UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE LAWYERS' COMMITTEE FOR 9/11 INQUIRY, INC., *et al.,*	)	
Plaintiffs,	)	
v.	)	Case No.:
	)	1:19-cv-00824 -TNM
CHRISTOPHER A. WRAY, Director, Federal Bureau of Investigation, *et al.*;	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Dated: September 25, 2019

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INTRODUCTION

Plaintiffs, by the undersigned counsel, hereby respectfully submit, their memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss (Doc. 12). For the reasons presented herein, Defendants' Motion to Dismiss should be denied.

As a preliminary but significant matter, the Defendants misrepresent the nature of the Plaintiffs' First Amended Complaint when they state:

> "Plaintiffs, the Lawyers' Committee for 9/11 Inquiry, Inc.; Robert McIlvaine; and Architects and Engineers for 9/11 Truth, bring this action **challenging the adequacy of a report submitted by the Federal Bureau of Investigation ("FBI") to Congress** regarding the FBI's implementation of recommendations set forth in the 2004 report by the 9/11 Commission regarding the terrorist attacks of September 11, 2001."

See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, Document 12-1 Filed 09/11/19 Page 6 of 21 (hereafter Defendants' Memorandum) (emphasis added). Contrary to Defendants' assertion, Plaintiffs bring the instant action not to challenge the adequacy of a government agency report to Congress but rather (a) to challenge the failure of a federal agency to comply with a clear mandate from Congress,[1] and (b) in the alternative to challenge arbitrary and capricious agency action which involves an agency knowingly misrepresenting to Congress and the American People that it has assessed and reported any and all 9/11 related evidence known to the FBI that was not considered by the original 9/11 Commission.[2]

Defendants further materially misrepresent the allegations made in Plaintiffs' First Amended Complaint when they state:

"Plaintiffs contend that the FBI's report **should have investigated theories that**

[1] Pursuant to the mandamus statute, 28 U.S.C. § 1361.
[2] Pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702, 706.

> **have circulated on the internet and in the media** about various alternative causes of the 9/11 attacks, including what they believe to be **indications of explosives** having been planted **on the ground floors** of the World Trade Center buildings, **purported images of individuals high-fiving in the aftermath of the attacks**, and **supposed evidence of Saudi financing and support for the attacks**."

Id. Contrary to Defendants' assertions, Plaintiffs in their First Amended Complaint do not make any contentions about what *they* think the FBI should have investigated and in particular make no contentions that the FBI should have investigated any particular *theory* because it was circulated on the internet and or by media. Rather, Plaintiffs assert that the FBI failed to assess and report to Congress *evidence known to and possessed by the FBI,* contrary to a specific mandate from Congress.

Further, Defendants describe the First Amended Complaint as addressing "what they [Plaintiffs] believe to be indications of explosives having been planted on the ground floors of the World Trade Center." But the dispositive evidence from scientists, engineers, and architects alleged and described in the First Amended Complaint goes well beyond mere "indications" of the use of explosives and does not allege that use of such explosives was limited to the ground floors of the World Trade Center (WTC).

In addition, Defendants reference to the First Amended Complaint addressing "purported images of individuals high-fiving in the aftermath of the attacks" omits the material fact that the photographs at issue of self-identified Israelis celebrating the aircraft strikes on the WTC were developed and obtained as part of a New Jersey State Police and FBI investigation that was initiated on 9/11 and these photographs are described in detail in official FBI reports, redacted versions of which are in the possession of the Plaintiffs.

The Defendants reference to the First Amended Complaint as addressing "supposed evidence of Saudi financing and support for the attacks" omits the material fact that this

"supposed evidence" is described in the report of the joint intelligence committees of the House and Senate (available at https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-107srpt351-5.pdf) which in turn makes explicit reference to FBI documents.

Notwithstanding what the Defendants would like this Court to believe, Plaintiffs' First Amended Complaint is not about what Plaintiffs, the media, or someone on the internet thinks the FBI should investigate. It is simply about evidence already known to and in the possession of the FBI, evidence that the Congress unambiguously mandated the FBI to assess and report on.

LEGAL STANDARDS

A. Motions to Dismiss under Rule 12(b)(1)

Plaintiffs agree with the Defendants' preliminary statement of (not argument regarding) the legal standards applicable to a motion to dismiss made pursuant to Rule 12(b)(1).

