IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES; UNITED STATES PUBLIC INTEREST RESEARCH GROUP; and KATHLEEN ENGEL, Plaintiffs, v. KATHLEEN L. KRANINGER, in her official capacity as Director of the Consumer Financial Protection Bureau; and CONSUMER FINANCIAL PROTECTION BUREAU, Defendants.	)	Case No. 1:20-cv-11141

DEFENDANTS' MEMORANDUM OF REASONS IN SUPPORT OF PARTIAL MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1)

Defendants, Kathleen L. Kraninger, in her official capacity as the Director of the Consumer Financial Protection Bureau, and the Consumer Financial Protection Bureau (Bureau), respectfully move this Court pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss Plaintiffs' first and fourth claims, and the first, second, third, and fifth elements of Plaintiffs' Prayer for Relief. This Court lacks subject matter jurisdiction with respect to those claims and that relief because Plaintiffs lack standing.

BACKGROUND

1. The Bureau

In 2010, in the wake of the financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat.1376 (2010) ("Dodd-Frank Act" or "Act"). The Dodd-Frank Act's purposes include "protect[ing] consumers from abusive

financial services practices." 124 Stat. at 1376. In furtherance of that statutory purpose, Title X of the Act, known as the Consumer Financial Protection Act (CFPA), established the Bureau and charged it with "implement[ing] and, where applicable, enforc[ing] Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). The CFPA gives the Bureau broad authority to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). The "Federal consumer financial laws" that the Bureau enforces include 18 preexisting consumer protection laws, such as the Truth in Lending Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act, rules implementing those laws, as well as the CFPA itself. 12 U.S.C. § 5481(12), (14).

2. The Taskforce

On October 11, 2019, the Bureau announced that it was establishing a Taskforce on Federal Consumer Financial Law (Taskforce) "to examine ways to harmonize and modernize federal consumer financial laws." https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-taskforce-federal-consumer-financial-law/ (Oct. 11, 2019 Press Release, cited at Comp. at ¶ 80 n.73).[1] On January 8, 2020, the Bureau's Director signed the Charter for the

[1] As the Bureau explained in the October 11, 2019 Press Release, the Taskforce was inspired, in part, by the National Commission on Consumer Finance, which was established by the Consumer Credit Protection Act in 1968. One of the goals of that commission was to assess the adequacy of the laws that were then in place to protect consumers from unfair practices in connection with consumer credit transactions, and to promote the informed use of credit. Pub. L. No. 90-321, § 404(a), 82 Stat. 165 (1968).

Taskforce. https://files.consumerfinance.gov/f/documents/cfpb_taskforce-charter.pdf (cited at Comp. at ¶ 81).[2] The Charter provides that the Taskforce is to:

> (1) examine the existing legal and regulatory environment facing consumers and financial services providers; and (2) report its recommendations for ways to improve and strengthen consumer financial laws and regulations, including recommendations for resolving conflicting requirements or inconsistencies, reducing unwarranted regulatory burdens in light of market or technological developments, improving consumer understanding of markets and products, and identifying gaps in knowledge that should be addressed through future Bureau research.

In particular, the Charter requires the Taskforce "to provide an objective and independent evaluation, in the form of one consensus final report to the [Bureau's] Director, of the Bureau's current regulatory framework. The findings should identify where there may be gaps or where regulation should be simplified or modernized to help the Bureau more effectively carry out the mission of protecting consumers."

The Charter provides that the Bureau's Director shall select the members of the Taskforce who are to be:

> financial law experts and academics with diverse points of view, such as attorneys and economists with significant experience researching and analyzing consumer financial markets, laws, and regulations, and a record of involvement in research and public policy, including senior public or academic service. Additionally, members should be prominent experts who are recognized for their professional achievements and objectivity including those specializing in household finance, finance, financial education, public economics, econometrics, and law and economics; and experts from social sciences related to the Bureau's mission.

