UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWYERS COMMITTEE FOR 9/11 INQUIRY, INC., *et al.*,

Plaintiffs,

v.

CHRISTOPHER A. WRAY, Director, Federal Bureau of Investigation, *et al.*,

Defendants.

Civil Action No. 19-0824 (TNM)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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CONTENTS

INTRODUCTION

Plaintiffs have failed to rebut any of the multiple independent bases for dismissal set forth in Defendants' motion to dismiss. Though they try to modify their claims to suit their arguments, they plainly seek judicial enforcement of an instruction contained only in an explanatory statement, which lacks the force of law, in the form of an order requiring the FBI[1] to correct what they view as an insufficient report to Congress, which is not a final agency action subject to judicial review. In addition, Plaintiffs lack either informational or organizational standing and their arguments to the contrary fail to meet their standing burden. Finally, Defendants have shown that the Review Commission's report, which Plaintiffs admit can be considered at this stage of the proceedings, demonstrates that the FBI fulfilled Congress's instructions regarding that report. Plaintiffs' amended complaint should be dismissed.

ARGUMENT

I. The instructions in the joint explanatory statement lack the force of law, and the Appropriations Act does not impose a duty to assess new evidence.

Plaintiffs seek to compel the FBI to conduct an assessment of several theories circulated in the media and on the internet that they view as "new evidence" regarding the 9/11 attacks, including that the World Trade Center was destroyed by planted explosives. *See* Am. Compl. ¶ 47. Plaintiffs contend that the 9/11 Review Commission was required to probe these theories in fulfilling an instruction in an explanatory statement accompanying the 2013 Appropriations Act directing it to conduct an "assessment of any new evidence now known to the FBI that was not considered by the 9/11 Commission related to any factors that contributed in any manner to the terrorist attacks of September 11, 2001." Even were Plaintiffs correct that the Review Commission was compelled to delve into these theories, they cannot through litigation compel the FBI to do so

[1] Defendants use the same shorthand and abbreviations as were defined in their opening brief.

because the cited instruction was set forth in an explanatory statement that lacks the force of law. *See* Def.'s Br. at 8–9.[2]

Plaintiffs do not dispute that the language in the explanatory statement lacks the force of law. Instead, contradicting their amended complaint, they now contend that they do not in fact seek to compel compliance with the explanatory statement, but instead seek to compel compliance with the Appropriations Act itself, which allocated funds to the FBI for a "comprehensive review" of the agency's implementation of the 9/11 Commission's recommendations. *Compare* Am. Compl. ¶ 7 (alleging that Defendants failed to comply with a "Congressional mandate that imposed a mandatory duty on Defendants to perform an assessment" of new evidence regarding the 9/11 attacks) *with* Pls.' Br. at 7–8 (arguing that Plaintiffs seek to compel compliance with the language in the Appropriations Act). Plaintiffs acknowledge that the language in the Appropriations Act alone "may seem superficially clear in not explicitly specifying that the FBI was mandated to assess and report all 9/11 evidence," but contend that the joint statement provides an indication that Congress nevertheless intended the "comprehensive review" of the implementation of recommendations to include an assessment of new evidence. Pls.' Br. at 9–10.

Plaintiffs' argument finds no basis in the text of the Act. The Act itself, by its plain terms, only allocated funds for the FBI to conduct a comprehensive review of "the implementation of the

[2] Plaintiffs observe that, though the explanatory statement was inserted in the Congressional Record by Senator Lisa Murkowski, Chair of the Senate Appropriations Committee, Congress directed in the Appropriations Act that it "have the same effect with respect to the allocation of funds and implementation of this Act as if it were a joint explanatory statement of a committee of conference." 127 Stat. 199; *see also* Pls.' Br. at 9. This does not undermine Defendants' argument, however, as the instruction lacks the force of law whether in a joint explanatory statement or a statement by the Senate Appropriations Committee alone. Indeed, all of the authorities cited in support of Defendants' argument specially addressed joint explanatory statements in conference reports and held them not to have the force of law. *See* Defs.' Br. at 8–9 (citing cases); *see also* 2A *Sutherland Statutory Construction* § 48:8 (7th ed.) ("But explanatory remarks in the conference report do not have the force of law.").

