debates." 230 F.3d at 386 (footnote omitted). Moreover, in answering criticism by the concurring judge, the majority in Becker vigorously denied that the injury of which plaintiff Nader complained was "overly speculative" and rested on "someday" events. Id. at 387 n.4. The majority pointed out that, when Nader brought suit, he was not only a candidate in the presidential race, but "he could have plausibly hoped to qualify for an invitation to the debates." Id. Also, at that time, "invitations to the debates were scheduled to be determined at a definite date, soon enough in the future to affect … [Nader's] present campaign plans." Id. In contrast, the plaintiff here is a remnant of a principal campaign committee from the 2000 elections, see FEC Mem. at 13-14, 16, and infra pp. 13-14, and the former candidate who established it is neither a plaintiff in the suit nor a current candidate for federal office.

Despite claiming to be Mr. Kean's "alter ego" (Opp. at 13 n.1), the Committee has not been able to obtain an affidavit from Mr. Kean about his political plans to support its case. Indeed, the Committee has not even submitted any evidence based on the personal knowledge of any individual who has communicated with Mr. Kean about his political future and who is willing to attest to what Mr. Kean told him. The only "evidence" the Kean Committee has submitted is a sworn declaration from the Committee's current treasurer, but the declaration does not state that Mr. Kean himself directly informed the treasurer about his future plans. See Declaration of Matthew McDermott ("McDermott Decl."). See Lujan, 504 U.S. at 561 ("In response to a summary judgment motion[,] … the plaintiff can no longer rest on … 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e)"). Instead of setting forth "specific facts," the declaration includes only indefinite assertions and mere rumor from unidentified sources. The treasurer states that "Tom Kean, Jr. has run for federal office in the past, and is a potential candidate in the future." McDermott Decl. ¶ 6. See also id. at ¶ 4 ("If Mr. Kean seeks to run for federal office in the future …."). The declaration nowhere suggests that Mr. McDermott has spoken with Mr. Kean about his political plans or quotes Mr. Kean himself on his future plans. That would be hearsay, but at least it would be an improvement over the Committee's own vague speculations about Mr. Kean, who is extraordinarily conspicuous by his failure to be an affiant in this litigation. Nor does Mr. McDermott provide any objective evidence or testimony indicating that Mr. Kean is even in the process of actively considering whether to run again for office, such as commissioning opinion polls or organizing potential supporters or fundraisers. There also is no evidence that the plaintiff Committee is engaged in any similar preliminaries to beginning a new campaign.

Rather than relying upon information he obtained from Mr. Kean himself, Mr. McDermott rests his speculation about Mr. Kean's plans upon a newspaper column, written by one or more unnamed journalists identified only as "THE AUDITOR." The item on which the Committee relies states in its entirety:

> Kean, Jr., 35, is often mentioned as a possible candidate for governor. But the Auditor is told he may be even more interested in running for United States Senate, where his interest in foreign policy could be put to good use. An opportunity might arise when Sen. Frank Lautenberg's term ends in 2008.

Exhibit A at 3. The item does not disclose to the reader who told "the Auditor" that Mr. Kean "may be interested" in running for the Senate. Moreover, it is merely speculating that "[a]n opportunity might arise" four years from now. See McConnell, 124 S.Ct. at 708 (quoted supra p.7). It is nothing but the most extreme form of unreliable, speculative hearsay.

The Commission is not suggesting, as the Committee asserts it is (Opp. at 16 n.3), that Mr. Kean "must … promise to run for federal office again as a prerequisite to challenging the FEC's dismissal of the administrative complaint." However, the courts have held that conditionally stated, "some day" intentions do not satisfy Article III's requirements, see Lujan, 504 U.S. at 560, 564, and the Committee has not even provided that kind of inadequate evidence. Contrast, e.g., Natural Law Party, 111 F.Supp.2d at 45 (in finding that the plaintiffs had standing, the court referred to the "firm intentions" expressed by the plaintiffs "to run in the 2000 election"). Instead, the Committee rests its case upon the fact that Mr. Kean has the "potential" to run for office. That is true of innumerable adult citizens of the United States, and it does not support the Committee's having standing under Article III.