B. Motions to Dismiss under Rule 12(b)(6)

Plaintiffs agree with the Defendants' preliminary statement of (not argument regarding) the legal standards applicable to a motion to dismiss made pursuant to Rule 12(b)(6).

ARGUMENT

I. The Mandate from Congress to the FBI Requiring a Comprehensive External Review of the 9/11 Commission Recommendations Including an Assessment of Any Evidence Now Known to the FBI that Was Not Considered By the 9/11 Commission Is Judicially Enforceable

Defendants assert that Plaintiffs' claims are subject to dismissal because the specific information to be included in the FBI's report was set forth in a statement published in the Congressional Record, not a duly promulgated law, and that statement itself does not carry the force of law and cannot serve as the basis for Plaintiffs' lawsuit. This argument by Defendant

misconstrues Plaintiffs' claims. Plaintiffs in the First Amended Complaint do not seek to enforce a statement made in the Congressional Record. Rather, Plaintiffs seek simply to enforce a public law, Public Law 113-6, that includes a non-discretionary directive (*i.e.* a mandate) from Congress to the FBI.

The Congress, in P.L. 113-6, directed that: "Provided further, That $500,000 shall be for a comprehensive review of the implementation of the recommendations related to the Federal Bureau of Investigation that were proposed in the report issued by the National Commission on Terrorist Attacks Upon the United States." The Senate Explanatory Report of March 11, 2013 for Public Law 113-6 (March 23, 2013) provides the following statement regarding this congressional mandate to the DOJ/FBI to perform certain tasks in regard to this comprehensive review of 9/11 related issues.

> Implementation of 9/11 Commission recommendations. This Act includes $500,000 for a comprehensive external review of the implementation of the recommendations related to the FBI that were proposed in the report issued by the National Commission on Terrorist Attacks Upon the United States (commonly known as the ''9/11 Commission''). The scope of this 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; (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 <u>now</u> 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. The FBI shall submit a report to the Committees, no later than one year after enactment of this Act, on the findings and recommendations resulting from this review. The FBI is encouraged, in carrying out this review, to draw upon the experience of 9/11 Commissioners and staff.

CONGRESSIONAL RECORD, March 11, 2013, SENATE at page S1305 (p. 19 of 302 pages of pdf) (emphasis added).

The Congress as a whole was not only aware of this Senate Explanatory Report but included in Public Law 113-6, which was voted on and passed into law by the entire Congress, the following statement that gives this Senate Explanatory Statement the force of a joint explanatory statement of a committee of conference:

> EXPLANATORY STATEMENT
> SEC. 4. The explanatory statement regarding this Act printed in the Senate section of the Congressional Record on or about March 11, 2013, by the Chairwoman of the Committee on Appropriations of the Senate shall 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.

PUBLIC LAW 113–6, MAR. 26, 2013, 127 STAT. 199 (p. 3 of 241 pages of pdf).

Thus, the role here of the Senate Explanatory Report, which the entire Congress in enacting Public Law 113-6 gave the force of a joint explanatory statement of a committee of conference, is not as a purported enforceable statement of the law standing alone but rather is simply an unambiguous authoritative statement of what the Congress intended to be included in the mandatory and judicially enforceable directive in Public Law 113-6 that the FBI conduct a "comprehensive external review of the implementation of the recommendations related to the FBI that were proposed in the report issued by the National Commission on Terrorist Attacks Upon the United States."

As the District of Columbia Circuit has noted, "[r]eference to statutory design and pertinent legislative history may often shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *Natural Res. Def. Council v. Browner*, 57 F.3d 1122, 1127 (D.C.Cir.1995). *Also see, Sierra Club v. EPA*, 353 F.3d 976, 988 (D.C.Cir. 2004); *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C.Cir. 2003). Although the text of Public Law 113-6 may seem superficially clear in not explicitly specifying that the FBI was mandated to assess and report all 9/11 evidence, there is no language in Public Law 113-6 to the

contrary and what Public Law 113-6 does say is that the 9/11 review to be conducted by the FBI is to be "comprehensive." Congress simply made clear in the Senate Explanatory Report, which the entire Congress in enacting Public Law 113-6 gave the force of a joint explanatory statement of a committee of conference, that to be "comprehensive," a term not entirely free of ambiguity, the FBI review must include "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." A conference report offers "'persuasive evidence of congressional intent' after statutory text itself." *Moore v. District of Columbia*, 907 F.2d 165, 175 (D.C.Cir.1990) (quoting & citing *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C.Cir.1981)).