recommendations related to the Federal Bureau of Investigation that were proposed in the [9/11 Commission Report]." 127 Stat. 247. This language does not direct the FBI to assess any new evidence about the 9/11 attacks and certainly does not require the FBI to examine the media and internet theories espoused by Plaintiffs. It is only the explanatory statement that goes farther. It repeats the requirement for the FBI to review the implementation of the 9/11 Commission's recommendations, reiterating that the review shall include "(1) an assessment of progress made, and challenges in implementing the recommendations of the 9/11 Commission that are related to the FBI." 159 Cong. Rec. S1305. But it also adds additional areas to the scope of the review,[3] including that the review include "(2) an analysis of the FBI's response to trends of domestic terror attacks since September 11, 2001, including the influence of domestic radicalization; (3) an assessment of any evidence now known to the FBI that was not considered by the 9/11 Commission related to any factors that contributed in any manner to the terrorist attacks of September 11, 2001; and (4) any additional recommendations with regard to FBI intelligence sharing and counterterrorism policy." *Id.* It also mandates that the FBI report to the Appropriations Committees within one year of the Act's enactment (a deadline that was later extended in explanatory statements accompanying other appropriations acts) and specified that the review should be "external." *Id.* These requirements are in addition to (though no doubt associated with) the Act's mandate for a review of the "implementation of . . . recommendations" by the 9/11 Committee, and they are found only in the joint explanatory statement, not the Act. Accordingly, those

[3] Reports accompanying appropriations acts frequently add "additional directives to the agencies funded therein." *See* Jessica Tollestrup, *Appropriations Report Language: Overview of Development, Components, and Issues for Congress* 6–7 (July 28, 2015), *available at* https://fas.org/sgp/crs/misc/R44124.pdf. This sometimes, as here, includes "general guidance about the timing or form of agency reports to be provided." *Id.* at 10. The Congressional Research Service acknowledges that such directives in explanatory statements "are not legally binding." *Id.* at 8.

additional requirements, including the requirement that the FBI include an assessment of new evidence in its review, lack the force of law. Plaintiffs cannot bring an action in court for the FBI to comply.

II. Congressional reporting requirements are not subject to judicial review, and it is clearly a reporting requirement that Plaintiffs seek to enforce.

Plaintiffs' claims are also subject to dismissal because even statutory requirements that agencies submit reports to Congress do not compel "final agency action" subject to judicial review. Defs.' Br. at 9–11. Plaintiffs attempt to avoid this defect by again contradicting their pleading and reformulating their claims solely for purposes of argument. They now say that they do not challenge the FBI's failure to submit a report to Congress, but instead challenge only its failure to conduct the review mandated by the text of the Appropriations Act. *Compare, e.g.,* Am. Compl. ¶ 7 ("The instant action has been brought because [Defendants] have failed to comply with this Congressional mandate . . . to perform an assessment of any evidence known to the FBI . . . and report that assessment to Congress."), *with* Pls.' Br. at 12 ("The mandate here is first a requirement for the FBI to conduct a comprehensive review including an assessment of any evidence now known to the FBI . . . .") (emphasis in original).

But Plaintiffs cannot escape their own pleading. All of the substantive relief requested by Plaintiffs specifically demands that the FBI "submit[] [an] assessment [of "new evidence"] in a public *report to Congress*." Am. Compl. ¶ 127(A), (B) (emphasis added). Moreover, as discussed more fully below, the reporting requirement (which is found in the explanatory statement alone) is the cornerstone of Plaintiffs' standing argument. They contend that the presumed public availability of the Review Commission's report to Congress gives rise to informational standing on the part of all three Plaintiffs. Pls.' Br. at 14–17, 19–20. They do not—and could not—claim informational standing from being deprived of an unreportable review of the FBI's implementation

of the 9/11 Commission's recommendations alone. Further, the organizational plaintiffs claim "organizational standing" based on their contention that they expended funds gathering information about the 9/11 attacks that they would not have had to expend "[h]ad the FBI and its 9/11 Review Commission honored its mandate from Congress and assessed and *reported to Congress* this same evidence of controlled demolition" of the World Trade Center buildings. *Id.* at 23. Thus, the relief demanded by Plaintiffs and the basis for their standing arguments center on the explanatory statement's requirement for a report to Congress. Not only does that requirement lack the force of law, it is not a final agency action subject to review. That warrants dismissal of Plaintiffs' claims.

III. Plaintiffs cannot meet their burden to show standing.

As a separate basis for dismissal, none of the Plaintiffs have standing to bring this action. Defs.' Br. at 11–14. Plaintiffs rely on two variants of standing—informational and organizational standing—neither of which they can satisfy.

