UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR DEMOCRACY, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 04-CV-00127 (EGS)
v.	)	
	)	MOTION TO DISMISS, OR IN
FEDERAL ELECTION COMMISSION,	)	THE ALTERNATIVE, FOR
	)	SUMMARY JUDGMENT
Defendant.	)	
	)	

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

The Federal Election Commission ("Commission") hereby moves to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. The Court should grant this motion because the plaintiffs have all the information they claim to be deprived of and fail to allege or demonstrate how any additional information will have any concrete effect on the individual plaintiffs' voting in future elections or on the Alliance for Democracy's programmatic activities. For these reasons plaintiffs have failed to establish standing under Article III. In support of this Motion the Commission also submits a Memorandum of Points and Authorities, a Statement of Material Facts Not In Genuine Issue, and a proposed order.

Respectfully submitted,

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March 29, 2004

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ALLIANCE FOR DEMOCRACY, et al.,	)	
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Plaintiffs,	)	
	)	Civ. No. 04-CV-00127 (EGS)
v.	)	
	)	MEMORANDUM
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
	)	
	)	

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

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The plaintiffs, Alliance for Democracy, Hedy Epstein, and Ben Kjelshus (collectively "Alliance"), lack Article III standing to bring this action because the information they claim to be deprived of is already on the public record. Alliance filed an administrative complaint with the Federal Election Commission ("FEC" or "Commission") that was investigated, evaluated by the Commission, and resulted in an executed conciliation agreement between the Commission and the administrative respondents. Much of the investigative record compiled during the Commission's investigation has been placed on the public record and is therefore available to Alliance.

In this action, Alliance claims it was harmed by the alleged failure of Spirit of America PAC ("SOA" or "the PAC") and the Ashcroft 2000 Committee to report the exact value of a mailing list that allegedly was contributed by SOA to Ashcroft 2000. However, as explained below, the public record now contains far more information about this transaction than otherwise would be reported in a political committee's disclosure report. Therefore, Alliance cannot have suffered an Article III injury based on being deprived of information that it in fact already possesses.

I. BACKGROUND

A. The Federal Election Commission

The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), codified at 2 U.S.C. 431-455. See 2 U.S.C. 437c(b)(1), 437d(e) and 437g. "Any person" may file an administrative complaint with the Commission alleging a violation of the FECA. 2 U.S.C. 437g(a)(1). The statute prescribes the steps the Commission is to take in processing an administrative complaint. The Commission

first reviews the complaint and any responses to it and then votes on whether there is "reason to believe" that a violation of the FECA has occurred. 2 U.S.C. 437g(a)(2). If four members of the Commission vote to find "reason to believe," then the Commission may conduct an investigation. Id. After the investigation is completed, the Commission votes to determine whether there is "probable cause" to believe that a violation has occurred. See 2 U.S.C. 437g(a)(4)(A)(i). If at least four members of the Commission vote in the affirmative, the Commission attempts to reach a conciliation agreement with the alleged violator. Id. If conciliation attempts fail, the Commission then may vote to determine whether to institute a de novo civil enforcement action. See 2 U.S.C. 437g(a)(6)(A).

If, at any point in this administrative process, four members of the Commission do not affirmatively vote to proceed to the next stage, the Commission dismisses the complaint. A complainant "aggrieved" by the Commission's dismissal may then file a petition for review in the United States District Court for the District of Columbia. 2 U.S.C. 437g(a)(8)(A). If the Court declares that the Commission's dismissal of the administrative complaint was "contrary to law," it may order the Commission to conform to the declaration within 30 days. 2 U.S.C. 437g(a)(8)(C). If the Court subsequently finds that the Commission has failed to conform to the order, the complainant may bring a private civil action against the administrative respondent. Id.

B. Plaintiffs' Administrative Complaint

On March 8, 2001, the Commission received an administrative complaint from Alliance that was designated Matter Under Review ("MUR") 5181 for administrative purposes at the Commission. The administrative complaint alleged "that the Spirit of America PAC contributed a fundraising list of 100,000 donors to Ashcroft 2000 and that, in turn, Ashcroft 2000 made a significant amount of money by renting [it] … to other entities." Admin. Compl. ¶¶ 8, 9

(quoting Walter Pincus, Possible Ashcroft Campaign Violations, Washington Post, Feb. 1, 2001, at A4) (FEC Exh. 1). The administrative complaint further alleged that the "donation of the fundraising list by Spirit of America PAC to Ashcroft 2000 constituted a 'contribution[,]' " which neither committee reported to the Commission in the required disclosure reports. Id. ¶¶ 9-10. The administrative respondents in MUR 5181 were Spirit of America PAC, Ashcroft 2000, and Garrett Lott, the treasurer of both political committees.

C. The Commission's Administrative Investigation

The Commission conducted an investigation into the allegations in Alliance's administrative complaint and developed a significant investigative record. Much of this information, which was the basis of the Commission's findings, has been placed on the public record. See FEC, Enforcement Query System ("FEC EQS"), http://eqs.sdrdc.com/eqs/searcheqs (search request for MUR 5181 retrieves documents). Available to the public are 58 documents totaling hundreds of pages, including the General Counsel's Reports, the General Counsel's Brief, briefs filed by the respondents, the Commissioners' Statements of Reasons, and the Conciliation Agreement ("CA") entered into by the Commission and the respondents. Id. This material explains in detail the transactions that were the basis of Alliance's administrative complaint.

Spirit of America PAC is a political committee founded and chaired by John Ashcroft. See CA ¶ IV.3 (FEC Exh. 2); GC Report #4, at 2 (FEC Exh. 3). Specifically, SOA is a "leadership PAC" — a political committee established by an elected official to support other candidates and party committees, and to fund other political pursuits of the officeholder apart from his own re-election. See Smith Statement of Reasons ("SOR") at 3 (FEC Exh. 4). Ashcroft

2000 was the authorized campaign committee supporting John Ashcroft's candidacy for the United States Senate from Missouri in the 2000 elections. See CA ¶ IV.2; GC Report #4, at 2-3.

Beginning in January 1998, SOA began developing a fundraising mailing list as part of its direct mail solicitation program. CA ¶ IV.15 (FEC Exh. 2); Smith SOR at 3 (FEC Exh. 4); GC Brief at 2 (FEC Exh. 5); see generally CA ¶¶ IV.15.22; GC Brief at 19-35; GC Report # 4, at 8-15 (FEC Exh. 3). The PAC began this process by renting lists or portions of lists from other organizations and by then "prospecting" for donors using these rented lists. The PAC also entered into name exchanges with other organizations; the PAC had the right to retain the names and addresses of individuals who responded to the initial mailings. CA ¶ IV.9. Most of the prospecting letters were signed by Mr. Ashcroft as chairman of the PAC. See id.

During 1998, SOA sent over 3.9 million prospecting solicitations costing over $1.7 million dollars. CA ¶ IV.15 (FEC Exh. 2); see also GC Report # 4, at 10-13 (FEC Exh. 3); GC Brief at 15-16, 25-26 (FEC Exh. 5). In May 1998, the PAC began to rent out its mailing list or portions of it to other organizations. GC Brief at 3. See also CA ¶ IV.13. In 1998, SOA received $6,331 in list rental income, and during the first half of 1999, it received $97,390 in additional rental income. CA ¶ IV.17.

On July 17, 1998, SOA and John Ashcroft entered into an agreement that provided John Ashcroft with an ownership interest in the mailing list. See Work Product Agreement ("WPA") (Weintraub SOR, Attachment 1) at 1 (FEC Exh. 6); see also GC Brief at 4, 23-24, 25-28 (FEC Exh. 5). The WPA provided that SOA could use Ashcroft's name and likeness in its fundraising solicitations and in turn John Ashcroft owned the names and addresses of those responding to the SOA solicitations. CA IV.12 (FEC Exh. 2). During the Commission's investigation, the

respondents contended that the WPA reflected a written memorialization of an oral understanding between Senator Ashcroft and SOA that began early in 1998. See Respondents Brief at 3 (FEC Exh. 7).

Effective January 1, 1999, Senator Ashcroft entered into a List License Agreement ("LLA") with Ashcroft 2000 providing Ashcroft 2000 the right to unlimited use of the mailing list for direct mail solicitations or any other use. LLA (Weintraub SOR, Attachment 2) (FEC Exh. 6); CA ¶ IV.16 (FEC Exh. 2); see also GC Brief at 4-5, 24-25 (FEC Exh. 5).