Although the Defendants now, *post hoc*, after litigation has commenced against them, wish to recreate history and pretend that they did not understand that this directive from Congress to conduct "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" was mandatory, the 2015 Report of the 9/11 Review Commission itself shows that the contemporaneous understanding of the Defendants was to the contrary, i.e. that they were indeed subjected to and acting under such a clear mandate from Congress.

> (U) INTRODUCTION THE FBI 9/11 REVIEW COMMISSION
>
> (U) The FBI 9/11 Review Commission was established in January 2014 **pursuant to a congressional mandate**.1 The **United States Congress directed** the Federal Bureau of Investigation (FBI, or the "Bureau") to create a commission with the expertise and scope to conduct a "**comprehensive external review** of the implementation of the recommendations related to the FBI that were proposed by the National Commission on Terrorist Attacks Upon the United States (commonly known as the 9/11 Commission)."2 **The Review Commission was tasked specifically to report on**:
>
> 1. An assessment of the progress made, and challenges in implementing the

recommendations of the 9/11 Commission that are related to the FBI.

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 not [sic] [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.

4. Any additional recommendations with regard to FBI intelligence sharing and counterterrorism policy.3

(U) The Review Commission was funded by Congress in Fiscal Years 2013, 2014, and 2015 (FY13, FY14, and FY15) budgets that provided for operations for one-year ending with the submission of its review to the Director of the FBI. The enabling legislation **also** required the FBI Director to report to the Congressional committees of jurisdiction on the findings and recommendations resulting from this review.4

See, Report of the 9/11 Review Commission, Defendants' Exhibit 1, at page 3 (footnotes omitted, emphasis added). Thus, here Plaintiffs seek to enforce a mandate in a public law, the congressional intent for which has been authoritatively clarified in the Congressional Record, and do not merely seek to enforce, as Defendants assert, a conference report or other statement in the Congressional Record. For these reasons, the *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991), *Goldring v. Dist. of Columbia*, 416 F.3d 70 (D.C. Cir. 2005), *Roeder v. Islamic Rep. of Iran,* 333 F.3d 228 (D.C. Cir. 2003), and *SourceAmerica v. U.S. Dep't of Educ*., No. 17-0893, 2018 WL 1453242 (E.D. Va. Mar. 23, 2018) cases cited by Defendants are inapposite.

Plaintiffs presume the Defendants wish this Court to take judicial notice of this 9/11 Review Commission Report, and the report of the original 9/11 Commission, for the purpose of a decision on the Defendants' Motion to Dismiss. Plaintiffs do not object to the Court taking such judicial notice and would request this Court to do so should the Court not deem the Defendants to have so requested.

Defendants also argue that even duly promulgated requirements for agencies to submit

informational reports to Congress are not actionable by private parties because such reports do not constitute "final agency action" within the meaning of the Administrative Procedures Act (APA). However, the mandate from Congress at issue here is more than a "reporting requirement." 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 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 (the worst terror attack ever in the U.S. and arguably the worst failure of the U.S. government, intelligence agencies, and military to protect the safety and security of U.S. citizens, with the possible exception of Pearl Harbor). This is a mandate from Congress to the FBI to take substantive actions (to do its job) on a matter of immense national importance, not merely a "reporting requirement." For these reasons, the *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988), *Coll. Sports Council v. Gov't Accountability Office*, 421 F. Supp. 2d 59 (D.D.C. 2006), and *Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998) cases cited by Defendants are inapposite.

Consequently, the agency action at issue here falls within the general presumption of reviewability of agency action. *See United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 675, 98 L.Ed.2d 830 (1988); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1510, 18 L.Ed.2d 681 (1967). As a basic element of our system of checks and balances, Congress has seen fit to provide broadly for judicial review of agency actions, in keeping with fundamental notions in our policy that the exercise of governmental power, as a general matter, should not go unchecked. *See, e.g., Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C.Cir.1988).

For all the foregoing reasons, this Court should hold that the mandate from Congress in

Public Law 113-6 for the FBI to conduct 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 is judicially enforceable. The Court should therefore deny Defendants' Motion to Dismiss.

II. Plaintiffs Have Standing

Defendants also argue that Plaintiffs lack standing because they can neither demonstrate a cognizable injury nor show that any injury is likely to be redressed by a favorable outcome.