[2] The Charter explains that Bureau's authority to establish the Taskforce comes from section 1013(a) of the CFPA, 12 U.S.C. § 5493(a), which authorizes the Bureau to hire employees necessary to conduct the Bureau's business, and from section 1021(c), 12 U.S.C. § 5511(c), which, among other things, authorizes the Bureau to "collect[], research[], monitor[], and publish[] information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets."

The Bureau accepted applications for membership on the Taskforce, and in January 2020, it announced the names of the five Taskforce members. They are:

- Dr. J. Howard Beales, III, former Professor of Strategic Management and Public Policy at the George Washington University and former Director of the Bureau of Consumer Protection at the Federal Trade Commission (FTC);
- Dr. Thomas Durkin, Senior Economist (Retired) at the Federal Reserve Board;
- William MacLeod, partner at Kelley Drye & Warren, LLP, Past Chair of the Antitrust Section of the American Bar Association, and former Director of the FTC's Bureau of Consumer Protection;
- L. Jean Noonan, Partner at Hudson Cook, former General Counsel at the Farm Credit Administration, and former Associate Director of the Division of Credit Practices in the FTC's Bureau of Consumer Protection; and
- Todd J. Zywicki (Taskforce Chair), Professor of Law at George Mason University (GMU) Antonin Scalia Law School, Senior Fellow of the Cato Institute, and former Executive Director of the GMU Law and Economics Center.

https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-membership-taskforce-federal-consumer-financial-law/ (Jan. 9, 2020 Press Release, cited at Comp. at ¶ 83 n.74); https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-additional-member-to-taskforce/ (Jan. 17, 2020 Press Release, cited at Comp. at ¶ 84 n.75).

After its creation, the Taskforce began holding meetings, including one external engagement in March 2020, with trade and consumer groups. https://www.consumerfinance.gov/about-us/blog/taskforce-federal-consumer-financial-law-charting-path-ahead/. The Taskforce also held a public hearing on July 16, 2020. https://www.consumerfinance.gov/about-

us/events/archive-past-events/?topics=taskforce-on-federal-consumer-financial-law. In addition, on April 1, 2020, the Bureau issued a request for comments and information to assist the Taskforce. 85 Fed. Reg. 18214. In particular, the request sought "information from interested parties on which areas of the consumer financial services markets are functioning well – that is, which areas are fair, transparent, and competitive – and which might benefit from regulatory changes that could facilitate competition and materially increase consumer welfare." The request included 23 questions to assist commenters in providing information "about how well financial markets are functioning for consumers." *Id.* at 18215. The Bureau allowed two months for responses to the notice, and it received a total of 97 comments, including three from Plaintiff Kathleen Engel. https://www.regulations.gov/docketBrowser?rpp=25&po= 50&dct=PS&D= CFPB-2020-0013&refD=CFPB-2020-0013-0001.

3. The Federal Advisory Committee Act (FACA)

In 1972, Congress enacted FACA, 5 U.S.C. app. 2 §§ 1-16, to provide a framework for certain commissions, advisory panels, and councils, known as "advisory committees," that advise officers and agencies in the executive branch of the government. FACA requires, among other things, that the creation, operation, and duration of advisory committees be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature. *Id.* § 2(b). An "advisory committee" is defined by FACA as a committee, established by an agency, for the purpose of providing advice or recommendations. *Id.* § 3(2). However, the definition excludes "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." *Id*.

Pursuant to FACA, before an advisory committee is established, the agency must consult with the Administrator of the GSA and determine that the committee is in the public interest. *Id.* § 9(a)(2). The advisory committee must have a charter that describes, among other things, the committee's objectives, its duties and cost, its meeting schedule, and its termination date. *Id.* § 9(c). FACA requires that the membership of a committee must be "fairly balanced in terms of points of view represented," that the committee must hold public meetings (with certain exceptions), and that it must make its records public. *Id.* §§ 5, 10.