By letter dated December 10, 1999, Garrett Lott, writing as "finance coordinator" of the PAC and Ashcroft 2000, provided direction to their mailing list management vendor that all mailing list rental revenue be shifted from SOA to Ashcroft 2000 and that six undeposited rental income checks payable to the PAC be rewritten and made payable to SOA. CA ¶ IV.18.a (FEC Exh. 2); see also GC Brief at 6, 21-22, 28-31 (FEC Exh. 5); Griffiths Decl. ¶ 5 (FEC Exh. 8); Mason/Toner SOR at 3 (FEC Exh. 9). These checks totaled $49,131. CA ¶ IV.18.a. Later, Garrett Lott similarly requested that the vendor redirect a seventh list rental check for $17,531. CA ¶ IV.18.c. In response to the vendor's questions regarding the reissuing of the checks, Garrett Lott signed a letter drafted by the vendor's counsel which stated that the transfer of these receipts was fully authorized by Mr. Ashcroft and SOA and did not contravene any existing agreement, law and/or regulation of any government authority, and that the vendor would be held harmless from any and all claims to the contrary. CA ¶ IV.18.b; Griffiths Decl. ¶ 6. The vendor then re-issued a single check to Ashcroft 2000 for $66,662 dated December 30, 1999. CA ¶ IV.18.c. Ashcroft 2000 disclosed the receipt of this list rental income as "mail receipts" in its FEC disclosure reports. CA ¶ IV.18.c.

Ashcroft 2000 received additional income from the list during 2000 by selling the right to collect payment from persons who had rented the mailing list from SOA. CA IV.19 (FEC Exh. 2). Ashcroft 2000 sold these "accounts receivables" for $46,300. Ashcroft 2000 disclosed in its FEC disclosure reports, with no identified purpose, that it had received $46,300 from its list vendor on March 31, 2000. CA ¶ IV.19. Between December 1999 and May 2001, Ashcroft 2000 received additional list rental income totaling $121,255. CA ¶ IV.21.

At the conclusion of the investigation, the Commission determined that there was probable cause to believe that SOA and its treasurer made an excessive contribution of over $110,000 to Ashcroft 2000 in violation 2 U.S.C. 441a(a)(2)(A) and failed to report that contribution in violation of 2 U.S.C. 434(b). See CA V.1 (FEC Exh. 2). Correspondingly, the Commission determined that there was probable cause to believe that Ashcroft 2000 and its treasurer violated 2 U.S.C. 441a(f) by receiving this excessive contribution and violated 2 U.S.C. 434(b) by failing to report the contribution. Id.

The Commission entered into a Conciliation Agreement with SOA and Ashcroft 2000 that described these violations and in which the respondents agreed to cease and desist from such violations and pay a $37,000 civil penalty. CA V.4 (FEC Exh.2). Individual Commissioners issued statements of reasons explaining the basis of their decisions on this matter. See Smith SOR (FEC Exh. 4); Mason/Toner SOR (FEC Exh. 9); Weintraub/Thomas/McDonald SOR (FEC Exh.10; and Weintraub SOR (FEC Exh. 6).

D. Plaintiffs' Judicial Complaint

Plaintiffs Ben Kjelshus, Hedy Epstein, and Alliance for Democracy filed the instant complaint against the Commission pursuant to 2 U.S.C. 437g(a)(8), seeking judicial review of the Commission's alleged dismissal of their administrative complaint. The complaint alleges,

inter alia, that "[t]he FEC's investigation of the matter, designated MUR 5181, revealed that the Spirit of America PAC developed the fundraising list at a cost of over $1.7 million, and confirmed that the PAC illegally donated the list to Ashcroft 2000." Complaint ¶ 1.

Ben Kjelshus is described in the complaint as a member of the Alliance for Democracy, a Missouri voter who voted in the 2000 Missouri Senate election (Complaint ¶ 4), and a Green Party candidate for the Missouri state office of Lieutenant Governor in 2000 (id. ¶¶ 4, 29).

The complaint alleges that "[p]laintiff Hedy Epstein is a Missouri voter who voted in the 2000 Missouri Senate election[,] is politically active[, and] will continue to vote and be politically active in future elections." Complaint ¶ 5.

According to the complaint, Alliance for Democracy is a "non-profit, non-partisan" organization that "seeks to build a progressive, populist movement to end corporate domination, to establish true political democracy, and to build a just society with a sustainable, equitable economy." Complaint ¶¶ 4, 22. The complaint also alleges that Alliance "is conducting a campaign advocating major reform of the current campaign finance system through Clean Elections (full public financing of elections)." Id. ¶ 23. Alliance is registered as a nonprofit organization under 26 U.S.C. 501(c)(3). See Letter from Masters to Mueller of 3/26/04 (Internal Revenue Service confirmation of tax status) (FEC Exh. 13); see also Alliance for Democracy http://www.thealliancefordemocracy.org/join.html (explaining that "[a]ll donations [to the Alliance] are tax deductible") (FEC Exh. 13).

Alliance's allegations of harm stem from its claim that SOA and Ashcroft 2000 failed to "disclose the donation of the list and its value in reports to the FEC." Complaint ¶ 1; see also id. ¶ 21. Plaintiffs also complain that the Commission "did not determine the monetary

value of the list," which they allege to be "far more than the $112,962 in excessive contributions found by the Commission." Complaint ¶ 18.

Alliance seeks to have MUR 5181 remanded to the FEC "to ascertain the value of the illegally donated mailing list, to require reporting and disclosure of the same, to seek further penalties, and/or to seek appropriate declaratory and injunctive relief against SOA, Ashcroft 2000, and their principals." Complaint ¶ 20.

II. THIS CASE SHOULD BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING

Plaintiffs' allegations of injury rest upon the alleged failure of SOA and Ashcroft 2000 to report the exact value of a mailing list that was allegedly contributed by SOA to Ashcroft 2000 in 1999, but plaintiffs in fact now have far more information about this transaction than they would have had if the respondents had simply complied with Alliance's view of the law. Plaintiffs' purported lack of information is less than nominal, and they do not even allege any injury from the underlying transfer of the mailing list itself.[1] Moreover, their alleged informational injuries concern either a past injury that cannot be redressed or a future injury that is preposterously speculative. They do not even come close to meeting the requirements of Article III.

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[1] Although Alliance alleges (Complaint ¶ 1) that the Commission obtained an inadequate civil penalty from the respondents, Alliance never alleges (see id. at ¶¶ 21-33) that either the size of the penalty or the underlying transfer of the mailing list caused an Article III injury-in-fact to any of the plaintiffs. In light of governing precedent construing Section 437g(a)(8), any such allegation of injury-in-fact would be foreclosed: a general interest in law enforcement — the desire to see the Commission "get the bad guys" — is insufficient to confer standing. Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997); see also Judicial Watch, Inc. v. FEC, 180 F.3d 277, 278 (D.C. Cir. 1999).

A. The Elements of Article III Standing

"Article III of the Constitution limits the 'judicial power' to the resolution of 'cases' and 'controversies.'" McConnell v. FEC, 124 S.Ct. 619, 707 (2003). "One element of the 'bedrock' case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." Id. To establish standing under Article III, the plaintiffs have the burden of demonstrating the "three requirements that constitute the 'irreducible constitutional minimum' of standing":

> First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." ... Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of — the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not ... th[e] result [of] some third party not before the court.'" ... Third, a plaintiff must show the "'substantial likelihood' that the requested relief will remedy the alleged injury in fact."

McConnell, 124 S.Ct. at 707 (citations omitted). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968).

The party invoking federal jurisdiction bears the burden of establishing that the elements of standing exist. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). See Wertheimer v. FEC, 268 F.3d 1070, 1074 (D.C. Cir. 2001) (standing is jurisdictional). "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor … clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (internal quotation marks and citations omitted).

A plaintiff "must allege in his pleading the facts 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., 493 U.S. at 235 (citation omitted). Moreover,

> [s]ince they 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 v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

An injury-in-fact 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 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)); Gottlieb v. FEC, 143 F.3d 618, 620 (D.C. Cir. 1998). "Particularized" means that "the injury must affect the plaintiff in a personal and individual way." Lujan, 504 U.S. at 560 n.1. Thus, the injury cannot be merely a "generalized grievance" about the government that affects all citizens or derives from an interest in the proper enforcement of the law. FEC v. Akins, 524 U.S. 11, 23 (1998); Lujan, 504 U.S. at 573-74. See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982) (the judicial process is not "a vehicle for the vindication of the value interests of concerned bystanders") (citation omitted).

Next, a plaintiff must show that its 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 not before the court.'" Lujan, 504 U.S. at 560 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). It is therefore notably more difficult to establish standing when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack

of regulation) of someone else…" Lujan, 504 U.S. at 562 (emphasis in original). Accord Common Cause, 108 F.3d at 417.

Finally, in order to establish standing, a party must show that a favorable decision by the court would likely provide actual relief from the alleged injury-in-fact. Such relief cannot be speculative. Lujan, 504 U.S. at 561. This third element of standing, redressability, is closely related to causation in that both seek a causal nexus between the plaintiff's injury and the defendant's assertedly unlawful act. "To the extent there is a difference, it is that [causation] examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas [redressability] examines the causal connection between the alleged injury and the judicial relief requested." Allen v. Wright, 468 U.S. 737, 753 n. 19 (1984).