B. The Committee Cannot Establish Article III Standing by Showing that It Is Lacking Information Unless It Also Demonstrates that It Will Suffer a Cognizable Injury as a Result

The Committee argues that, under 2 U.S.C. 437g(a)(8), merely depriving a plaintiff of particular information about campaign-related activities satisfies Article III's injury-in-fact requirement. Opp. at 12-13. This argument rests on a misreading of FEC v. Akins, 524 U.S. 11 (1998), which held that the allegation by the voter-plaintiffs there of informational injury sufficed to show the requisite injury-in-fact. As the Commission has explained, see FEC Mem. at 12-13, the plaintiffs in Akins rested their allegation of injury on the use they as voters would make of the information disclosed in reports to the FEC. Because that information would help them evaluate candidates in deciding whom to support and whom to oppose, the lack of the information harmed their interest in being educated voters.[2]

There was no dispute in Akins that the administrative respondent had never registered as a political committee or reported any of its receipts or disbursements. If the Kean Committee's view of the law had been the one adopted by the Supreme Court — that it does not matter when or even whether the plaintiff might use the missing information — then much of the Supreme Court's own decision would have been superfluous. The Court could have simply noted the undisputed fact that the complaint included a claim that information had not been reported and then found Article III standing. But the Court did no such thing. Instead, after a lengthy discussion of the relevant facts and law, the Court explained that "[t]here is no reason to doubt [plaintiffs'] claim that the information would help them … evaluate candidates for public office" and, for that reason, their "injury consequently seems concrete and particular." Akins, 524 U.S.

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[2] Contrary to the Committee's suggestion (Opp. at 15), the plaintiffs in Akins did not establish standing based merely on the fact that they had voted in the past. Rather, they sued as voters who intended to vote on an ongoing basis. See Akins, 524 U.S. at 21.

at 21 (emphasis added). In other words, the Supreme Court relied upon a causal connection between the usefulness of the information to the plaintiffs in their future voting and the consequent injury to them from the failure to disclose.

The D.C. Circuit has interpreted Akins as holding that an important part of the standing inquiry is determining how missing information will be useful to the plaintiffs. In Ethyl Corp. v. EPA, 306 F.3d 1144 (D.C. Cir. 2002), the court stated:

> The Supreme Court has made clear … that a denial of access to information can work an "injury in fact" for standing purposes, at least where a statute … requires that the information "be publicly disclosed" and there "is no reason to doubt their claim that the information would help them."

Id. at 1148 (citing Akins, 524 U.S. at 21). Accord, Judicial Watch v. FEC, 293 F.Supp.2d 41, 46 (D.D.C. 2003) ("Informational injury, that injury caused when voters are deprived of useful political information at the time of voting, is a particularized injury sufficient to create standing if the denied information is useful in voting and required by Congress to be disclosed") (internal quotations and citations omitted; emphasis added). Before the Supreme Court's Akins decision, the D.C. Circuit had anticipated that decision's holding: "[W]e expressly limited our recognition of this injury to those cases where the information denied is both useful in voting and required by Congress to be disclosed." Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997).

Similarly, in Becker, the First Circuit rejected plaintiffs' claim that just "any voting-related injury" was adequate to establish standing under Akins. The court held that "Akins does not open the door so wide …. [W]hat was important was that the voters had been denied access to information that would have helped them evaluate candidates for office[.]" Becker, 230 F.3d at 389-90 (citing Akins, 524 U.S. at 21, and Common Cause, 108 F.3d at 418). The court in Becker described the continuing effect of Common Cause as "limiting 'informational standing'

under FECA to cases in which plaintiffs are denied information that is 'both useful in voting and required by Congress to be disclosed.'" Id. (quoting Common Cause, 108 F.3d at 418).

Since the Kean Committee is not a voter, it cannot claim that the information it seeks would be useful to it in voting. That by itself makes Akins inapplicable here. The Committee does not adequately explain any other way in which the information would be useful to it so that lack of the information would injure it. For example, the Committee asserts 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 [Mr. Kean]." Opp. at 16. However, it is Mr. Kean, not his Committee from the 2000 election, who will decide whether he will run again, and Mr. Kean is not a plaintiff in this lawsuit.