> To establish standing, Plaintiffs "must state a plausible claim that [they have] suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits." *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C.Cir.2015). "[G]eneral factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Bennett*, 520 U.S. at 168, 117 S.Ct. 1154 (internal quotation marks omitted).

Food & Water Watch, Inc. v. Vilsack, 808 F.3d 905, 913 (D.C.Cir.2015). Contrary to Defendants' assertion, Plaintiffs do have standing here for the following reasons.

All Plaintiffs have informational standing, and the two organizational plaintiffs have organizational standing. Plaintiff Lawyers' Committee for 9/11 Inquiry, Inc. (hereafter "Lawyers' Committee") is a Pennsylvania non-profit corporation. The mission of the Lawyers' Committee is to promote transparency and accountability regarding the tragic events of September 11, 2001 (9/11). The Lawyers' Committee believes that the family members of the victims of the tragic crimes of 9/11 have a compelling right to know the full truth of what happened to their loved ones on 9/11, and that Congress and the Department of Justice, in order to do their jobs, have a compelling need to know. The Lawyers' Committee has a special interest in the Defendants complying with the mandate from Congress that the Defendants perform an

assessment of any evidence 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. A public evaluation and report to Congress by Defendants regarding the 9/11 related evidence addressed in the First Amended Complaint that Defendants failed to assess during the work of the Defendants' 9/11 Review Commission would promote both of the primary goals in the Lawyers' Committee's non-profit mission: transparency and accountability regarding the tragic events of 9/11. These are important organizational interests distinct from the general public interest in seeing government agencies comply with the law. All of the facts stated in this paragraph are alleged in the First Amended Complaint at ¶ 10.

Plaintiff Architects & Engineers for 9/11 Truth (AE) is also a non-profit organization, incorporated in California, that has conducted an independent multi-year scientific investigation of the causes of the collapse of the WTC towers and WTC Building 7 on 9/11. AE's mission includes investigation and education of the public as to the true reasons these WTC buildings collapsed on 9/11. This is an important organizational interest distinct from the general public interest in seeing government agencies comply with the law. A public evaluation and report to Congress by Defendants regarding the 9/11 related evidence addressed in the First Amended Complaint that Defendants failed to assess during the work of the Defendants' 9/11 Review Commission, particularly in regard to the evidence regarding use of explosives and incendiaries to demolish three WTC buildings on 9/11, would promote the primary goals of AE's non-profit mission. All of the facts stated in this paragraph are alleged in the First Amended Complaint at ¶ 13.

The federal courts have recognized the concept of informational standing arising from circumstances where a denial of access to information works an injury to the plaintiff.

> Following *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), "we have recognized that a denial of access to information can," in certain circumstances, "work an 'injury in fact' for standing purposes," *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc*., 659 F.3d 13, 22 (D.C. Cir. 2011) (Feld) (internal quotation omitted). To carry its burden of demonstrating a "sufficiently concrete and particularized informational injury," the plaintiff must show that "(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." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016); see *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 1549, 194 L.Ed.2d 635 (2016) ("judgment of Congress" is "important" to "whether an intangible harm," including informational harm, "constitutes injury in fact").

Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity, 878 F.3d 371, 378 (D.C.Cir. 2017).

Although the duty imposed by the mandate from Congress at issue here is one that requires the FBI to assess all 9/11 evidence and then report that assessment and evidence to Congress, rather than report that information directly to plaintiffs or the public, the plaintiffs have a reasonable expectation that, pursuant to the requirements of the "Journal Clause" of the Constitution, in all but very unusual circumstances this information reported to Congress would in turn be reported to the public (and thereby to plaintiffs).

The Journal Clause of the United States Constitution requires that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy." U.S. CONST. art. I § 5 cl. 3. The Supreme Court, for example, in 1892, in *Marshall Field & Co. v. Clark,* 143 U.S. 649 (1892), noted the purpose of the Journal Clause was to inform the electorate regarding congressional proceedings and promote government transparency.

> **The clause of the constitution upon which the appellants rest their contention that the act in question was never passed by congress is the one declaring that 'each house shall keep a journal of its proceedings, and from time to**

> **time publish the same, except such parts as may in their judgment require secrecy;** and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.' **Article 1, § 5.** It was assumed in argument that the object of this clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of congress. But the words used do not require such interpretation. **On the contrary, as Mr. Justice Story has well said, 'the object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism and integrity and wisdom obtain their due reward**; and votes are ascertained, not by vague conjecture, but by positive facts. * * * So long as known and open responsibility is valuable as a check or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor and be demanded by public opinion.' 2 Story, Const. §§ 840, 841.