A. *Informational Standing*

All three Plaintiffs claim informational standing, but they cannot satisfy its requirements because they fail to show that the Appropriations Act required the disclosure of any information to them or that their alleged harms are of the kind that Congress sought to remedy by allocating funds for a review of the FBI's implementation of the 9/11 Commission's recommendations. Defs.' Br. at 11–13. Plaintiffs contend that, though the explanatory statement requires only that the Review Commission report to Congress, they "reasonably expect" that such report would ultimately be made public, thereby allowing them access to it. Pls.' Br. at 13–17. On that basis, they claim informational standing.

Plaintiffs' argument is flawed in a number of respects. *First*, as discussed, Plaintiffs in their opposition brief do not deny that the explanatory statement lacks the force of law and now contend

that they exclusively seek to compel the FBI's compliance with the Appropriations Act itself. Critically, however, the Appropriations Act contains no reporting requirement. *See* 127 Stat. 247. The obligation to report to Congress is found only in the explanatory statement that Plaintiffs concede cannot form the basis of their claims. The Appropriations Act simply appropriates certain funds for a review of the FBI's implementation of recommendations by the 9/11 Commission; it does not compel the FBI to produce any report to Congress or the public regarding that review. Accordingly, Plaintiffs are unable to claim informational standing based on an alleged violation of the Appropriations Act, which is what they now purport to be claiming.

Second, Plaintiffs have not even attempted to show—as they must—that their alleged harms are "the type of harm Congress sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017). Plaintiffs contend that the Review Commission failed to assess and report on several theories circulated in the media and on the internet proposing alternative causes of the 9/11 attacks and that this failure frustrated their respective missions to promote transparency and accountability about the "full truth" of what happened on September 11, 2001, and to discover the "true reasons" that the World Trade Center buildings collapsed. Pls.' Br. at 13–14. Similarly, the individual plaintiff wants to know the real reasons behind the 9/11 attacks because of the tragic personal loss of his son. *Id.* at 19–20. But these interests—though surely motivating for Plaintiffs (particularly McIlvaine)—are clearly not the type of interest that Congress had in mind when it allocated funds for the review. The explicitly stated reason for funding the review was to assess the implementation of the 9/11 Commission's recommendations, not to conduct a wholesale reinvestigation of the causes of the 9/11 attacks, or to probe alternative theories propagated in the media and on the internet, or to undermine the core findings underlying the 9/11 Commission's recommendations.

Accordingly, Plaintiffs cannot show that their alleged harms are the type that Congress sought to address in the Appropriations Act and therefore lack informational standing.

Finally, Plaintiffs have not adequately addressed Defendants' argument regarding redressability. Even if the FBI were ordered to assess and report on all of the theories and information set forth in Plaintiffs' complaint, it is overly speculative for Plaintiffs to allege that it would result in any different understanding of the causes of the 9/11 attacks. *See* Defs.' Br. at 13–14. Plaintiffs have not proffered any competing argument.

B. *Organizational Standing*

In addition to informational standing, the two organizational plaintiffs contend that they have organizational standing because on August 30, 2019—after Defendants filed their initial motion to dismiss based in part on standing grounds—those plaintiffs purportedly filed an application with the Department of State and the FBI seeking a reward for reporting their theory that the World Trade Center buildings were destroyed with explosives. Am. Compl. ¶¶ 11, 14. This action does not suffice to confer standing, however, as the relief requested in this case would not provide any redress in their claim for an award. When assessing redressability, "[c]ourts do not lightly speculate how 'independent actors not before [them]' might 'exercise [their] broad and legitimate discretion.'" *West v. Lynch*, 845 F.3d 1228, 1237 (D.C. Cir. 2017) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). Whether Plaintiffs receive an award in response to their request rests in the broad discretion of an independent actor not before this Court: namely, the Secretary of State or his designee. *See Heard v. U.S. Dep't of State*, No. 08-2123, 2010 WL 3700184, at *4 (D.D.C. Sept. 17, 2010) (noting that "the administration of the Rewards Program lies within the 'sole discretion' of the Secretary of State, subject only to consultation with the Attorney General" (quoting 22 U.S.C. § 2708(b)). Further, as in *Guerrero v. Clinton*, the report

required by the explanatory statement is for informational purposes only and nothing that this Court could order with respect to the report would require the arrest or conviction of any individual, much less a reward for Plaintiffs stemming from such arrest of conviction. 157 F.3d 1190, 1194 (9th Cir. 1998). Accordingly, Plaintiffs' request for an award is insufficient to generate standing.