B. Plaintiffs Cannot Demonstrate An "Informational Injury" Because They Already Have The Information They Allegedly Seek

Despite the numerous paragraphs that Alliance devotes (Complaint ¶¶ 21-33) to describing its alleged harm, all of its alleged injuries derive from its claim (id. ¶ 1) that the respondents "unlawfully failed to disclose the donation of the list or its value in reports to the FEC." Although Alliance acknowledges that the FEC has now completed its investigation of the administrative complaint and placed a wealth of information onto the public record,[2] Alliance ignores the fact that this information far exceeds what would normally be reported by political committees that transferred a mailing list.

In the opening paragraph of its complaint, Alliance provides its own summary of this information, including the obvious fact that it knows the mailing list was transferred: It alleges

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[2] As Alliance admits, "[d]ocuments describing the results of the OGC's investigation, including the General Counsel's reports and other FEC documents referenced in this complaint, are publicly available through the Enforcement Query System on the Commission's website, *see* http://www.fec.gov/finance_law.html." Complaint ¶ 13.

that the "FEC's investigation of this matter, designated MUR 5181, revealed that the Spirit of America PAC developed the fundraising list at a cost of over $1.7 million, and confirmed that the PAC illegally donated the list to Ashcroft 2000."[3] Complaint ¶ 1. Alliance also alleges details about the underlying transaction: "A 'Work Product Agreement' (WPA) purported to transfer the list from Spirit of America PAC to Mr. Ashcroft in exchange for permission to use his name and likeness in the Spirit of America PAC mailings." Complaint ¶ 13.

In fact, these details are just the tip of the iceberg already in Alliance's possession. The voluminous documents available on the Commission's website provide abundant raw data and numerous views of how that data could be analyzed to determine the value of the mailing list — an inherently judgmental task. These documents disclose when SOA began developing the mailing list, how it developed the list and at what cost, how the two committees used the list, and how much income it generated. See, e.g., GC Brief at 3-4 (SOA worked with its vendors to send 3.9 million "prospecting solicitations" at a cost of more than $1.7 million) (FEC Exh. 5); CA IV.9 (PAC "prospected" for contributors from mailing lists rented from other organizations) (FEC Exh. 2); CA IV.9 (PAC rented its mailing list to other organizations); CA IV.16 (Ashcroft 2000 used mailing list as part of committee's direct mail efforts); CA IV.19 (detailing SOA's list rental income). The record also provides the full text of the documents that executed the transfer of legal interests from SOA to Ashcroft 2000. See Attachments 1 and 2 to Weintraub SOR (FEC Exh. 6).

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[3] Indeed, Alliance had sufficient information in March 2001 to file a sworn complaint with the Commission alleging a violation of the Act. See 2 U.S.C. 437g(a)(1). That complaint alleged "that Spirit of America PAC contributed a fundraising list of 100,000 donors to Ashcroft 2000," that the list was developed "at a cost of more than $2 million," and that "Ashcroft 2000 in turn made more than $116,000 renting out the list to other fundraisers." Admin. Complaint at 3 (citations and quotation marks omitted).

Reasonable persons can disagree about how this information could be analyzed to determine the value of the mailing list, but it is indisputable that this voluminous information stands in stark contrast to the single entry of allegedly missing information that is the sole foundation for Alliance's purported informational injury. If the respondents were to disclose the transfer of the mailing list as Alliance alleges they must, the FECA and applicable regulations would require the two respondent committees to each include a single entry that would reflect the committees' view of the value of the in-kind contribution. See 2 U.S.C. 434(b); 11 C.F.R. 104.3(a), (b); 11 C.F.R. 104.13(a); see also FEC, Campaign Guide for Nonconncected Committees 37 (2002) (FEC Exh.11); FEC, Campaign Guide for Congressional Candidates and Committees 52 (2002) (explaining in-kind contribution reporting requirements and providing examples of in-kind contribution entries from disclosure reports) (FEC Exh. 12).[4]

Contrary to Alliance's implication (Complaint ¶ 18), the FECA does not require the Commission to "determine the monetary value of the list." When political committees file their disclosure reports, the Commission has no obligation to second-guess their itemized receipts and disbursements — an impossible task, given the multitude of data the Commission processes each year from thousands of reporting entities. See generally 2 U.S.C. 433, 434 (Act's reporting requirements). And even during the consideration of Alliance's administrative complaint, the Commission was not required to determine the exact value of the mailing list as part of its investigation. See generally 2 U.S.C. 437g(a). Indeed, the facts in this case illustrate how

[4] Alliance's complaint also fails to acknowledge that much information about the mailing list has already been reported by SOA. As the conciliation agreement in this matter stated (at ¶ 9): "The PAC reported to the Commission the PAC's expenditures related to mailing list development, including the cost of renting lists or portions of lists belonging to other organizations, creative and production fees, printing, mail preparation, postage, caging and escrow, and file maintenance fees in the PAC's disclosure reports filed with the Commission."

persons can reasonably disagree about the exact value of such a list. As explained below, the Commission's investigation and deliberations have made public data and valuation methodologies that Alliance can use to draw its own conclusion about the mailing list transaction.

For example, the General Counsel recommended that the Commission find probable cause to believe that Ashcroft 2000 received excessive in-kind contributions totaling $254,917 through the mailing list and its use, see Weintraub/Thomas/McDonald SOR (FEC Exh. 10) at 3 (citing General Counsel reports)— an interpretation contrary to the view of the respondents (Brief of SOA, Ashcroft 2000, & Lott ("SOA Brief") at 2-4) (FEC Exh. 7).[5] The General Counsel calculated this figure as the sum of the following specific items (Weintraub/Thomas/McDonald SOR at 3-4):

1.	Redirected mailing list rental payments (December 1999)	$66,662
2.	Accounts receivable from SOA mailing list rentals (sold by Ashcroft 2000)	$46,300
3.	Approximate share of $121,255 income paid through outside vendor to Ashcroft 2000 attributable to SOA mailing list	$80,000
4.	Ashcroft 2000's use of SOA names	$61,955

Three of the FEC Commissioners agreed with this analysis (id. at 5, citing GC Brief at 19-35 (FEC Exh. 5)), but added that the "excessive contributions in this matter arguably are far greater than the $255,000" because of the $1.7 million SOA spent to develop the mailing list (id. at 7).

[5] Because the respondents believed that Mr. Ashcroft obtained ownership of the mailing list through an exchange of equal value, they contended that no "contribution" took place under the FECA when Mr. Ashcroft obtained ownership of the list. SOA Brief at 6, 9-10 (FEC Exh. 7).

Three other FEC Commissioners disagreed. Based upon unrebutted testimony, the evidence amassed in the investigation, and prior Commission proceedings, two Commissioners found that Mr. Ashcroft's agreements with SOA and Ashcroft 2000 were fair market value exchanges. Mason/Toner SOR at 9 (FEC Exh. 9). A third Commissioner concurred that it would be inappropriate to second-guess the list agreements. Smith SOR at 8-9 (FEC Exh. 4). Accordingly, while these Commissioners found it fitting to impose a civil penalty regarding items #1 and #2 above — involving the redirection of mailing list income earned by SOA and transferred to Ashcroft 2000 — they did not believe that transfer of the mailing list itself constituted an in-kind contribution.

Commissioners Mason and Toner also perceived certain complexities in valuing the mailing list. Mason/Toner SOR at 9-11 (FEC Exh. 9). They pointed out, for example, the pitfalls of valuing a mailing list on a cost basis. Because the process of "prospecting" mailings often generates significant revenue, a successful prospecting might break even, while a failed effort might earn very little. Thus, the net cost of creating a break-even list would be zero, while the net cost of a total failure would equal all the costs of the prospecting. Because the former list would obviously be more valuable because of its proven success, it would "def[y] common sense" to determine the "value" of the respective lists by simply subtracting the revenue earned from the costs of prospecting, because, under such a formula, the more successful a list, the lower its value. Id. at 10. See also Smith SOR at 8-9 (agreeing that the revenues earned while compiling a list would have to be considered if the cost of developing a list were viewed as relevant to its fair market value) (FEC Exh. 4).

Commissioners Mason and Toner also discussed the possibility of determining a list's value by multiplying the number of names on a list by a fixed dollar amount per name, e.g., fifty

cents per name. Here, this method would have yielded an approximate value of $40,000 for the 80,000-name mailing list, not including subtractions for other adjustments, such as the value of any new names Mr. Ashcroft received when he transferred the list to Ashcroft 2000. Mason/Toner SOR at 10 (FEC Exh. 9). In Commissioner Smith's view (Smith SOR at 8-9), the "Commissioners supported divergent theories that required list valuation and [the Commission's] application of unclear rules and evidence."[6]

In sum, this case is not even remotely comparable to FEC v. Akins, 524 U.S. 11 (1998), where the Supreme Court determined that voters could suffer an "informational injury" only when they lacked particular information directly related to voting and required by the Act to be disclosed. See id. at 19-26. In that case, the administrative complaint sought to have the respondent American Israel Public Affairs Committee ("AIPAC") declared a "political committee" subject to the Act's reporting requirements. Such a finding is the threshold

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[6] Alliance inaccurately alleges (Complaint ¶ 18; emphasis added) that "[b]ecause the Commission did not find the transfer of the fundraising list to be an illegal contribution, it did not determine the monetary value of the list …." But that is not why the Commission did not determine a single precise value for the list. Rather, as we have just discussed and the record demonstrates, placing a single value on such a list is an inherently complex task, and the Commissioners expounded their reasonable, yet divergent opinions about how such a valuation could be done.