Id. at 670-71.

Further, in addition to the fact that the Constitution requires publication of proceedings of Congress (which includes reports submitted to Congress) for the benefit of the public, both the Senate and the House have made clear the desire and intention of Congress that all 9/11 related evidence be declassified and disclosed not only to the public to the maximum extent possible but also specifically for the benefit of 9/11 family members, such as Plaintiff Robert McILvaine. *See* Senate Resolution 610, Wed. September 26, 2018 Cong. Rec. pp. 56316-56317 (available at https://www.congress.gov/bill/115th-congress/senate-resolution/610/text). Also see, House Resolution 663, introduced on December 13, 2017 (https://www.congress.gov/bill/115th-congress/house-resolution/663/text). The Senate resolution, urging the release of information regarding the September 11, 2001, terrorist attacks upon the United States, states in relevant part:

> There are so many we honor today by our passage of this sense-of-the-Senate resolution. This Senate resolution is itself succinct but significant. It resolves that it is the sense of the Senate that documents related to the events of September 11, 2001, should be declassified to the greatest extent possible; and, two, that the

> survivors, the families of the victims, and the people of the United States deserve answers about the events and circumstances surrounding the September 11 terrorist attack upon the United States. Many years later, the pain and grief they endure on that horrific day is still with them. Each year in Connecticut we commemorate this day, and we will never forget. That is our resolve--never to forget, never to yield to hopelessness, never to allow our support for these families to diminish. This sense-of-the-Senate resolution makes real the promise the Nation made to these 9/11 families. They deserve this evidence. Even if it is embarrassing to foreign governments or foreign nationals, they deserve justice.

Senate Resolution 610. The House Resolution includes equally clear language that the Congress wanted 9/11 information declassified and released to the public for the specific benefit of 9/11 family members:

> Whereas the contents of these documents are necessary for a full public understanding of the events and circumstances surrounding the September 11, 2001, attacks upon the United States;
>
> Whereas the decision to maintain the classified status of many of these documents prevents the people of the United States from having access to information about the attacks, including the involvement of certain foreign governments; and
>
> Whereas the people of the United States and the families of the victims of the September 11, 2001, terrorist attacks deserve full and public disclosure of the events surrounding the attack: Now, therefore, be it
>
> Resolved, That it is the sense of the House of Representatives that—
>
> (1) documents related to the events of September 11, 2001, should be declassified to the greatest extent possible; and
>
> (2) the survivors, the families of the victims, and the people of the United States deserve answers about the events and circumstances surrounding the September 11, 2001, attacks upon the United States.

House Resolution 663. Senate Resolution 610 was passed on September 26, 2018. It is not clear that House Resolution 663 ever came to a vote.

For these reasons, contrary to Defendants' assertions, the Plaintiffs have informational standing under the legal standards articulated in the cases cited by Defendants. *See Fed. Election*

Comm'n v. Akins, 524 U.S. 11 (1998); *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989); *Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016); and *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371 (D.C. Cir. 2017).

Plaintiff Lawyers' Committee and Plaintiff AE (as non-profit organizations) also have an organizational financial interest at stake. On August 30, 2019, the Lawyers' Committee along with AE filed an application for a reward with the U.S. State Department and the FBI under the State Department's Rewards for Justice Program. *See* First Amended Complaint at ¶¶ 11, 14. This State Department program offers and pays rewards to citizens who report information that leads to the arrest or conviction of persons who committed or aided the commission of terrorist acts or crimes. As part of its application to this State Department rewards program, the Lawyers' Committee submitted evidence and information it had previously submitted to the U.S. Attorney for the Southern District of New York pursuant to 18 U.S.C. § 3332(a). This evidence thoroughly addresses the fact, described in the First Amended Complaint, that three WTC buildings were destroyed by use of explosives and incendiaries on 9/11.