4. Plaintiffs' Complaint

On June 16, 2020, Plaintiffs National Association of Consumer Advocates (NACA), the U.S. Public Interest Research Group (US PIRG), and Prof. Kathleen Engel (collectively, Plaintiffs) filed their Complaint in this case. The Complaint alleges that the Taskforce is subject to FACA, but that when the Bureau established the Taskforce, it did not comply with all of FACA's requirements. Plaintiffs claim that the alleged failure to comply with FACA deprived them of information they wish to have and to which they assert they are statutorily entitled. Comp. at ¶¶ 140-47. The Complaint also alleges that Plaintiffs have been harmed because their views are not represented on the Taskforce, and that they may be harmed in the future because the Taskforce could make policy recommendations with which Plaintiffs disagree and which Plaintiffs might choose to analyze or advocate against. *Id*. at ¶¶ 148-49, 151-55. Finally, the Complaint alleges that Professor Engel was "injured by the Taskforce's rejection of her application." *Id.* at ¶ 150.

The Complaint contains four claims for relief. The first claim challenges the formation of the Taskforce. In particular, it alleges that, before setting up the Taskforce, the Bureau failed to make certain determinations required by FACA and its implementing regulations – that the

Taskforce is in the public interest, that it is essential to the conduct of the Bureau's business, and that the information the Taskforce will obtain is not otherwise available within the government. The first claim also alleges that the Bureau did not meaningfully consult with GSA before creation of the Taskforce, and did not prepare a Membership Balance Plan (which is required by FACA's implementing regulations). The second claim alleges that the Bureau violated FACA by failing to give adequate advance notice of, and allow public participation at, Taskforce meetings. The third claim alleges that the Bureau violated FACA by failing to make the records of the Taskforce available to the public. And the fourth claim alleges that the Bureau failed to comply with FACA's requirement that an advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." *Id.* at ¶¶ 167-70. It specifically alleges that, although the Taskforce's stated function is to make recommendations regarding improving and strengthening consumer financial laws and regulations, the Taskforce does not include consumer advocates or consumer finance law experts who endorse consumer protections.

In their Prayer for Relief, Plaintiffs ask this Court to set aside the Taskforce's charter and all aspects of its creation, including the appointment of Taskforce members. They ask that the Taskforce be enjoined from further meetings, conducting any business, or from advising the Bureau's Director. They request that all materials prepared for the Taskforce be released, and that the Bureau be enjoined from relying on or using any recommendations or advice from the Taskforce.

ARGUMENT

Plaintiffs lack standing with respect to two of their claims, as well as four of the elements of relief that they seek. "[A]ny person invoking the power of a federal court must demonstrate

standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). Indeed, "standing is a prerequisite to a federal court's subject matter jurisdiction." *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc*., 958 F.3d 38, 46 (1st Cir. 2020). Standing, however, is not dispensed in gross: "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc*., 137 S. Ct. 1645, 1650 (2017); *see also O'Hara v. Diageo-Guinness, USA, Inc*., 306 F. Supp. 3d 441, 451 (D. Mass. 2018) (same). Here, Plaintiffs have failed to show that they have standing with respect to their first and fourth claims for relief, which concern the Taskforce's creation and composition, respectively. Accordingly, this Court should dismiss those two claims for lack of subject matter jurisdiction. In addition, Plaintiffs also lack standing to seek broad declaratory or injunctive relief related to the Taskforce's creation and administration or to the Bureau's use of the Taskforce's recommendations.

1. Standing

The standing doctrine is intended to "ensure that federal courts do not exceed their authority as it has been traditionally understood." That is, it "confines the federal courts to a properly judicial role" – resolution of cases or controversies. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). It is well "established that the 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (internal citation omitted). And at the pleading stage, Plaintiff must "clearly allege facts demonstrating each element." *Id.*; *see Amrhein v. eClinicalWorks, LLC*, 954 F.3d 328, 330 (1st Cir. 2020).