In these circumstances, even if Alliance had standing and were entitled under the Act to a determination by the Commission of the list's value, there is no reason to believe that the Commissioners would come to any different conclusion if the matter were remanded to them. Thus, any determination of the list's value made at the direction of the Court would reflect the Court's views, not the Commission's, although Alliance purports to seek the Commission's views. See FEC v. National Republican Senatorial Comm., 966 F.2d 1471, 1475-76 (D.C. Cir. 1992) (to determine the Commission's construction of a regulation, the appellate court would review the original views of the controlling Commissioners, not the position they took based solely on a belief that they were obligated to follow the district court's order). Cf. Perot v. FEC, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam) ("This court could not compel the FEC to enforce its regulation in accordance with the FECA…. [W]e have interpreted § 437g(a)(8)(C) to allow nothing more than an order requiring FEC action"), cert. denied, 520 U.S. 1210 (1997).

determination under the Act for requiring a group to disclose all its receipts and disbursements to the FEC and the public. See 524 U.S. at 13-18. AIPAC had allegedly acted as a political committee, assisting many candidates, without reporting which candidates it supported. If AIPAC were deemed a political committee, the Act would require it to disclose all of its finances in reports to the Commission. Thus, the plaintiffs in Akins had been completely denied access to any information about AIPAC's receipts and disbursements, and thus had no way to determine whether a particular candidate was even supported by AIPAC. In contrast to the allegations in Akins regarding ongoing activities on behalf of numerous candidates, in this case Alliance's complaint alleges that the only piece of missing information is the exact value of a single mailing list involving a past transaction between a known (former) candidate and his own leadership PAC. Given the wealth of information Alliance has about the mailing list, the allegedly missing information is entirely insignificant.

Alliance's case for standing is as flawed as that of the plaintiffs in Wertheimer, 268 F.3d at 1075, who failed to demonstrate informational injury because they "only [sought] the same information from a different source." All told, Alliance has far more data about the mailing list than what the respondents would disclose in a report to the Commission, and plaintiffs also have the Commissioners' views about various evaluation methodologies. At most Alliance is lacking the respondents' own valuation of the mailing list, but "any such increase in information … seems trivial." Id.[7]

[7] Indeed, Alliance's continuing insistence (see, e.g., Complaint ¶ 24) that the respondents "report the value of the list as an in-kind donation" is, ultimately, nonsensical. Alliance already knows that, according to respondents, there was no in-kind donation because they considered Mr. Ashcroft's "provision of [his] name and likeness" to be "equivalent consideration" for the "work product resulting from the use of such likeness." SOA Br. at 10 (FEC Exh. 7). Requiring the respondents to report their own view of the transaction, therefore, would be an exercise in futility. On the other hand, if Alliance wants

Finally, Alliance seeks (Complaint ¶ 18) to have the "Commission … determine the monetary value of the list," but as discussed supra pp. 13 & 16 n.6, the FECA simply does not require the Commission to determine the precise value of the list; the Act only requires the Commission to disclose information that regulated entities are required to report to it. 2 U.S.C. 434. Stripped of their inconsistencies, Alliance's claims amount to nothing more than a request that the Commission declare the list transfer an unlawful contribution and, as a subsidiary matter, put the agency's gloss on the specific magnitude of the violation. However, as in Wertheimer, the "government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury." 268 F.3d at 1074 (citing Common Cause, 108 F.3d at 417). The decision in Wertheimer thus reaffirmed that neither a desire to gain information about the purported illegality of political conduct nor a desire to have political transactions reported in a different form creates informational injury in an action brought under 2 U.S.C. 437g(a)(8). "'To hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of knowledge as to whether a violation of the law has occurred would be tantamount to recognizing a judiciable interest in the enforcement of the law. This we cannot do.'" Id. (quoting Common Cause, 108 F.3d at 418).

C. Plaintiffs' Allegations Of Past Injury Cannot Establish Standing

The plaintiffs allege (Complaint ¶¶ 25, 29, 32) that they were injured by not having information about the mailing list at the time of the 2000 elections, but these allegations fail to satisfy any of the three criteria for constitutional standing. "'Past exposure to illegal conduct

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the Commission to insist that the respondents place a value on the transfer according to the Commission's view of its value, then that would be a different (and circular) exercise in futility: requiring the respondents to report the Commission's view of the list's value would obviously tell Alliance nothing about the respondents' own view. Moreover, as discussed above, Alliance already knows how the Commission treated the appraisal issues.

does not in itself show a present case or controversy regarding injunctive relief.'" Natural Resources Defense Council v. Pena ("NRDC"), 147 F.3d 1012, 1022 (D.C. Cir. 1998) (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)). Thus, the claimed past injury cannot serve as the injury-in-fact necessary for Alliance to have Article III standing now; the only relief it seeks is to have the Commission require the respondents to provide information, but that relief cannot affect the 2000 election retroactively.

Specifically, Mr. Kjelshus alleges (Complaint ¶ 29) that during the 2000 election "[i]n talking to prospective voters about whom to support, it would have been very helpful to … have full information on the illegal donations involving the Ashcroft campaign and Spirit of America PAC, including the dollar value of the fund-raising list that Spirit of America PAC donated to the Ashcroft campaign [and] when it donated the list." Similarly, Ms. Epstein alleges that "[i]n evaluating the candidates and talking to other prospective voters about whom to support, she would have been very interested in knowing the information that the Ashcroft 2000 campaign and the Spirit of America PAC have thus far failed to disclose, such as the dollar amount of the donation that the Spirit of America PAC made to the Ashcroft campaign when it donated the mailing list." Complaint ¶ 32. Even if these allegations were sufficiently concrete under Article III, however, they do not present an ongoing case or controversy because gaining more information now about the mailing list cannot possibly redress the purported injury in connection with the 2000 election. "In actions for injunctive relief, harm in the past … is not enough to establish a present controversy, or in terms of standing, an injury in fact." American Society for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334, 336 (D.C. Cir. 2003).

Moreover, even if Alliance could prove that it suffered a legally cognizable political injury during the 2000 campaign,[8] that injury would not have "stemm[ed] from the FEC's dismissal of … [plaintiffs'] administrative complaint." Judicial Watch, 180 F.3d at 277. Alliance filed its administrative complaint on March 8, 2001 (Complaint ¶ 9), after the 2000 elections had concluded, and the Commission's dismissal of the administrative complaint necessarily took place after the election as well. Any injury Alliance might have suffered in 2000, therefore, would have been "'th[e] result [of] the independent action of some third party'" and would not be "'fairly … trace[able] to the challenged action of the defendant [FEC].'" Lujan, 504 U.S. at 560-61 (quoting Simon 426 U.S. at 41-42). Nor could this Court offer any relief that would change the outcome of the long concluded 2000 Senate campaign in Missouri, and thus redress the alleged political injury.

D. The Individual Plaintiffs' Allegations of Future Injury Are Entirely Speculative

The individual plaintiffs describe their possible future injury in generalized, amorphous terms, and their attempt to link that supposed harm to the dismissal of their administrative complaint fails to show that the harm is, as required, "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotation marks and citation omitted).

Mr. Kjelshus alleges that he "remains interested in having this information because he will continue to vote in future elections and to work for Green Party and other candidates in future elections. For example, knowing the size of the undisclosed donation would assist his evaluation of President Bush in his re-election efforts in 2004[.]" Complaint ¶ 30. Ms. Epstein

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[8] "The endless number of diverse factors potentially contributing to the outcome of … elections … forecloses any reliable conclusion that voter support of a candidate" is attributable to any one factor. Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980). See also Shakman v. Dunne, 829 F.2d 1387, 1397 (7th Cir. 1987), cert. denied, 484 U.S. 1065 (1988); infra pp. 20-25.

similarly alleges that "[s]he remains interested in having this information because she will continue to vote and be politically active in future elections. The information would be relevant to her evaluation of candidates in future elections and her decisions about which political parties to support [and] would assist her evaluation of President Bush in his re-election efforts in 2004[.]" Complaint ¶ 32. However, plaintiffs make no effort to satisfy Common Cause's requirement that they show how the information would be "useful in voting," 108 F.3d at 418, beyond the vague and conclusory assertion that they remain interested in the information.