If Plaintiffs here were to prevail and the FBI were required by this Court to honor the mandate from Congress and conduct an assessment of this evidence and report such evidence and assessment to Congress, based on the dispositive scientific and eye witness accounts in this evidence, and the credibility that such evidence would gain from an FBI finding in a report to Congress, Plaintiffs would likely be successful in their claim for this federal agency reward. *See Sargeant v. Dixon*, 130 F.3d 1067, 1070 (1997). *Dixon* is a case regarding standing to enforce the mandatory statutory duty of a United States Attorney to present evidence reported by a citizen to a special grand jury. In *Dixon*, the court referenced one scenario where a plaintiff might have standing to enforce the statute at issue there as being the scenario where the plaintiff had filed an

application with the government for a bounty or reward.

> We emphasize that Mohwish lacks standing because he has failed to identify any cognizable injury, not because § 3332 is inherently unenforceable at the instance of a private litigant; for example, a person who would be entitled to a bounty if a prosecution were initiated might well have standing. *Cf. Lujan,* 504 U.S. at 573, 112 S.Ct. at 2143.).

Id. And see, cf. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992) ("Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff.").

The fact that Plaintiff 9/11 family member Robert McILvaine does not have such a financial interest is not a basis for dismissing the First Amended Complaint for lack of standing even if Mr. McILvaine lacked the informational standing he has, as described above. *See Ezell v. City of Chicago*, 651 F.3d 684, 696 n.7 (7th Cir. 2011) ("Where at least one plaintiff has standing, jurisdiction is secure" citing *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 264, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). Of course, Mr. McILvaine has his own unique basis for standing here, including informational standing, because his son Bobby was killed at the WTC on 9/11.

If the Defendants are ordered to comply with the mandate from Congress that they perform an assessment of any evidence 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, the result of such an FBI investigation and report to Congress regarding the 9/11 related evidence addressed in this Complaint that Defendants have heretofore failed to assess or include in their 9/11 Review Commission Report is reasonably expected to result in a better public understanding of the events of 9/11 and possibly disclosure of criminal conduct or

government malfeasance, misfeasance or non-feasance not previously known by the public. The resulting public disclosures will provide a more complete picture of the truth of what happened on 9/11, assisting the family members of the 9/11 victims, including Robert McIlvaine, in coming to closure regarding this tragedy. This is an important personal interest, shared only by the family members of the other 9/11 victims, and is distinct from the general public interest in seeing government agencies comply with the law. Mr. McILvaine has been requesting the federal government to provide him a true and complete explanation of how and why his son Bobby died at the WTC on 9/11 but to date no government agency has done so. Under such circumstances, Mr. McILvaine has standing under the First Amendment to petition his government for redress of this grievance and the instant case is one mechanism for him to do so. As explained *supra*, the Congress has made clear via resolutions that it intends that as much 9/11 evidence as possible in the hands of the federal government be made available to 9/11 family members such as Plaintiff Robert McILvaine.

Plaintiff Lawyers' Committee and Plaintiff AE also have organizational standing. Organizational standing requires an organization, just as in the case of an individual plaintiff, to show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919–20 (D.C.Cir. 2015).

> An organization must allege more than a frustration of its purpose because frustration of an organization's objectives "is the type of abstract concern that does not impart standing." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C.Cir.1995). "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." *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C.Cir.2006). Accordingly, for FWW to establish standing in its own right, it must have "suffered a concrete and demonstrable injury to [its] activities." *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C.Cir.2015) (internal quotation marks omitted).

> Making this determination is a two-part inquiry—"we ask, first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." *Id.* at 1094 (internal quotation marks omitted). … .
>
> To allege an injury to its interest, "an organization must allege that the defendant's conduct perceptibly impaired the organization's ability to provide services in order to establish injury in fact." *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C.Cir.2015) (internal quotation marks omitted). An organization's ability to provide services has been perceptibly impaired when the defendant's conduct causes an "inhibition of [the organization's] daily perations." *PETA*, 797 F.3d at 1094 (quoting *Action All. of Senior Citizens of Greater Phila. v. Heckle*r, 789 F.2d 931, 938 (D.C.Cir.1986)). Our precedent makes clear that an organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury. *Id*. at 1093–94; *Turlock Irrigation Dist*., 786 F.3d at 24. Furthermore, 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." *Nat'l Taxpayers Union, Inc*., 68 F.3d at 1434; *see also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C.Cir.2011) (organization's expenditures must be for " 'operational costs beyond those normally expended' to carry out its advocacy mission" (quoting *Nat'l Taxpayers Union*, 68 F.3d at 1434)).