With respect to the first element, injury in fact, "a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Id.*; *see Dantzler v. Empresas Berrios*, 958 F.3d at 47. For an injury to be "concrete," it "must be 'de facto'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548. A plaintiff cannot automatically satisfy the injury-in-fact requirement merely by alleging a statutory violation because "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549.

> Indignation at violation of the law is not concrete because it does not impact the plaintiff personally; it is not particularized because it does not affect him in an 'individual way.' For a harm to be particularized, there must be some connection between the plaintiff and the defendant that 'differentiates' the plaintiff so that his injury is not common to all members of the public."

Carello v. Aurora Policemen Credit Union, 930 F.3d 830, 834 (7th Cir. 2019) (internal citations omitted); *see also United States v. AVX Corp*., 962 F.2d 108, 119 (1st Cir. 1992) (citing *Capital Legal Found. v. Commodity Credit Corp*., 711 F.2d 253, 258 (D.C. Cir. 1983), for the proposition that an undifferentiated injury common to all members of the public does not constitute an injury in fact necessary to establish standing).

There are three plaintiffs in this case: two organizations (NACA and US PIRG) and one individual (Prof. Engel). In determining whether the organizations have organizational standing – standing on their own behalf – this Court must apply the same test that it applies when

assessing whether an individual has standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).[3]

2. Plaintiffs do not have standing to challenge the procedures the Bureau used to create the Taskforce

Plaintiffs have not met their burden of establishing standing with respect to their first claim for relief. The first claim challenges the procedures employed by the Bureau in establishing the Taskforce. It alleges that, when the Bureau established the Taskforce, it violated FACA by failing to make certain findings: that establishment of the Taskforce would be in the public interest, that the Taskforce would be essential to the conduct to the Bureau's business, and that the information the Taskforce would obtain is not already available. The claim also alleges that, before establishing the Taskforce, the Bureau did not meaningfully consult with the GSA, and did not prepare a Membership Balance Plan.

In their first claim (Comp. at ¶¶ 156-159), Plaintiffs do not allege any injury, let alone a particularized injury, resulting from what they contend were the improper procedures that led to the formation of the Taskforce. Instead, Plaintiffs' allegations of harm are set forth in Part IV of their Complaint. Comp. at ¶¶ 139-155. But even that part of the Complaint makes barely a mention of the procedures challenged in the first claim, and to the extent it does, the only harm it even suggests is that the procedural errors alleged in the first claim resulted in an informational injury. In particular, Plaintiffs contend that "the secrecy of the Taskforce – including its failure[] to … consult with the GSA … – prevents Plaintiffs from studying how the Taskforce's work

[3] An organization, such as NACA or US PIRG, could also assert "associational standing" – standing on behalf of its members. "To satisfy this requirement, the association must, at the very least, identify [a] member[] who ha[s] suffered the requisite harm." *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016). Neither NACA nor US PIRG has attempted to identify any of their members or allege that any of their members has suffered any harm.

may impact the regulation of consumer financial products and from informing the public about these issues." Comp. at ¶ 140. This sort of "barebones allegation, bereft of any vestige of a factual fleshing-out, is precisely the sort of speculative argumentation that cannot pass muster where standing is contested." *AVX Corp*., 962 F.2d at 117. "To show an informational injury, a plaintiff must show: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr. v. Dep't of Commerce*, 928 F.3d 95, 103 (D.C. Cir. 2019).

Again, Plaintiffs' first claim challenges five purported shortcomings in the establishment of the Taskforce: the Bureau's failure to make three findings – that the Taskforce is in the public interest, that it is essential to the conduct of agency business, and that the information the Taskforce will obtain is not available elsewhere – and the Bureau's failure to take two actions – consult with the GSA, and prepare a membership balance plan.[4] The Complaint does not, however, identify any way in which the Bureau's alleged failure to take these steps, and in particular its failure to consult with the GSA (the only one of those failings mentioned in Part IV of the Complaint) caused Plaintiffs to suffer their alleged informational injury, that is, preventing them from studying the Taskforce's work and reporting on it to the public. Indeed, the first claim for relief does not refer to the withholding of any information at all.[5] Because Plaintiffs have

[4] Whereas the first claim challenges the Bureau's failure to have an advance plan regarding balanced Taskforce membership, the fourth claim, *see infra*, alleges that the Taskforce's membership was not, in fact, balanced.