The D.C. Circuit has explained "that '[a] voter deprived of useful information at the time he or she votes suffers a particularized injury' sufficient to create standing. However, we 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, 108 F.3d at 418 (quoting Akins, 101 F.3d at 737) (emphasis added). Accord Judicial Watch, 180 F.3d at 278 ("Common Cause … emphasized that the relevant analysis must turn on the nature of the information allegedly denied"). Here, even if the Court were to find that plaintiffs are lacking non-trivial information about the respondents' view of the value of the mailing list, there is every "reason to doubt their claim that the information would help them … to evaluate candidates for public office." Akins, 524 U.S. at 21.

The attenuated chain of causation inherent in plaintiffs' predictions is wildly speculative. Plaintiffs now know how much money it cost to generate the mailing list and how much the list raised for respondents, yet plaintiffs make no attempt to explain how the alleged lack of respondents' specific appraisal of the mailing list could possibly matter to anyone's voting

decision, even if Mr. Ashcroft were himself a candidate for federal office.[9] But since Mr. Ashcroft is not such a candidate, plaintiffs must demonstrate how this allegedly missing appraisal could be useful in evaluating another candidate. Although the complaint alleges (at ¶¶ 30, 32) that "knowing the size of the undisclosed donation would assist [plaintiffs'] evaluation of President Bush in his re-election efforts in 2004," this unexplained, self-serving prediction is inadequate under Article III.

> When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events … and those which predict a future injury that will result from present or ongoing actions — those types of allegations that are not normally susceptible of labeling as "true" or "false." Our authority to reject as speculative allegations of future injuries is well-established.

United Transp. Union v. Interstate Commerce Comm'n, 891 F.2d 908, 912 (D.C. Cir. 1989) (citing Los Angeles v. Lyons, 461 U.S. 95 (1983); O'Shea v. Littleton, 414 U.S. 488 (1974); Golden v. Zwickler, 394 U.S. 103 (1969) (internal quotations omitted)).[10] "'Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges,

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[9] Alliance does not present any allegation or shred of evidence that any voter has ever decided how to vote because of uncertainty about the precise value of a single in-kind contribution. In addition, the allegedly unlawful contribution in this case came from Mr. Ashcroft's own leadership PAC. Thus, unlike the facts in Akins, any revelations about the extent of the PAC's generosity to this one candidate would not disclose heretofore unknown alliances between an interest group and a federal candidate.

[10] In analyzing standing issues, the Court also noted that the familiar standard for a Fed. R. Civ. P. 12(b)(1) motion that states the 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, 891 F.2d at 911-12 (quotes omitted). 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. Moreover, because the Commission is also moving in the alternative for summary judgment, Alliance must now set forth "specific facts" to demonstrate its standing. 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).

and ultimately proves, a real and immediate — as opposed to merely conjectural or hypothetical — threat of future injury.'" NRDC, 147 F.3d at 1022 (internal citation omitted).

President Bush appointed Mr. Ashcroft to be Attorney General before the allegations in plaintiffs' administrative complaint became public (see Smith SOR 4 (FEC Exh. 4)), so there is no basis for assuming that Mr. Bush was even aware of the mailing list at the time he decided to appoint Mr. Ashcroft. Consequently, there is no rational basis for judging Mr. Bush based on later-obtained evidence about the value of the list. But even if Mr. Bush had known about the mailing list transfer, it strains credulity to believe that it would be "useful in voting" in choosing the President of the United States to know the precise value that a PAC in 1999 placed on a single mailing list that it transferred to a former candidate for another federal office. Like the declarants in Rainbow/PUSH Coalition v. FCC, 330 F.3d 539, 544 (D.C. Cir. 2003), who merely "identif[ied] rather than document[ed]" their purported injury with "broad and conclusory assertions," plaintiffs' "claim is not sufficiently 'concrete and particularized' to pass constitutional muster." Moreover, since plaintiffs already know the full range of possible valuations for the list transfer — from zero (according to the respondents) to $1.7 million (based solely on the gross cost of the list's development) — it is incomprehensible that a sliver of additional information about where in that range the value might fall could have any concrete effect on voting for a candidate who had no connection with the mailing list in the first place.

Plaintiffs identify no future federal candidates or elections in their complaint other than President Bush's re-election efforts. Although Alliance alleges (at ¶ 33) that information about the mailing list is "likely to assist [Ms. Epstein] in her urging other voters to support or oppose particular political parties and candidates in future elections," the Supreme Court has explained that "[s]uch 'some day' intentions — without any description of concrete plans, or indeed even

any specification of when the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require." Lujan, 504 U.S. at 564 (emphasis in original). See also Renne v. Geary, 501 U.S. 312, 321 (1991) (challenge to state law prohibiting endorsements of candidates in local, nonpartisan elections was not ripe because, among other reasons, none of the plaintiffs alleged a concrete plan to endorse any particular candidate in future elections). Plaintiffs' allegations about unidentified future elections are even more vague and hypothetical than the inadequate "'some day' intentions" of the would-be animal observers in Lujan, who at least testified that they hoped to return to specific countries to view specific animals. See 504 U.S. at 563-64.

> [A]bsent the ability to demonstrate a "discrete injury" flowing from the alleged violation of FECA, [a plaintiff] cannot establish standing merely by asserting the FEC failed to process its complaint in accordance with law. To hold otherwise would be to recognize a justiciable interest in having the Executive Branch act in a lawful manner. This … is not a legally cognizable interest for purposes of standing.

Common Cause, 108 F.3d at 419. See also Fund Democracy, LLC v. SEC, 278 F.3d 21, 27-28 (D.C. Cir. 2002).

Finally, to the extent that plaintiffs' allegations rest on a purported injury to their ability to influence "other voters" in unspecified future elections (see Complaint ¶¶ 30, 33), such allegations suffer from yet another fatal flaw because the use of the allegedly missing information by other voters requires another attenuated causal prediction: that plaintiffs' use of this information could or would affect actions taken by third parties. See Lujan, 504 U.S. at 560-62; Gottlieb v. FEC, 143 F.3d at 621 ("As to the four voters, the supposed injury to their 'ability to influence the political process' rests on gross speculation and is far too fanciful to merit treatment as an 'injury in fact'") (citation omitted). "The endless number of diverse factors potentially contributing to the outcome of [elections] forecloses any reliable conclusion

that voter support of a candidate is 'fairly traceable' to any particular event." Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir. 1980).

E. The Alliance For Democracy Has No Standing As An Organization

Alliance alleges that it is bringing this action "on its own behalf and on behalf of its members." Complaint ¶ 3. However, Alliance cannot establish standing as an organization on either theory. It is not missing any information, it has suffered no cognizable injury to its discrete programmatic activities, and its organizational mission is outside the zone of interests of the FECA.

1. Alliance Does Not Have Representational Standing To Sue On Behalf of Its Members

Under the representational theory of standing, typically asserted by trade associations and labor unions, an organization may sue for redress of injuries to its members even without a showing of injury to the organization itself. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 342 (1977). To establish representational standing Alliance must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." National Taxpayers Union v. United States, 68 F.3d 1428, 1435 (D.C. Cir. 1994) (quoting Hunt, 432 U.S. at 343). However, as demonstrated supra pp. 11-25, the individual plaintiffs lack standing to bring this action, and Alliance has not alleged that any of its other members have any different or less speculative allegations of injury. Because Alliance cannot demonstrate that any of its members have suffered any injury-in-fact that could be redressed in this case, and because Alliance has not alleged sufficient facts to satisfy the second and third requirements of the Hunt standard, Alliance lacks representational standing for the same reasons.

2. Alliance Does Not Have Standing To Sue On Its Own Behalf

In order for Alliance "to assert standing…on its own behalf, it must meet the general standing requirements applied to individuals." National Taxpayers Union, 68 F.3d at 1433-34 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 378 (1982)). However, Alliance cannot demonstrate that, as an organization, it has suffered an injury of a legally protected interest that is concrete and particularized, and actual or imminent. National Taxpayers Union, 68 F.3d at 1444; see also supra pp. 9-11 (requirements for Article III standing).

Like the individual plaintiffs, Alliance cannot demonstrate that it is lacking any information about the mailing list transfer, so it cannot establish an injury-in-fact based on a deprivation of information. See supra pp. 11-18. Even if it were missing information, however, Alliance could not demonstrate standing based on the kind of informational injury recognized in Akins because it does not vote. See Akins 524 U.S. at 19-25. The D.C. Circuit has expressly held "that '[a] voter deprived of useful information at the time he or she votes suffers a particularized injury' sufficient to create standing." Common Cause, 108 F.3d at 418 (quoting Akins, 101 F.3d at 737). However, that informational injury is "expressly limited … to those cases where the information denied is both useful in voting and required by Congress to be disclosed." Id. at 418 (emphasis added). As an organization, Alliance cannot vote and therefore cannot be deprived of information that would be useful to it in casting a vote. Also, given Alliance's tax status as a 501(c)(3) organization, it cannot in any way lawfully participate in campaigns.[11] Specifically, 26 U.S.C. 501(c)(3) broadly states that such organizations cannot

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[11] See Letter from Masters to Mueller of 3/26/04 (Internal Revenue Service confirmation of tax status) (FEC Exh. 13); see also Alliance for Democracy http://www.theallianceforde mocracy.org/join.html. (explaining that "[a]ll donations [to the Alliance] are tax deductible") (FEC Exh. 13).

"participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." See 26 C.F.R. 501(c)(3)-1. "[N]o degree of support for an individual's candidacy for public office is permitted." Association of the Bar of City of New York v. Commissioner, 858 F.2d 876, 881 (2d Cir. 1988) (quotation marks omitted). In fact, the tax "exemption is lost ... by participation in any political campaign on behalf of any candidate for public office. It need not form a substantial part of the organization's activities." Association of the Bar, 858 F.2d at 881 (quoting United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981), cert. denied, 456 U.S. 983 (1982)) (emphasis in original). Therefore, as a charitable organization formed under 26 U.S.C. 501(c)(3) of the Internal Revenue Code, Alliance is barred from using the information it purportedly seeks in voting or campaigning.[12]

Alliance cannot otherwise prove an Article III injury. Alliance cannot establish a

> concrete and demonstrable injury to the organization's activities — with [a] consequent drain on the organization's resources — constitut[ing] ... more than simply a setback to the organization's abstract social interests.... Indeed, [t]he organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action.

Common Cause, 108 F.3d at 418 (quoting National Taxpayers Union, 68 F.3d at 1433). Alliance's complaint describes two programmatic concerns: the organization seeks (1) "to build a progressive, populist movement to end corporate domination, to establish true political democracy, and to build a just society with a sustainable, equitable economy" (Complaint ¶ 22),

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[12] It appears that Alliance's actual goal in this case is to penalize the respondents, not to obtain information. According to Nick Penniman, national coordinator of the Alliance, "John Ashcroft's 2000 Senate campaign committee and the Spirit of America PAC engaged in direct and serious violations of federal campaign finance law.…The FEC should fully investigate these matters and impose appropriate sanctions." Alliance for Democracy Web Site, available at http://www.thealliancefordemocracy.org/html/eng/1238-AA.shtml. Again, however, Alliance has not claimed any injury based on the Commission's alleged failure to impose an appropriate penalty on the respondents.

and (2) "major reform of the current campaign finance system through Clean Elections (full public financing of elections)" (id. ¶ 23).

Alliance's first concern to "end corporate domination" and "build a just society" is, on its face, the quintessential "abstract social interest[]" that is neither "discrete" nor cognizable for Article III purposes. Common Cause, 108 F.3d at 417. In any event, Alliance has failed to demonstrate how this abstract goal is being "directly and adversely affected" by the trivial information it allegedly lacks.

Alliance's showing of injury concerning this abstract goal is even less adequate than that rejected in Rainbow/PUSH Coalition. There, the Rainbow/PUSH Coalition ("Rainbow") sought to have the FCC deny the transfer of certain broadcasting licenses. Rainbow described itself as "an organization committed to furthering social, racial, and economic justice" that sought to expand opportunities in broadcasting and diversity of broadcasting sources. 330 F.3d at 543 (quotes omitted). The Court found that "Rainbow's real claim of injury goes to the alleged deprivation of 'program service in the public interest,' but that claim is not sufficiently 'concrete and particularized' to pass constitutional muster." Id. at 544. Here, Alliance's broad interest (Complaint ¶ 22) in "true political democracy" and a "sustainable, equitable economy" is even less particularized than Rainbow's insufficiently concrete interest in increasing television programming in the public interest in particular markets.

Furthermore, neither this first mission, nor Alliance's second goal (Complaint ¶ 23) of achieving "major reform of the current campaign finance system through … full public financing of elections" presents the kind of "direct conflict" with the Commission's conduct that is required for organizational standing.

> Frustration of an organization's objectives "is the type of abstract concern that does not impart standing." Individual persons cannot obtain judicial review of

> otherwise non-justiciable claims simply by incorporating, drafting a mission statement, and then suing on behalf of the newly formed and extremely interested organization.
>
> However, in those cases where an organization alleges that a defendant's conduct has made the organization's activities more difficult, the presence of a direct conflict between the defendant's conduct and the organization's mission is necessary — though not alone sufficient — to establish standing. If a defendant's conduct does not conflict directly with an organization's stated goals, it is entirely speculative whether the defendant's conduct is impeding the organization's activities.

National Treasury Employees Union v. United States, 101 F.3d 1423, 1429-30 (D.C. Cir. 1996) (first emphasis added; citations omitted). Alliance has not even attempted to allege how its missions for "true political democracy" and "full public financing of elections" are causally related to the Commission's handling of its administrative complaint, let alone how there is a "direct conflict" with these missions as required by D.C. Circuit precedent.

Alliance does allege (Complaint ¶ 24) that "as part of its education and outreach on money in politics, [it] wants to inform the public of the full amount of the illegal donations received by" Ashcroft 2000, but, as in National Law Center on Homelessness & Poverty v. Kantor, 91 F.3d 178, 182 (D.C. Cir. 1996), this "information-dissemination objective … appears not to be free standing, but ancillary to [Alliance's] general approach of gaining governmental responses…." such as enacting full public financing of federal elections. Similarly, just as the court in Kantor rejected as "surely imponderable" the appellants' claim about how the "American people would react to a census count that would arguably show more homeless [persons] than [the Census Bureau] counted," it is equally "the far end of speculation" here to give any credence to Alliance's suggestion that having another bit of information about the

mailing list will enable it to move closer to its goals of a just society with publicly financed elections. Id.[13]

The only specific "drain" on its resources that Alliance alleges is that it "has been required to devote staff time and energy to obtaining the information through legal action." Complaint ¶ 26. But Alliance cannot claim an Article III injury from the resources it has expended on this litigation. A plaintiff

> may not allege the drain on its resources from conducting this litigation as injury in fact. This position, which would enable every litigant automatically to create injury in fact by filing a lawsuit, has been expressly rejected by the Supreme Court: Article III injury does not arise from "an injury that is only a by-product of the suit itself" but "requires an injury with a nexus to the substantive character of the statute or regulation at issue."

Haitian Refugee Center v. Gracey, 809 F.2d 794, 799 n.2 (D.C. Cir. 1987) (quoting Diamond v. Charles, 476 U.S. 54, 55 (1986)) (emphasis omitted). It is well established that "[a]n organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit." National Taxpayers Union, 68 F.3d at 1434 (quoting Spann v. Colonial Village, 899 F.2d 24, 27 (D.C. Cir. 1990)).

Finally, Alliance cannot meet the prudential standing requirements because its organizational goals are not within the "zone of interests to be protected or regulated" by the FECA. Akins, 524 U.S. at 20 (citations and quotation marks omitted). Although the Supreme Court in Akins found that the voter plaintiffs met these requirements in their suit brought under 2 U.S.C. 437g(a)(8), the Court's holding rested specifically upon its finding that, "[g]iven the

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[13] Notably, Alliance has not alleged that it has ever actually disseminated the specific value of any illegal campaign contribution as part of its public education programs. Nor has Alliance alleged that it has told its members that the mailing list might have been worth as much as $1.7 million but that its inability to disclose the list's exact value is hindering its ability to, for example, "motivate and organize those citizens advocating for campaign finance reform." Complaint ¶ 23.

language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit." Id. at 20.[14]

As we have shown, however, Alliance is not a voter but an organization that seeks to "build a progressive, populist movement to end corporate domination" and to replace the current campaign finance system with "full public financing of elections." Complaint ¶¶ 22, 23. Although FECA was clearly intended to promote democracy by educating voters and deterring corruption, Buckley v. Valeo, 424 U.S. 1, 13-38, 64-70 (1976), it was not designed to enhance the political power of any one segment of the population, such as "progressives" or "populists." Furthermore, it would be perverse to suggest that Congress enacted FECA to enhance the ability of organizations to facilitate the subsequent amendment of that very statute: that is, Congress did not enact FECA to help organizations lobby for full public financing of elections.

> [T]o come within the zone of interests of the statute under which suit is brought, an organization must show more than a general corporate purpose to promote the interests to which the statute is addressed. Rather it must show a congressional intent to benefit the organization or some indication that the organization is "a peculiarly suitable challenger of administrative neglect."

