

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASA GORDON,

Plaintiff

v.

NATIONAL ARCHIVES AND
RECORDS ADMINISTRATION, *et al.*

Defendants

Case 1:16-cv-02458-RJL

**DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT AND
REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Plaintiff Asa Gordon lacks the standing necessary to bring this lawsuit, just as he lacked the standing to bring substantially similar claims on two prior occasions.¹ His scattershot attempts to address those standing defects through various arguments and a proposed pleading amendment all fail, and he has not addressed other bases for dismissal put forward in Defendants' motion to dismiss. Consequently, his motion for leave to amend his complaint should be denied and this action should be dismissed.

BACKGROUND

Mr. Gordon filed this case on December 19, 2016. [See Pl.'s Compl., ECF No. 1.] Initially, he sought to block the results of the 2016 Presidential election by obtaining a temporary restraining

¹ As noted in Defendants' motion to dismiss, Mr. Gordon has filed lawsuits substantially similar to this one on at least two prior occasions. Both of them were dismissed because he lacked standing. *See Gordon v. Biden*, 364 F. App'x 651, 652 (D.C. Cir. 2010) ("The plaintiff is not injured by the operation of the five states' winner-take-all systems because he does not vote in those states."); *Gordon v. Haas*, 828 F. Supp. 2d 13, 18 (D.D.C. 2011) ("In this rehashed complaint, Gordon has, yet again, failed to furnish facts demonstrating an injury-in-fact. . . . Gordon remains a voter only in the District of Columbia. The allegation that he suffers injury from alleged minority vote dilution in the five states does not save his claim.").

order prohibiting Defendants from “recognizing” certificates of votes from so-called “unbound” states that award electoral votes on a winner-take-all basis. Mr. Gordon wanted to obtain such an order in advance of a January 6, 2017, joint session of Congress in which that body counted and certified the electoral-vote totals. [See Pl.’s Mot. for TRO & Prelim. Inj. at 8, ECF No. 4.]

He did not obtain such an order. Defendants opposed Plaintiff’s motion for preliminary relief and moved to dismiss, relying in large part on Plaintiff’s lack of standing. [See ECF Nos. 6 & 7.] During a January 9, 2017, hearing on Mr. Gordon’s TRO motion, the Court held that his request for emergency relief was moot (Congress had already certified the electoral results) and took his request for a preliminary injunction under advisement. After that, on February 10, 2017, Mr. Gordon filed an opposition to Defendants’ motion to dismiss and a motion for leave to file an amended complaint. [ECF Nos. 11 & 12.] In each, he attempts to cure the standing defects in his original complaint. Those efforts fail, however, and so Defendant opposes the motion to amend and replies in support of its motion to dismiss.

ARGUMENT

Mr. Gordon’s motion for leave to file an amended complaint and opposition to Defendants’ motion to dismiss do not successfully cure or address the defects identified in Defendants’ motion. Even with his proposed amended complaint, Mr. Gordon still lacks standing and identifies no ministerial legal duty for Defendants to do what he seeks to compel them to do. His motion to amend should therefore be denied and this case should be dismissed.

I. Mr. Gordon Cannot Claim Organizational Standing.

Invoking *Havens Realty Corp. v. Coleman*, Mr. Gordon contends that he has organizational standing to maintain his claims. [See Pl.’s Opp. to Defs.’ Mot. to Dismiss at 6, ECF No. 11 (citing 455 U.S. 363 (1982)).] Mr. Gordon is apparently the Executive Director of an organization called

the Douglass Institute of Government, which he describes as an “advocacy think tank.” [Pl.’s Proposed Am. Compl. ¶ 14, ECF No. 12-1.] He argues that the Douglass Institute has suffered a direct injury as a result of Defendants’ actions, which provides him standing to challenge them.

Mr. Gordon’s reliance on organizational standing suffers several flaws. Most glaringly, Mr. Gordon is the plaintiff here, not the Douglass Institute; and Mr. Gordon is not an organization, he is an individual. The *Havens Realty* line of cases upon which he relies addresses the standing of *organizations* claiming *direct* harm by an alleged unlawful action. *See, e.g., Havens Realty*, 455 U.S. at 378–79 (determining whether an organization, not an individual, has standing to sue in its own right). Even if Mr. Gordon could establish such a direct injury by the Douglass Institute, he himself may not claim standing based upon it. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[E]ven when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”).