Id. Here the challenged actions of the government Defendants have impeded the activities of the organizational plaintiffs Lawyers' Committee and AE and forced the organizational plaintiffs to expend resources beyond those normally expended (and beyond the instant litigation).

As indicated in the First Amended Complaint at paragraph 11, the organizational plaintiffs Lawyers' Committee and AE filed an application for a reward with the State Department's Rewards for Justice Program based on the same evidence at issue in the First Amended Complaint count regarding use of explosives and incendiaries at the WTC on 9/11. The primary goal of this action is not to recovery moneys for these non-profit organizations (which is a secondary goal), but rather to compel a government investigation of this heretofore ignored 9/11 evidence. In addition, also as referenced in the First Amended Complaint at paragraph 11, the Lawyers Committee researched, drafted, and filed an extensive formal Petition

to the U.S. Attorney for the Southern District of New York pursuant to 18 U.S.C. § 3332(a) in order to have this evidence of controlled demolition at the WTC on 9/11 presented to a special grand jury. In addition, because that U.S. Attorney, while agreeing to comply with the requirements of 18 U.S.C. § 3332(a) in regards to the Lawyers' Committee's Petition, has declined to provide any information to the Lawyers' Committee regarding the status of that Petition and grand jury inquiry, the Lawyers' Committee has gone to the additional effort and expense of filing a mandamus action and request for disclosure of grand jury records in the United States District Court for the Southern District of New York.

Further, organizational plaintiff AE has gone to substantial expense to fund an engineering study of the collapse of WTC Building 7 by Professor Leroy Hulsey of the University of Alaska. This study was initiated in May 2015 and just recently resulted in public release of a peer review draft report presenting an engineering analysis of the collapse of WTC Building 7 (which was not hit by any aircraft) which concluded in short that fire did not cause the collapse and that whatever did cause the collapse involved the near simultaneous failure of nearly all of the buildings steel support columns (which reflects controlled demolition using timed explosives).

The time and effort expended by the attorneys, architects, engineers, and scientists who developed this Petition and the supporting evidence that accompanied it was extraordinary (thousands of hours over several years) and well beyond the normal public education efforts of these or other nonprofit organizations. Tens of thousands of dollars were spent for key staff time (in addition to the thousands of donated professional hours) to develop and file this Petition, and the State Department Rewards application that was based upon the Petition. The Lawyers' Committee has also expended significant time and funds supporting the litigation of several

Freedom of Information Act cases on behalf of plaintiff and FOIA requester David Cole, the Lawyers' Committee's volunteer FOIA Director, three of which are now pending in the United States District Court for the District of Columbia, regarding requests for federal agency records relating to agency studies of the collapse of the WTC towers and WTC building 7 on 9/11.

Had 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 at the WTC on 9/11, the organizational plaintiffs would not have had to have expended thousands of hours and tens of thousands of dollars developing and filing the Petition to the U.S. Attorney for the special grand jury and the State Department Rewards Program application, and AE would not have had to expend over two hundred thousand dollars for the special engineering study contracted for by AE with civil engineering Professor Leroy Hulsey of the University of Alaska (available at https://www.ae911truth.org/wtc7). The organizational plaintiffs here engaged in these extraordinary expenditures of resources in an effort to counteract the harm to their interests caused by Defendants' failures to comply with the mandate from Congress to assess and report on all 9/11 evidence, and specifically the failure to assess and report on the abundant evidence of the use of controlled demolition at the WTC on 9/11.

In addition, the interests of the organizational plaintiffs here have been further harmed by the Defendants' failures to comply with this mandate from Congress because of Defendant Department of Justice's (DOJ) actions to fund local and state terrorism programs that attempt to discredit the organizational plaintiffs via communications to citizens from state or local police agencies. Such communications funded by DOJ are highly suspect under the First Amendment. *See, e.g.,* Exhibit 1, Columbus Ohio Police flyer for public distribution (funded by a grant from the DOJ). This DOJ funded police flyer reflects efforts to convince citizens that organizations

that question the government's explanation for the 9/11 attacks in any manner that would suggest that "Westerners" could have been involved are to be treated as suspected terrorists. *See* Exhibit 1 (page 1 middle column 6th bullet).