Animal Legal Defense Fund v. Espy, 23 F.3d 496, 503 (D.C. Cir. 1994) (quoting Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 283 (D.C. Cir. 1988)). Alliance can point to no

[14] In Grand Council of the Crees v. FERC ("Grand Council"), 198 F.3d 950, 955 (D.C. Cir. 2000) (citations omitted), the D.C. Circuit explained the limited breadth of Akins: "[T]he purpose of [the Supreme Court's] pronouncement [about the word 'aggrieved'] was evidently only to recognize 'person aggrieved' as a congressional means of dispensing with traditional requirements of 'legal right.'" The court in Grand Council then proceeded to apply the zone-of-interests test and found that the environmental organization in that case lacked prudential standing. Id. at 959. Thus, while Akins established that certain voters seeking information by bringing a suit under 2 U.S.C. 437g(a)(8) could satisfy the prudential standing requirements, the Court had no occasion to address the ability of an organization with specific social or political goals to satisfy those requirements. Grand Council explains that the zone-of-interests test still applies to determine whether there is congressional intent to benefit a particular kind of organization.

congressional intent that either FECA's reporting requirements or enforcement procedures were designed to help organizations like Alliance further a "progressive" political agenda or radically alter the privately financed campaign system established by FECA itself. See Sierra Club v. EPA, 292 F.3d 895, 902-03 (D.C. Cir. 2002) (trade association of hazardous waste treatment companies, whose interest in stricter environmental regulation was to improve business opportunities, not in the zone of interests of statute establishing rules for the disposal of solid waste). Thus, Alliance not only fails to meet the Article III requirements for standing, but the prudential requirements as well.

CONCLUSION

For the foregoing reasons, all of the plaintiffs lack standing and this case should be dismissed with prejudice.

Respectfully submitted,

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March 29, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR DEMOCRACY, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 04-CV-00127 (EGS)
v.	)	
	)	STATEMENT OF
FEDERAL ELECTION COMMISSION,	)	MATERIAL FACTS
	)	
Defendant.	)	
	)	
	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S
STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE

Pursuant to Fed. R. Civ. P. 56(c) and LCvR 7(h) (D.D.C.), defendant Federal Election Commission ("Commission" or "FEC") presents the following statement of material facts as to which there is no genuine issue and that entitle the Commission to judgment as a matter of law:

A. Background

1. The Commission is the independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), codified at 2 U.S.C. 431-455. See 2 U.S.C. 437c(b)(1), 437d(e) and 437g.

2. On March 8, 2001, the Commission received an administrative complaint from the Alliance for Democracy, Hedy Epstein, and Ben Kjelshus (collectively "Alliance"), that was designated Matter Under Review ("MUR") 5181 for administrative purposes at the Commission. The administrative complaint alleged "that the Spirit of America PAC contributed a fundraising

list of 100,000 donors to Ashcroft 2000 and that, in turn, Ashcroft 2000 made a significant amount of money by renting [it] … to other entities." Admin. Compl. ¶¶ 8, 9 (quoting Walter Pincus, Possible Ashcroft Campaign Violations, Washington Post, Feb. 1, 2001, at A4) (FEC Exh. 1).

3. The administrative complaint further alleged that the "donation of the fundraising list by Spirit of America PAC to Ashcroft 2000 constituted a 'contribution[,]' " which neither committee reported to the Commission in the required disclosure reports. Id. ¶¶ 9-10. The administrative respondents in MUR 5181 were Spirit of America PAC ("SOA"), Ashcroft 2000, and Garrett Lott, the treasurer of both political committees.

B. The Commission's Administrative Investigation

4. The Commission conducted an investigation into the allegations in Alliance's administrative complaint and developed a significant investigative record. Much of this information, which was the basis of the Commission's findings, has been placed on the public record. See FEC, Enforcement Query System ("FEC EQS"), http://eqs.sdrdc.com/eqs/searcheqs (search request for MUR 5181 retrieves documents). Available to the public are 58 documents totaling hundreds of pages, including the General Counsel's Reports, the General Counsel's Brief, briefs filed by the respondents, the Commissioners' Statements of Reasons, and the Conciliation Agreement ("CA") entered into by the Commission and the respondents. Id.

5. Spirit of America PAC is a political committee founded and chaired by John Ashcroft. See CA ¶ IV.3 (FEC Exh. 2); GC Report #4, at 2 (FEC Exh. 3). Specifically, SOA is a "leadership PAC" — a political committee established by an elected official to support other candidates and party committees, and to fund other political pursuits of the officeholder apart from his own re-election. See Smith Statement of Reasons ("SOR") at 3 (FEC Exh. 4).

6. Ashcroft 2000 was the authorized campaign committee supporting John Ashcroft's candidacy for the United States Senate from Missouri in the 2000 elections. See CA ¶ IV.2; GC Report #4, at 2-3.

7. Beginning in January 1998, SOA began developing a fundraising mailing list as part of its direct mail solicitation program. CA ¶ IV.15 (FEC Exh. 2); Smith SOR at 3 (FEC Exh. 4); GC Brief at 2 (FEC Exh. 5); see generally CA ¶¶ IV.15-22; GC Brief at 19-35; GC Report # 4, at 8-15 (FEC Exh. 3). The PAC began this process by renting lists or portions of lists from other organizations and by then "prospecting" for donors using these rented lists. The PAC also entered into name exchanges with other organizations; the PAC had the right to retain the names and addresses of individuals who responded to the initial mailings. CA ¶ IV.9. Most of the prospecting letters were signed by Mr. Ashcroft as chairman of the PAC. See id.

8. During 1998, SOA sent over 3.9 million prospecting solicitations costing over $1.7 million dollars. CA ¶ IV.15 (FEC Exh. 2); see also GC Report # 4, at 10-13 (FEC Exh. 3); GC Brief at 15-16, 25-26 (FEC Exh. 5). In May 1998, the PAC began to rent out its mailing list or portions of it to other organizations. GC Brief at 3. See also CA ¶ IV.13. In 1998, SOA received $6,331 in list rental income, and during the first half of 1999, it received $97,390 in additional rental income. CA ¶ IV.17.

9. On July 17, 1998, SOA and John Ashcroft entered into an agreement that provided John Ashcroft with an ownership interest in the mailing list. See Work Product Agreement ("WPA") (Weintraub SOR, Attachment 1) at 1 (FEC Exh. 6); see also GC Brief at 4, 23-24, 25-28 (FEC Exh. 5). The WPA provided that SOA could use Ashcroft's name and

likeness in its fundraising solicitations and in turn John Ashcroft owned the names and addresses of those responding to the SOA solicitations. CA IV.12 (FEC Exh. 2).

10. During the Commission's investigation, the respondents contended that the WPA reflected a written memorialization of an oral understanding between Senator Ashcroft and SOA that began early in 1998. See Brief of SOA, Ashcroft 2000, & Lott (FEC Exh. 7) at 3.

11. Effective January 1, 1999, Senator Ashcroft entered into a List License Agreement ("LLA") with Ashcroft 2000 providing Ashcroft 2000 the right to unlimited use of the mailing list for direct mail solicitations or any other use. LLA (Weintraub SOR, Attachment 2) (FEC Exh. 6); CA ¶ IV.16 (FEC Exh. 2); see also GC Brief at 4-5, 24-25 (FEC Exh. 5).

12. By letter dated December 10, 1999, Garrett Lott, writing as "finance coordinator" of the PAC and Ashcroft 2000, provided direction to their mailing list management vendor that all mailing list rental revenue be shifted from SOA to Ashcroft 2000 and that six undeposited rental income checks payable to the PAC be rewritten and made payable to SOA. CA ¶ IV.18.a (FEC Exh. 2); see also GC Brief at 6, 21-22, 28-31 (FEC Exh. 5); Griffiths Decl. ¶ 5 (FEC Exh. 8); Mason/Toner SOR at 3 (FEC Exh. 9). These checks totaled $49,131. CA ¶ IV.18.a. Later, Garrett Lott similarly requested that the vendor redirect a seventh list rental check for $17,531. CA ¶ IV.18.c.

13. In response to the vendor's questions regarding the reissuing of the checks, Garrett Lott signed a letter drafted by the vendor's counsel which stated that the transfer of these receipts was fully authorized by Mr. Ashcroft and SOA and did not contravene any existing agreement, law and/or regulation of any government authority, and that the vendor would be held harmless from any and all claims to the contrary. CA ¶ IV.18.b; Griffiths Decl. ¶ 6. The vendor then re-issued a single check to Ashcroft 2000 for $66,662 dated December 30, 1999. CA ¶

IV.18.c. Ashcroft 2000 disclosed the receipt of this list rental income as "mail receipts" in its FEC disclosure reports. CA ¶ IV.18.c.

14. Ashcroft 2000 received additional income from the list during 2000 by selling the right to collect payment from persons who had rented the mailing list from SOA. CA IV.19 (FEC Exh. 2). Ashcroft 2000 sold these "accounts receivables" for $46,300. Ashcroft 2000 disclosed in its FEC disclosure reports, with no identified purpose, that it had received $46,300 from its list vendor on March 31, 2000. CA ¶ IV.19. Between December 1999 and May 2001, Ashcroft 2000 received additional list rental income totaling $121,255. CA ¶ IV.21.