[5] Presumably this is because all that FACA would require to be made public concerning these procedures is that the agency has determined, after consulting with GSA, that the committee would be in the public interest. 5 U.S.C. App. 2 § 9(a)(2). And as the materials cited in the

failed to show with respect to their first claim that they were deprived of information the Bureau was required to provide or that they have suffered any harm, let alone the kind of harm that Congress sought to prevent, the first claim must be dismissed for lack of standing.

3. Plaintiffs do not have standing to challenge the membership of the Taskforce

The fourth claim for relief challenges what Plaintiffs refer to as the "[u]nfairly [b]alanced [a]dvisory [c]ommittee." The claim alleges that the Taskforce lacks "consumer advocates or consumer finance law experts who endorse consumer protections." Comp. at ¶ 169. As a result, Plaintiffs contend that the Taskforce is "incapable of considering … with integrity" one of its stated goals: providing recommendations on "ways to improve and strengthen consumer financial laws and regulations." *Id.*, citing the Taskforce's charter at ¶ 3.[6] In other words, this claim alleges that the Bureau did not select a "fairly balanced" membership for the Taskforce, and that, as a result, the Taskforce will not perform its duties "with integrity."

Complaint make clear, the Bureau has already publicly explained why it views the Taskforce to be in the public interest. *See*, Comp. at ¶ 80 n.73, citing *CFPB Announces Taskforce on Federal Consumer Financial Law*, Oct. 11, 2019 Press Release, https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-taskforce-federal-consumer-financial-law/ ("An objective and independent evaluation of our current regulatory framework to identify where there may be gaps or where regulation should be simplified or modernized is needed to help us more effectively carry out our mission of protecting consumers."). The Bureau's assessment of whether the Taskforce is essential, whether information is otherwise available, and any membership balance plan, are merely subjects to be considered during the nonpublic consultation with the GSA. *See* 41 C.F.R. § 102-3.60.

[6] Paragraph 3 of the Charter (cited *supra*) actually provides that the Taskforce is to make "recommendations for ways to improve and strengthen consumer financial laws and regulations, including recommendations for resolving conflicting requirements or inconsistencies, reducing unwarranted regulatory burdens in light of market or technological developments, improving consumer understanding of markets and products, and identifying gaps in knowledge that should be addressed through future Bureau research."

In Part IV of their Complaint, Plaintiffs allege two types of harm resulting from the Bureau's choice of Taskforce members. Comp. at ¶¶ 148-154. First, they assert that Prof. Engel was injured when she was not selected to serve on the Taskforce. Comp. at ¶ 150. Second, all three Plaintiffs worry that because of its allegedly imbalanced membership, the Taskforce may ultimately issue a report that is not to Plaintiffs' liking. Comp. at ¶ 151. In that event, Plaintiffs claim that they will be required "to expend further resources to monitor, and if necessary, advocate against harmful agency actions." Comp. at ¶ 154. They also contend that the report "is likely" to recommend measures "that will allow the proliferation of harmful consumer financial products." Comp. at ¶ 152. Neither of the harms Plaintiffs allege supports standing here.