Plaintiffs' reliance on *Sergeant v. Dixon* is misplaced. In that case, the D.C. Circuit observed, in *dicta*, that a plaintiff "might well have standing" to bring an action to force a prosecution under 18 U.S.C. § 3332 if such person would be entitled to a reward based on the initiation of such prosecution. 130 F.3d 1067, 1070 (D.C. Cir. 1997). But Plaintiffs here do not directly seek the initiation of a prosecution that would itself entitle them to a reward. They seek an order that the FBI assess and report to Congress about their alternative theories regarding the 9/11 attacks. Thus, unlike the situation hypothesized by the court in *Sergeant*, the injury alleged by Plaintiffs in this case is highly attenuated to their claims and is insufficient to show redressability.

The only other basis for standing set forth by the institutional plaintiffs is that they have spent money investigating what they view as the true causes of the 9/11 attacks and seeking to compel the federal government to further investigate those causes. Pls.' Br. at 21–23. As an initial matter, Plaintiffs have provided neither allegations in their amended complaint nor any form of proof with their motion demonstrating their efforts to purportedly counteract the FBI's alleged failure to assess new evidence regarding the 9/11 attacks and to report on that assessment to Congress. For this reason alone, Plaintiffs' cannot show injury. More fundamentally, however, the organizational plaintiffs' allegations about spending money to investigate the true causes of the 9/11 attacks simply amounts to those entities pursuing their core missions. *See* Am. Compl. ¶¶ 10, 13. Importantly, however, the D.C. Circuit has emphasized that "conflict between a defendant's

conduct and an organization's mission is alone insufficient to establish Article III standing;" thus, no organizational standing exists where the claimed injury is merely "frustration of an organization's objective." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161–62 (D.C. Cir. 2005); *see also Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (noting that "impairment" of an organization's "advocacy . . . will not suffice" and that "the expenditure of resources on advocacy is not a cognizable Article III injury"). Instead, an organization must demonstrate that "defendant's conduct causes an inhibition of [the organization's] daily operations." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015). Because the institutional plaintiffs argue only that the FBI's alleged failure to assess and report on their alternate 9/11 theories frustrates their mission, they cannot establish organizational standing.

IV. The Review Commission fulfilled its instructions, and the Court may consider this argument at this stage of the proceedings.

Finally, even if Plaintiffs had established standing, properly invoked a requirement with the force of law, and challenged a final agency action subject to review, their claims would nevertheless fail at the motion to dismiss stage because the FBI plainly complied with Congress's instruction to assess new evidence about the 9/11 attacks known to the FBI. Defs.' Br. at 15–16. Plaintiffs contend that this argument is not appropriate at the motion to dismiss stage because the Court must accept as true all of Plaintiffs' allegations about the purported evidence supporting their alternative theories about the causes of the 9/11 attacks. Pls.' Br. at 25–32. But this misses the point. Defendants' argued that, even were all of Plaintiffs' allegations correct, the Review Commission was not required by the Appropriations Act or the explanatory statement to assess all of the purported evidence alleged by Plaintiffs given the language of the instructions, the level of funding provided, and the time limitations imposed. Defs.' Br. at 15–16. Instead, the FBI fully discharged Congress's instruction that it perform an "assessment of any evidence now known to

the FBI ," 159 Cong. Rec. S1305. when it "conducted multiple interviews of key personnel at FBI Headquarters and in the field to identify any new information related to the 9/11 attacks, with a special emphasis on identifying any previously unknown co-conspirators," Exhibit 1 at 100, ECF No. 12-2. This was sufficient to fulfill the Review Commission's charge. Nothing required that it perform the broad wholesale reinvestigation of the 9/11 attacks that Plaintiffs contemplate.

Plaintiffs' also argue that Defendants failed to follow the procedures set forth for summary judgment motions set forth in Local Civil Rule 7(h)(1). *See* Pls.' Br. at 32–33. But Defendants have not moved for summary judgment, they moved to dismiss based on the pleadings and documents incorporated therein, including the Review Commission Report, which Plaintiffs do not object to the Court considering in connection with this motion. *See* Pls.' Br. at 11. And, in any event, the local rule cited by Plaintiffs does not apply in actions like this one, where review is based on an administrative record. *See* D.D.C. LCvR 7(h)(2). Accordingly, there is nothing procedurally improper in terms of the arguments set forth by Defendants and the format of their brief.

CONCLUSION

For the foregoing reasons and the reasons set forth in Defendants' opening brief, the Court should dismiss Plaintiffs' amended complaint with prejudice.

Dated: October 2, 2019

Respectfully submitted,

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