15. At the conclusion of the investigation, the Commission determined that there was probable cause to believe that SOA and its treasurer made an excessive contribution of over $110,000 to Ashcroft 2000 in violation 2 U.S.C. 441a(a)(2)(A) and failed to report that contribution in violation 2 U.S.C. 434(b). See CA V.1 (FEC Exh. 2).

16. The Commission determined that there was probable cause to believe that Ashcroft 2000 and its treasurer violated 2 U.S.C. 441a(f) by receiving this excessive contribution and violated 2 U.S.C. 434(b) by failing to report the contribution. Id.

17. The Commission entered into a Conciliation Agreement with SOA and Ashcroft 2000 that described these violations and in which the respondents agreed to cease and desist from such violations and pay a $37,000 civil penalty. CA V.4 (FEC Exh. 2).

18. Individual Commissioners issued statements of reasons explaining the basis of their decisions on this matter. See Smith SOR (FEC Exh. 4); Mason/Toner SOR (FEC Exh. 9); Weintraub/Thomas/McDonald SOR (FEC Exh. 10); and Weintraub SOR (FEC Exh. 6).

C. Plaintiffs' Judicial Complaint

19. Plaintiffs Ben Kjelshus, Hedy Epstein, and Alliance for Democracy filed the instant complaint against the Commission pursuant to 2 U.S.C. 437g(a)(8), seeking judicial review of the Commission's alleged dismissal of their administrative complaint. The complaint alleges, inter alia, that "[t]he FEC's investigation of the matter, designated MUR 5181, revealed that the Spirit of America PAC developed the fundraising list at a cost of over $1.7 million, and confirmed that the PAC illegally donated the list to Ashcroft 2000." Complaint ¶ 1.

20. Ben Kjelshus is described in the complaint as a member of the Alliance for Democracy, a Missouri voter who voted in the 2000 Missouri Senate election (Complaint ¶ 4), and a Green Party candidate for the Missouri state office of Lieutenant Governor in 2000 (id. ¶¶ 4, 29).

21. The complaint alleges that "[p]laintiff Hedy Epstein is a Missouri voter who voted in the 2000 Missouri Senate election[,] is politically active[, and] will continue to vote and be politically active in future elections." Complaint ¶ 5.

22. According to the complaint, the Alliance for Democracy is a "non-profit, non-partisan" organization that "seeks to build a progressive, populist movement to end corporate domination, to establish true political democracy, and to build a just society with a sustainable, equitable economy." Complaint ¶¶ 4, 22. The complaint also alleges that Alliance "is conducting a campaign advocating major reform of the current campaign finance system through Clean Elections (full public financing of elections)." Id. ¶ 23.

23. Alliance is registered as a nonprofit organization under 26 U.S.C. 501(c)(3). See Letter from Masters to Mueller of 3/26/04 (Internal Revenue Service confirmation of tax status) (FEC Exh. 13); see also Alliance for Democracy http://www.theallianceforddemocracy.org/join.html. (explaining that "[a]ll donations [to the Alliance] are tax deductible") (FEC Exh. 13).

24. Alliance's allegations of harm stem from its claim that SOA and Ashcroft 2000 failed to "disclose the donation of the list and its value in reports to the FEC." Complaint ¶ 1; see also id. ¶ 21. Plaintiffs also complain that the Commission "did not determine the monetary value of the list," which they allege to be "far more than the $112,962 in excessive contributions found by the Commission." Complaint ¶ 18.

25. Alliance does not allege that it suffered any harm as a result of the mailing list transaction between SOA and Ashcroft 2000 or that it was harmed in any way by the amount of the civil penalty that was part of the Conciliation Agreement entered into by the Commission, SOA, and Ashcroft 2000. Complaint ¶¶ 21-33.

26. In the opening paragraph of its complaint, Alliance acknowledges that the mailing list was transferred and that it has information about the costs of creating it. Alliance alleges that the "FEC's investigation of this matter, designated MUR 5181, revealed that the Spirit of America PAC developed the fundraising list at a cost of over $1.7 million, and confirmed that the PAC illegally donated the list to Ashcroft 2000." Complaint ¶ 1.

D. Available Public Record Information

27. The voluminous documents available on the Commission's website provide raw data and numerous views of how that data could be analyzed to determine the value of the

mailing list. These documents disclose when SOA began developing the mailing list, how it developed the list and at what cost, how the two committees used the list, and how much income it generated. See, e.g., GC Brief at 3-4 (SOA worked with its vendors to send 3.9 million "prospecting solicitations" at a cost of more than $1.7 million) (FEC Exh. 5); CA IV.9 (PAC "prospected" for contributors from mailing lists rented from other organizations) (FEC Exh. 2); CA IV.9 (PAC rented its mailing list to other organizations); CA IV.16 (Ashcroft 2000 used mailing list as part of committee's direct mail efforts); CA IV.19 (detailing SOA's list rental income). The record also provides the full text of the documents that executed the transfer of legal interests from SOA to Ashcroft 2000. See Attachments 1 and 2 to Weintraub SOR (FEC Exh. 6).

28. The conciliation agreement in this matter stated that SOA had already reported information about the mailing list to the FEC: "The PAC reported to the Commission the PAC's expenditures related to mailing list development, including the cost of renting lists or portions of lists belonging to other organizations, creative and production fees, printing, mail preparation, postage, caging and escrow, and file maintenance fees in the PAC's disclosure reports filed with the Commission." CA ¶ IV.9.

29. The Commission's General Counsel recommended that the Commission find probable cause to believe that Ashcroft 2000 received excessive in-kind contributions totaling

$254,917 through the mailing list and its use. The General Counsel calculated this figure as the sum of the following specific items:

1.	Redirected mailing list rental payments (December 1999)	$66,662
2.	Accounts receivable from SOA mailing list rentals (sold by Ashcroft 2000)	$46,300
3.	Approximate share of $121,255 income paid through outside vendor to Ashcroft 2000 attributable to SOA mailing list	$80,000
4.	Ashcroft 2000's use of SOA names	$61,955

Weintraub/Thomas/McDonald SOR (FEC Exh. 10) at 3-4 (citing General Counsel reports).

30. The respondents believed that Mr. Ashcroft obtained ownership of the mailing list through an exchange of equal value, and they contended that no "contribution" took place under the FECA when Mr. Ashcroft obtained ownership of the list. Brief of SOA, Ashcroft 2000, & Lott (FEC Exh. 7) at 6-10.

31. Three of the FEC Commissioners agreed with the General Counsel's analysis, Weintraub/Thomas/McDonald SOR (FEC Exh. 10) at 5 (citing GC Brief at 19-35 (FEC Exh. 5)), but added that the "excessive contributions in this matter arguably are far greater than the $255,000" because of the $1.7 million SOA spent to develop the mailing list (id. at 7).

32. Three other FEC Commissioners disagreed with the General Counsel's analysis. Based upon unrebutted testimony, the evidence amassed in the investigation, and prior Commission proceedings, two Commissioners found that Mr. Ashcroft's agreements with SOA and Ashcroft 2000 were fair market value exchanges. Mason/Toner SOR at 9 (FEC Exh. 9). A third Commissioner concurred that it would be inappropriate to second-guess the list agreements. Smith SOR at 8-9 (FEC Exh. 4). Accordingly, while these Commissioners found it fitting to impose a civil penalty regarding items #1 and #2 in ¶ 29 above — involving the redirection of

mailing list income earned by SOA and transferred to Ashcroft 2000 — they did not believe that transfer of the mailing list itself constituted an in-kind contribution.

33. Commissioners Mason and Toner also perceived certain complexities in valuing the mailing list. Mason/Toner SOR at 9-11 (FEC Exh. 9). They pointed out, for example, the pitfalls of valuing a mailing list on a cost basis because the process of "prospecting" mailings often generates significant revenue. See also Smith SOR at 8-9 (agreeing that the revenues earned while compiling a list would have to be considered if the cost of developing a list were viewed as relevant to its fair market value) (FEC Exh. 4).

34. Commissioners Mason and Toner also discussed the possibility of determining a list's value by multiplying the number of names on a list by a fixed dollar amount per name, e.g., fifty cents per name. Here, this method would have yielded an approximate value of $40,000 for the 80,000-name mailing list, not including subtractions for other adjustments. Mason / Toner SOR at 10 (FEC Exh. 9). In Commissioner Smith's view (Smith SOR at 8-9), the "Commissioners supported divergent theories that required list valuation and [the Commission's] application of unclear rules and evidence."

Respectfully submitted,

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v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
	)	

[PROPOSED] ORDER

Upon consideration of Defendant Federal Election Commission's Motion to Dismiss, or in the Alternative, for Summary Judgment, its supporting Memorandum of Points and Authorities, Plaintiffs' Opposition, and the Federal Election Commission's Reply thereto it is hereby ORDERED that the Federal Election Commission's Motion is GRANTED.

So ordered this ___________ day of ________________, 2004.

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United States District Judge