The Committee tries to cover up this flaw in its standing theory by asserting that it is Mr. Kean's "alter ego" (Opp. at 13 n.1). Although the Committee and Mr. Kean undoubtedly shared a common interest in his winning the 2000 primary election, under the FECA and the Commission's regulations, the Committee is in no sense an "alter ego" of Mr. Kean for any future campaigns he may one day decide to conduct. As the Commission explained in its opening memorandum, like all principal campaign committees, the Kean Committee was established by the then-candidate under a statutory directive to serve a limited purpose: to manage the finances of that specific candidate's campaign for a specific federal office in a specific election cycle. See FEC Mem. 13-14 (citing pertinent statutory and regulatory provisions). See also First Amended Complaint ¶ 20; Opp. at 2. From its inception, therefore, the Kean Committee was unlike, for example, a political party's congressional political committee, which engages in ongoing campaign activities on behalf of multiple candidates, election cycle after election cycle. Thus, the Committee's assertion (Opp. at 7) that the

Committee "is established and operated to participate in federal elections" is simply not true. The Committee was established only to participate in a single campaign, and it has done nothing at all since the end of that campaign, other than sue the Commission. If Mr. Kean were ever to become a candidate for federal office in the future, he would have to decide whether to authorize the establishment of a new principal campaign committee or redesignate the Committee (if it had not yet been terminated) as his principal campaign committee. See FEC Mem. at 15 n.10. Although the Committee's treasurer states that the Committee "would again be designated as … [Mr. Kean's] principal campaign committee" (McDermott Decl. ¶ 4), the treasurer does not identify the source of that assertion, and the treasurer has no authority to make that decision. Thus, not only are the Committee's factual assertions speculative and hypothetical, but the Committee has been unable to obtain any support for its conclusory assertions from the one person whose future political ambitions it claims would be injured by the alleged lack of information — Tom Kean, Jr.

In sum, no matter how hard the Kean Committee struggles to come within the confines of Akins, the suit simply does not fit. The Committee cannot fill the void created by the absence of Tom Kean, Jr., as an administrative complainant in the underlying administrative proceedings and then as a plaintiff in this court action. When the Committee filed the present action, Mr. Kean was not a candidate for federal office and, from the Committee's own allegations, apparently might not ever be one again. At that time, the Committee was not a political competitor in the federal electoral arena, had no legally cognizable stake in obtaining future information about CRG's finances, and could suffer no legally cognizable injury if it did not

obtain that information.[3] All of that is still true. The Committee is the only plaintiff in this case, and, despite its attempt to base its own standing on an alleged informational injury to someone else, it is well settled that "[a] federal court's jurisdiction … can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" Warth v. Seldin, 422 U.S. 490, 499 (1975) (emphasis added; internal citation omitted).

These circumstances strongly suggest that the Kean Committee's allegations of informational injury are merely a vehicle by which the Committee hopes to obtain federal court jurisdiction for another purpose: punishing CRG with a legal determination that it violated the law for undertaking activities that, in the Committee's view, contributed to Mr. Kean's narrow defeat in the 2000 primary election. At one point in its Opposition, the Committee comes close to admitting that goal: "The gravamen of the instant complaint challenges 'pre-election conduct,' … namely, allegedly improper expenditures by CRG intended help to [sic] defeat Mr. Kean and to assist his opponent in the 2000 Congressional primary." Opp. at 19. The Committee's real goal is to obtain a sanction for expenditures it views as illegal, not merely to find out how much CRG has spent.

The "government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury." Wertheimer, 268 F.3d at 1074 (citing Common Cause, 108 F.3d at 417). As the D.C. Circuit has explained, "[t]o hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to

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[3] The Kean Committee's April 2004 Quarterly Report, covering activity from January 1, 2004, through March 31, 2004, shows no contributions received and no operating expenditures incurred during that period. The report can be retrieved online at http://herndon1.sdrdc.com/cgi-bin/fecimg/?C00351742.

whether a violation of the law has occurred would be tantamount to recognizing a justiciable interest in the enforcement of the law. This we cannot do." Common Cause, 108 F.3d at 418.

C. The Committee Confuses Prudential Standing with Article III Standing

The Committee brushes aside all the authoritative decisions that show it has failed to carry its burden of demonstrating the injury-in-fact to itself that is required for standing. The Supreme Court, the Committee asserts (Opp. at 10), has "indicated that courts should broadly construe standing to bring actions under the FECA." But such arguments are based upon principles relating to prudential standing, which have nothing to do with the injury-in-fact that must be proven to establish Article III standing. The "core component" of Article III standing — the "case" or "controversy" requirement — consists of injury-in-fact, causation, and redressability, see Lujan, 504 U.S. at 560, which together form "the irreducible constitutional minimum of standing." Id. "In addition to the[se] immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.'" Bennett v. Spear, 520 U.S. 154, 162 (1997) (internal citation omitted). These are "'judicially self-imposed limits on the exercise of federal jurisdiction,'" id. (internal citation omitted), and, "unlike their constitutional counterparts, they can be modified or abrogated by Congress." Id. See also, e.g., Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing"); Warth v. Seldin, 422 U.S. at 501 (same).