1. With respect to the rejection of Prof. Engel's application, Plaintiffs lack standing because Prof. Engel has no entitlement to Taskforce membership. *See Sanchez v. Pena*, 17 F. Supp. 2d 1235, 1237-38 (D.N.M. 1998) (applicants' exclusion from advisory committee membership was not an injury-in-fact); *Pub. Citizen v. HHS*, 795 F. Supp. 1212, 1217 (D.D.C. 1992) (FACA "confers no cognizable personal right to an advisory committee appointment"). Absent such an entitlement, the mere fact that Prof. Engel (or any other applicant, *see* Comp. at ¶ 118) was not selected, does not constitute the sort of injury that could support standing.[7]

Moreover, even if Plaintiffs could somehow show that the rejection of Prof. Engel's application constituted the sort of injury that would support standing, they fail to show this injury is "likely to be redressed by a favorable judicial decision." *See Spokeo*, 136 S. Ct. at 1547.

[7] Even if Prof. Engel had standing to press such a claim, it would not be justiciable because it would challenge an individual hiring decision committed to the Bureau's discretion. *Cf. Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 18 n.5 (1st Cir. 2020) (distinguishing for purposes of justiciability between "individual hiring decisions committed to discretion" and "agency-wide policy").

"[T]he redressability element of standing requires that the plaintiff allege that a favorable resolution of its claim would likely redress the professed injury. This means that it cannot be merely speculative that, if a court grants the requested relief, the injury will be redressed." *Dantzler v. Empresas Berrios*, 958 F.3d at 47 (internal citation omitted). None of the relief that Plaintiffs seek would redress the rejection of Prof. Engel's application because they do not ask that she be included on the Taskforce. Instead, the relief that Plaintiffs seek would terminate the Taskforce altogether, and thus has nothing to do with its composition. Accordingly, the relief sought by Plaintiffs would not result in Prof. Engel being added to the Taskforce or otherwise redress the denial of her application, and for that reason as well, the first type of harm that Plaintiffs assert regarding the composition of the Taskforce does not support standing.[8]

2. Plaintiffs fare no better with respect to the second type of harm they allege in connection with their fourth claim: that they will be injured because the Taskforce could make recommendations that Plaintiffs do not agree with. To begin, it is well settled that "an organization's abstract interest in a problem is insufficient to establish standing, 'no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem.'" *Am. Soc. For Prevention of Cruelty to Animals v Feld Entm't, Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)); *accord Citizens to*

[8] This case is very different from *Union of Concerned Scientists v*. Wheeler, 377 F. Supp. 3d 34 (D. Mass. 2019), *rev'd on other grounds*, 954 F. 3d 11 (1st Cir. 2020). In that case, a not-for-profit organization and one individual challenged an EPA directive that prohibited EPA grant recipients from serving on EPA advisory committees. To remain on the advisory committee, the individual plaintiff relinquished her role in connection with a $3 million EPA grant. *Id*. at 41-42. The district court held that the individual plaintiff had standing because relinquishing the multi-million dollar grant was a concrete and particularized injury. *Id.* The court also held that the injury was redressable because the relief the plaintiffs sought, rescission of the directive, would allow the individual plaintiff to resume her role under the grant. Here, Prof. Engel did not relinquish anything. She merely applied for membership on the Taskforce, and was not selected.

End Animal Suffering & Exploitation v. New England Aquarium, 836 F. Supp. 45, 57 (D. Mass. 1993). This means that even a party alleging procedural harm, such as Plaintiffs allege in their fourth claim, "is not relieved from compliance with the actual injury requirement for standing." *AVX Corp.*, 962 F.2d at 119. "To establish injury-in-fact in a procedural injury case, like the present one, petitioners must show that the government act performed without the procedure in question … will cause a distinct risk to a particularized interest of the plaintiff." *Town of Winthrop v. FAA*, 535 F.3d 1, 6 (1st Cir. 2008).