Further, even if the Douglass Institute were a party to this case, Mr. Gordon has not provided a sufficient basis for it to claim organizational standing, even with the new allegations in his proposed amended complaint. As the Supreme Court has held, organizational standing arises from a “concrete and demonstrable injury to the organization’s activities,” not from “simply a setback to the organization’s abstract social interests.” *Havens Realty*, 455 U.S. at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)); *see also Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (“The court has distinguished between organizations that allege that their activities have been impeded from those that merely allege that their mission has been compromised.”); *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (holding that frustration of an organization’s

mission “is the type of abstract concern that does not impart standing”). Thus, the District of Columbia Circuit has held that “an organization does not suffer an injury in fact where it ‘expend[s] resources to educate its members and others’ unless doing so subjects the organization to ‘operational costs beyond those normally expended.’” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015) (quoting *Nat’l Taxpayers Union*, 68 F.3d at 1434). Applying that principle in *Food & Water Watch*, the court of appeals held that an organization existing to educate the public about safe and sustainable food systems had no standing to challenge food-safety regulations just because it would have to spend more resources educating the public about those regulations and advocating against them. *See id.* (holding that such allegations “make clear that [the organization] has alleged no more than an abstract injury to its interests”).

Mr. Gordon’s allegations suffer the same defect and show that the Douglass Institute claims nothing more than a “setback to [its] abstract social interests.” *Havens Realty*, 455 U.S. at 379. In his proposed amended complaint, Mr. Gordon alleges that there is a “direct conflict” between Defendants’ alleged “malfeasance” and the Douglass Institute’s mission to “protect[] the rights of citizens to be informed about the activities of government officials, ensur[e] the integrity of government officials, and the elecctoral [*sic*] process at least at the federal level.” [*Id.* ¶ 30.] He also says that “Defendants electoral malfeasance creates questions about the litimacy [*sic*] of the members that make up the Electoral College and thus the Constitutional legitimacyof [*sic*] the Presidency [*sic*], leaving the public insufficient information to judge.” [*Id.*] He claims that “since the 2000 presidential election,” he “has expended a significant amount of time and resources . . . educating the public about citizens’ voting rights pursuant to section two of the fourteenth amendment.” [*Id.* ¶ 31.] These allegations show only that the Douglass Institute has spent resources educating its members about matters within its area of concern. They do not demonstrate

that the organization has suffered any extraordinary operational costs as a result of the alleged unlawful action and therefore cannot form the basis for organizational standing. *See Food & Water Watch*, 808 F.3d at 920.

II. *Anderson v. Celebrezze* Does Not Apply.

Without much elaboration, Mr. Gordon also claims standing based on *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which he simply block quotes in his paper. [Pl.’s Opp. to Defs.’ Mot. to Dismiss at 5, ECF No. 11.] But the language quoted by Mr. Gordon is not part of a standing analysis (standing was not at issue in *Anderson*), but to an assessment of the burden imposed by an Ohio law requiring early registration by independent candidates for president. *See Anderson*, 460 U.S. 790–95. The Court noted that the burdens imposed by the law extended beyond the borders of Ohio, which factored into its determination that those burdens outweighed the state interests advanced by the law. *Anderson* provides no basis upon which Mr. Gordon can claim standing.

III. Mr. Gordon’s Other Standing Arguments Also Lack Merit.

Mr. Gordon’s remaining standing arguments lack merit and can be summarily rejected. First, he asserts “unique standing as a DC citizen voter.” [Pl.’s Opp. to Defs.’ Mot. to Dismiss at 4, ECF No. 11.] Specifically, he complains that citizens of the District of Columbia lack the right to vote for representation in the House of Representatives and Senate, which he argues is a real and particularized injury giving rise to standing. [*Id.*] But that is not the injury that Mr. Gordon challenges in this case. It therefore lacks any “causal connection [to] the conduct complained of” and “will not be redressed by a favorable decision.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It therefore cannot support his standing to bring this action.