The Committee relies most heavily on Akins, in which the Court found that allegations by the voter-plaintiffs of informational injury satisfied both prudential and Article III standing

requirements.[4] See supra pp.11-12. Most of the passages from Akins cited or quoted by the Committee concern prudential standing, however, not Article III standing, a key fact the Committee neglects to mention. See Buchanan v. FEC, 112 F.Supp.2d 58, 64-65 (D.D.C. 2000) (quoting some of the same lines from Akins, but adding that, "[o]f course, … the Supreme Court was referring to the doctrine of 'prudential' standing rather than constitutional standing. FECA does not alter the constitutional requirement that the plaintiffs suffer an injury in fact" (footnote omitted)). The purpose of those prudential pronouncements in Akins, as the D.C. Circuit has noted, was "only to recognize 'person aggrieved' as a congressional means of dispensing with traditional requirements of 'legal right,' … for the Court went on to cite standard applications of the 'aggrieved' language …." The Grand Council of the Crees v. FERC, 198 F.3d 950, 955 (D.C. Cir. 2000). Such prudential concerns are not at issue here.

The Committee places great weight on the statement in Akins that "nothing in the Act … 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." Akins, 524 U.S. at 20. However, this language, which is part of the Court's discussion of prudential standing, only addresses congressional intent in drafting 2 U.S.C. 437g(a)(8). Article III standing, the issue here, is a matter of constitutional law, not of congressional intent. The Commission has not argued that the Committee does not satisfy the statutory requirements of section 437g(a)(8); it is

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[4] The Committee also cites Buckley v. Valeo, 424 U.S. 1 (1976), as support for its proposition. Opp. at 10-11. Although the Court in Buckley discussed standing only briefly, it found that at least one of the many plaintiffs in that case had Article III standing to challenge each of the statutory provisions at issue. Id. at 12. The Court did not state or imply that a plaintiff proceeding under the Federal Election Campaign Act need not meet the same requirements of Article III that plaintiffs suing under other statutes must meet. Moreover, in Buckley, the plaintiffs were challenging statutory provisions restricting their own activities, not the government's failure to regulate someone else's activities more strictly, as the Kean Committee is here.

the constitutional standing requirements of Article III that the Committee has failed to satisfy. Accordingly, this language from Akins, and a large portion of the Committee's legal argument, which mistakenly addresses prudential standing, is entirely off point. "[B]ecause Article III standing is always an indispensable element of the plaintiff's case, neither … [the courts] nor the Congress can dispense with the requirement — even if its application renders a … [statutory] violation irremediable in a particular case." Natural Resources Defense Council v. Pena, 147 F.3d 1012, 1020 (D.C. Cir. 1998).

D. The Committee Cannot Rely on Past Injuries to Establish Its Standing to Seek Prospective Equitable Relief

The Committee's complaint also alleges (First Amended Complaint ¶ 20) that CRG's communications "competitively disadvantaged the Kean Committee" in the June 2000 primary campaign.[5] As we have established, the Committee has failed to demonstrate that it suffers any ongoing injury or will suffer an imminent injury. This failure by itself defeats any reliance by the Committee on the political harm it allegedly suffered during the 2000 campaign.

Although the Commission clearly invoked the long established rule limiting the circumstances in which a court may grant prospective relief, see FEC Mem. at 8, 10-11, and supra pp.2, 4-5, the Kean Committee does not address this point but instead attacks a straw man. The Committee mischaracterizes the Commission's argument as asserting that the dismissal of the administrative complaint is "immune from judicial review merely because it relates to a past election" (Opp. at 17). The Commission is not, however, arguing that no plaintiff who suffered

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[5] The Committee alleged that "supporters" of Mr. Kean also suffered injuries during that campaign (First Amended Complaint ¶¶ 20, 21), but the Committee's Opposition neither develops a positive argument based on those supposed injuries to the unnamed "supporters" nor attempts to rebut the Commission's showing that the Committee lacks representational standing. See FEC Mem. 17-18. This Reply does not, therefore, further discuss the unidentified "supporters."

an injury during a past election campaign can establish standing under Article III. Rather, the Commission is relying upon clear Supreme Court precedent that a plaintiff must also show a continuing adverse effect or imminent harm — a showing that this plaintiff has been unable to make.