Plaintiffs have failed to meet this requirement because the only risk they identify that is remotely related to their specific interests is that the Taskforce *might* make a recommendation to the Bureau or Congress, and the Bureau or Congress *might* use that recommendation in connection with a regulation or legislation, and Plaintiffs *might* choose to use their resources to advocate or lobby against that regulation or legislation. Comp. ¶ at 154. It is "clear that an organization's use of resources for … advocacy is not sufficient to give rise to an Article III injury." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). "Nor is standing found when the only 'injury' arises from the effect of the [agency action] on the organizations' lobbying activities." *People for the Ethical Treatment of Animals v. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015). For instance, in *Center for Law & Education v. Department of Education*, 396 F.3d 1152, 1161 (D.C. Cir. 2005), the D.C. Circuit held that a challenge to an agency's action that allegedly forced organizations "to change their lobbying strategies" and engage in "a more costly form of lobbying" was not the sort of concrete and particularized injury that would support standing. Here, the Complaint does not even allege that lobbying against the adoption of hypothetical "harmful" recommendations would be more costly than advocating in favor of the kinds of recommendations Plaintiffs might prefer. The mere fact

that Plaintiffs might choose to allocate their resources to lobby against the adoption of some unspecified Taskforce recommendation is not sufficient to establish standing.

To the extent that the Complaint alleges that Plaintiffs would be injured because a hypothetical Taskforce recommendation might lead to one or more unspecified "deregulatory measures that will allow the proliferation of harmful consumer financial products," Comp. at ¶ 152, this too is an insufficient basis for standing. First, Plaintiffs do not allege that any of them would ever use or be harmed by those products. Second, this is far too speculative a basis for standing because the "series of events that must occur before the … harm is realized is both too uncertain and too remote to constitute a reasonably probable threat of injury." *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1233 (9th Cir. 2017); *see Pub. Citizen v. HHS*, 795 F. Supp. 1212, 1214 (D.D.C. 1992) (theory that "unbalanced membership of [committee] causes it to make certain biased recommendations, which in turn cause government agencies to adopt policies favoring the petroleum industry, which in turn cause the appellants to be injured as consumers and citizens" is a "speculative chain of events . . . simply too attenuated to amount to injury in fact.").

Accordingly, neither of the types of harm that Plaintiffs allege is sufficient to support their standing to pursue their fourth claim challenging the Taskforce's composition.

* * *

Because Plaintiffs lack standing to assert their first and fourth claims of relief challenging the Taskforce's creation and composition, the Court should dismiss those claims under Fed. R. Civ. P. 12(b)(1). The Court should also dismiss the first, second, third, and fifth elements of Plaintiffs' Prayer for Relief, which seek declaratory relief with respect to the creation and administration of the Taskforce (Prayer for Relief at ¶ 1), an injunction to set aside the

Taskforce's creation (Prayer for Relief at ¶ 2), bar the Taskforce from meeting (Prayer for Relief at ¶ 3), and prevent the Bureau from using any advice offered by the Taskforce (Prayer for Relief at ¶ 5).

A plaintiff's standing to seek relief "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff[s] ha[ve] established." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006); *accord Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (explaining that because standing is not dispensed in gross, "a plaintiff's remedy must be tailored to redress the plaintiff's particular injury"). Here, Plaintiffs' remaining claims, which allege that the Bureau has refused to provide Plaintiffs with sufficient access to the Taskforce's records and meetings, do not give Plaintiffs standing to seek declaratory or injunctive relief that would shut down the Taskforce and preclude the Bureau from using the Taskforce's recommendations. *See Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1022 (D.C. Cir. 1998) (vacating injunction against use of recommendations, explaining "[t]hat the appellees may have sustained a continuing injury by virtue of the Department's ongoing denial of FACA access to Committee documents and records cannot support their standing to sue for an injunction that does not itself address the access issue."). Accordingly, the Court should dismiss the first, second, third, and fifth elements of Plaintiffs' Prayer for Relief.

CONCLUSION

For the reasons set forth above, this Court should dismiss the first and fourth claims for relief in Plaintiffs' Complaint and the first, second, third, and fifth elements of the Prayer for Relief.

Dated: August 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Defendants' Memorandum of Reasons in Support of Partial Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) was served on August 17, 2020, on all counsel or parties of record through the CM/ECF system, and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ *Lawrence DeMille-Wagman*
Lawrence DeMille-Wagman