Mr. Gordon also “asserts a right to proceed as a private attorney general.” [Pl.’s Opp. to Defs.’ Mot. to Dismiss at 4.] But he cites no legal authority for that asserted right. In the absence of such authority, Mr. Gordon’s bare assertion does not cure his lack of standing.

Finally, Mr. Gordon, again without citing authority, claims that “every voting citizen has mathematical standing.” [*Id.* at 7.] To the contrary, standing cannot be predicated upon an injury that is “remote and speculative and shared by millions of others.” *Lampkin v. Connor*, 239 F. Supp. 757, 761 (D.D.C. 1965). Mr. Gordon’s unsupported “universal mathematical standing” theory contradicts that principle; so it must be rejected.

IV. Mr. Gordon Does Not Adequately Rebut Defendants’ Other, Independent Bases for Dismissal.

Defendants have provided other reasons to dismiss this case that are not adequately rebutted by Mr. Gordon’s proposed amended complaint or his opposition to Defendants’ motion to dismiss. For one, Defendants showed that Mr. Gordon lacks standing not only because he suffered no direct injury, but also because the injury he claims would not be redressed by his lawsuit against the National Archives and Records Administration and the Office of the Federal Register. [Defs.’ Mot. to Dismiss at 6–7, ECF No. 7-1.] Similarly, one of Mr. Gordon’s prior lawsuits challenging the allocation of electoral-college votes was dismissed for lack of redressability because the court concluded that the injury was “fairly traceable” to the actions of third-party states and state officials, not to the Vice President of the United States. *See Gordon v. Biden*, 606 F. Supp. 2d 11, 13 (D.D.C. 2009), *aff’d*, 364 F. App’x 651 (D.C. Cir. 2010). No states or state officials are parties to this suit, so it likewise must be dismissed.

Additionally, Defendants showed that there is no ministerial duty for them to take the actions that Mr. Gordon seeks to compel through mandamus. [Defs.’ Mot. to Dismiss at 8–9.] In response to that, Mr. Gordon asserts that Defendants have somehow conceded that they have such

a duty by noting that the Office of the Federal Register does in fact review Certificates of Vote submitted by states to ensure that they are in the proper format and that no members of Congress or the Cabinet served as electors—something that the Constitution prohibits. [Pl.’s Opp. to Defs.’ Mot. to Dismiss at 2–3, ECF No. 11.] But to support a mandamus claim, there must be a legal duty to undertake the action sought to be compelled, and that duty must be “clear and undisputable.” *See 13th Reg’l Corp. v. U.S. Dep’t of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). Mr. Gordon has yet to identify any source imposing upon Defendants a clear and undisputable duty to do what he seeks to compel them to do. He therefore cannot obtain mandamus relief.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiff’s motion for leave to amend his complain be denied and that this case be dismissed.

Dated: March 17, 2017

Respectfully submitted,

CHANNING D. PHILLIPS, D.C. Bar #415793
United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

By: /s/ Johnny Walker
JOHNNY H. WALKER, D.C. Bar #991325
Assistant United States Attorney
555 4th Street, N.W.
Washington, District of Columbia 20530
Telephone: 202 252 2575
Email: johnny.walker@usdoj.gov

Counsel for Defendants

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[PROPOSED] ORDER

Upon consideration of Plaintiff's motion for leave to amend his complaint and the briefs in support thereof and in opposition thereto, it is hereby ORDERED that Plaintiff's motion is DENIED.

Dated: _____

The Honorable Richard J. Leon
United States District Judge

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on this day, March 17, 2017, **Defendants' Combined Opposition to Plaintiff's Motion for Leave to Amend His Complaint and Reply in Support of Defendants' Motion to Dismiss** was served upon Plaintiff by mailing it, postage prepaid, to the following address:

Asa Gordon
Douglass Institute of Government
1667 Webster Street, NE
Washington, District of Columbia 20017

A courtesy copy has been sent by email to dignews@aolcom.

/s/ Johnny Walker
JOHNNY H. WALKER
Assistant United States Attorney