The Committee's mischaracterization of the Commission's position is compounded by its confusion of standing and mootness. The Commission has argued that the Kean Committee lacks standing under Article III, but the Committee has responded with arguments about mootness. See Opp. at 19 & n.5. "Standing doctrine functions to ensure that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 191 (2000). Standing "depends on the facts as they exist when the [court] complaint is filed." Lujan, 504 U.S. at 571 n.4 (internal quotation marks and citation omitted; emphasis omitted). In contrast, "by the time mootness is an issue, the case has been brought and litigated, often … for years." Friends of the Earth, 528 U.S. at 191. See also id. at 190 ("[T]here are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness"). Moreover, mootness admits of exceptions, but standing under Article III does not. See, e.g., id. ("[I]f a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum").

Thus, the Committee is obviously wrong in believing that its standing under Article III is determined as of the day it filed its administrative complaint, May 31, 2000, rather than when it filed its original complaint in this Court in January 2004 or its amended complaint in March 2004. See Opp. at 19 ("[I]t can scarcely be doubted that plaintiff possessed standing at the time

it filed its [administrative] complaint with the FEC in May 2000"). It is also mistaken in stating that "the FEC is arguing, in essence, that the controversy has become moot because the 2000 election is over." Id. In invoking the rule regarding the inadequacy of mere past exposure to illegal conduct, as in its other arguments that the plaintiff lacks Article III standing, the Commission refers to the facts as of the time the Committee filed its lawsuit in this Court, just as the Supreme Court's decisions require.

The two cases on which the Committee relies to rebut the straw man it creates actually support the Commission's real argument because they involved either a plaintiff who had shown he was likely to run for federal office again or one who was an active candidate at the time suit was filed. In Natural Law Party, discussed Opp. at 18-19, a political party and its candidates for president and vice president filed an administrative complaint with the Commission in which they alleged that the organization staging the upcoming presidential debates was using candidate-selection criteria illegal under FEC regulations. After the debates and the subsequent election took place, the Commission found no reason to believe that the Act had been violated and so dismissed the complaint. The administrative complainants then filed a court complaint challenging that dismissal. "[A]t the time the [court] complaint was filed, which is the point at which standing is determined, there was more than a speculative possibility that the[ ] injuries [alleged] would recur. . . . [The individual] Plaintiffs …, who were the Natural Law Party's nominees in 1992 and again in 1996, were likely to run again in the 2000 election." Natural Law Party, 111 F.Supp.2d at 44-45 (emphasis added). Moreover, "the Natural Law Party … itself was more than likely to field a presidential candidate in the 2000 election." Id. at 45. The "firm intentions" expressed by the candidate plaintiffs and their party "to run in the 2000 election and again be exposed to the … [allegedly unlawful] criteria [of the presidential debate organization],

contrast[ ] sharply with … speculative plans," id., and that is the only kind that the Kean Committee offers.

The second case on which the Committee relies, Buchanan v. FEC, 112 F.Supp.2d 58 (D.D.C. 2000), also concerns a challenge to the Commission's dismissal of an administrative complaint alleging that the organization staging the presidential debates violated FEC regulations. The plaintiffs in Buchanan included a candidate for president who hoped to participate in the upcoming debates. 112 F.Supp.2d at 60. Indeed, he was still a candidate later when, before the debates were held, the court issued its decision. Id. In contrast, Mr. Kean is not a plaintiff in the present action and, in any event, at the time the court complaint was filed he had no plans to run for federal office again.

Pursuing its mischaracterization of the Commission's argument even further, the Kean Committee contends that accepting the Commission's argument would enable the Commission to delay processing an administrative complaint until an election is over in order to insulate from judicial review the agency's decision to dismiss the complaint. Opp. at 17-19.[6] The Committee offers absolutely no evidence that the Commission has somehow manipulated or would manipulate its proceedings to avoid judicial review, and it ignores the well-settled "presumption of regularity [that] attaches to the actions of Government agencies." United States Postal Service v. Gregory, 534 U.S. 1, 10 (2001). That "strong presumption" cannot be overcome by "sheer multiplication of innuendo." Louisiana Ass'n of Independent Producers and Royalty Owners v.

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[6] Congress, not the Commission, established the timetables and procedural steps that the Committee criticizes. See FEC Mem. 2-3, 11. "[P]rocedural requirements … bind the FEC's deliberations about, and investigation of, complaints." Perot v. FEC, 97 F.3d 553, 558 (D.C. Cir. 1996), cert. denied, 520 U.S. 1210 (1997). Moreover, "Congress … knew full well that complaints filed [with the FEC] shortly before elections … might not be investigated and prosecuted until after the event." Id. at 559. See also id. ("Congress could have chosen to allow judicial intervention in the face of such exigencies, but it did not do so").

FERC, 958 F.2d 1101, 1111 (D.C. Cir. 1992). Like the Committee's other arguments, moreover, this argument is directed at a straw man rather than at the Commission's actual position. In many cases, plaintiffs will be able to show a prospective injury-in-fact to support their standing to litigate even after an election is over — as the voter-plaintiffs in Akins did. The Committee is unable to show any such injury, not because of any action by the Commission, but because of its own circumstances, the failure of Mr. Kean to join in its administrative complaint and its lawsuit, and the nature of the violations it alleged. Indeed, since the Commission filed its administrative complaint only six days before the election, see First Amended Complaint ¶¶ 12, 17, there was nothing the Commission could have done to resolve that complaint before the election. See 2 U.S.C. 437g(a)(1).

In fact, the timing of events in this case is fatal to the Committee's causation analysis. The Committee repeatedly states that CRG caused the Committee political injury during the 2000 primary campaign. First Amended Complaint ¶ 20; Opp. at 4-5; 20 n.6; 21; 22. However, to support standing in a section 437g(a)(8) suit, the injury alleged must "stem[ ] from the FEC's dismissal of … [plaintiff's] administrative complaint." Judicial Watch, 180 F.3d at 277. See supra p.3; FEC Mem. at 10. The Committee attempts to supply the missing linkage by relying on the principle 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.'" Opp. at 21 (quoting Telephone and Data Systems, Inc. v. FCC ("TDS"), 19 F.3d 42, 47 (D.C. Cir. 1994)). As the cases cited by the Committee itself show, however, this principle applies only where the governmental action occurs before the alleged injury occurs, for only in that circumstance may the injury be considered traceable to or a consequence of the governmental action. TDS, 19 F.3d at 44 (agency order granting "a conditional permit" allowed plaintiff's competitor to construct

and operate cellular communications services in a particular market); Animal League Defense Fund, Inc. v. Glickman, 154 F.3d 426, 428, 442 (D.C. Cir. 1998) (federal regulations permitted dealers, exhibitors, and research facilities to keep primates under inhumane conditions), cert. denied, 526 U.S. 1064 (1999); Natural Law Party, 111 F.Supp.2d at 45 (FEC's "ratification" of debate organization's allegedly unlawful candidate-selection criteria "increases the probability that plaintiffs will be unfairly excluded from future presidential debates") (emphasis added). See also Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976) ("[I]ndirectness of injury … 'may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm'") (internal citation omitted; emphasis added). In the present case, the Commission dismissed the Committee's administrative complaint three years after CRG allegedly injured the plaintiff, so, as a matter of simple logic, this action could not have "caused" the electoral injury that the Committee claims CRG inflicted three years earlier. "Causation remains inherently historical." Freedom Republicans, Inc. v. FEC, 13 F.3d 412, 418 (D.C. Cir.) (no causation and, hence, no Article III standing because "[t]he Republican Party's practice of allocating delegates in accordance with Republican voting strength … preceded public convention funding by fifty-eight years"), cert. denied, 513 U.S. 821 (1994).

In sum, this Court "need not venture beyond the threshold question of standing in order to decide this case." Freedom Republicans, 13 F.3d at 415. The Kean Committee has failed to carry its burden to meet the minimum constitutional requirements for standing. The Committee's First Amended Complaint is insufficient even to survive a motion to dismiss, much less a motion for summary judgment.

IV. CONCLUSION

For the reasons stated above and in the Commission's opening memorandum, the Federal Election Commission requests that the Court grant the Commission's motion and dismiss the plaintiff's First Amended Complaint.

Respectfully submitted,

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