Apart from being potentially defamatory, such communications funded by DOJ not only significantly undercut the ability of nonprofits such as the Lawyers' Committee and AE to recruit volunteers and receive financial support, i.e. survive as a nonprofit, but also substantially impede efforts of the organizational plaintiffs to educate the public regarding 9/11 evidence. The DOJ is not just funding local police attempts to persuade citizens that the organizational (and individual) plaintiffs are misinformed, these DOJ funded police actions are actually trying to convince citizens to treat such nonprofits as suspect terrorists who should not be trusted or listened to at all (except for surveillance purposes). Such DOJ funded actions will continue to seriously impede the ability of the organizational plaintiffs to establish effective lines of communications with the public, local government, and police agencies in attempting to perform their nonprofit public education missions regarding 9/11. On the other hand, had the government Defendants here complied with the mandate from Congress to assess and report on all 9/11 evidence, including the evidence of use of controlled demolition at the WTC on 9/11, then the organizational plaintiffs would be substantially vindicated and these DOJ funded attempts to defame and discredit them could be effectively countered.

For these reasons, contrary to the assertions of Defendants, organizational plaintiffs Lawyers' Committee and AE have organizational standing under the legal standards articulated in the cases cited by Defendants. *See Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.,* 659 F.3d 13 (D.C. Cir. 2011); *Havens Realty Corp. v. Coleman*, 455 U.S. 363

(1982); *Sierra Club v. Morton*, 405 U.S. 727 (1972); and *Equal Rights Ctr. v. Post Properties, Inc.,* 633 F.3d 1136 (D.C. Cir. 2011).

On the basis of the facts articulated in the First Amended Complaint and herein and for the reasons stated *supra*, Plaintiffs can meet the standing requirements of injury traceable to Defendants' challenged actions (or failures to act) which injury would be redressed by a favorable decision on Plaintiffs' First Amended Complaint requiring Defendants to comply with the mandate from Congress that they assess and report to Congress all 9/11 evidence known to the FBI not considered by the original 9/11 Commission. For these reasons, Plaintiffs do meet the standing requirements articulated in the cases cited by Defendants including the cases regarding informational and organizational standing referenced *supra*, and under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), *Allen v. Wright*, 468 U.S. 737 (1984), *West v. Lynch*, 845 F.3d 1228 (D.C. Cir. 2017), and *Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998) as well.

For all of the above reasons, Plaintiffs have standing to prosecute their First Amended Complaint and Defendants' Motion to Dismiss should be denied.

III. The Defendants' Argument that The 9/11 Review Commission Fulfilled Its Instructions Lacks Any Merit as a Basis for a Motion to Dismiss Because All Well Pled Facts in the First Amended Complaint Must Be Taken as True, and as a Motion for Summary Judgment this Argument is Premature at Best, Not Properly Captioned, and Does Not Comply with the Rules Applicable to Motions for Summary Judgment

Defendants also argue, in the alternative, that even if the directive from Congress for the FBI to conduct "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" was a judicially enforceable mandate, that Plaintiffs' claims

would fail on the merits because the FBI fully discharged its requirement to report to Congress "on certain specified subjects surrounding the FBI's implementation of the 9/11 Commission's recommendations." Ignoring the potentially disingenuous wording used by Defendants in presenting this argument (regarding the requirement to report on "certain specified subjects surrounding the FBI's implementation of the 9/11 Commission's recommendations"), this argument by Defendants is at best a premature summary argument and Defendants have not complied with the rule requirements for summary judgment motions.

On a motion to dismiss, as Defendants acknowledge, all well-pled facts in Plaintiffs' First Amended Complaint must be taken as true in deciding Defendants' motion to dismiss. The Plaintiffs' First Amended Complaint spells out seven specific categories of 9/11 related evidence known to the FBI that was not considered by the original 9/11 Commission and also was not assessed by the FBI's later convened 9/11 Review Commission (in response to the mandate from Congress at issue here).

For example, paragraphs 34, 34a, 34b, and 34c of the First Amended Complaint state:

> 34. Notable among this publicly available evidence not assessed by the FBI's 9/11 Review Commission is the following:
>
> 34a. Numerous First Responders reported seeing and hearing explosions at the WTC on 9/11, including Kenneth Rogers, Firefighter (F.D.N.Y.); Daniel Rivera, Paramedic (E.M.S.); Stephen Gregory, Assistant Commissioner (F.D.N.Y.); Kevin Gorman, Firefighter; Thomas Fitzpatrick, Deputy Commissioner for Administration (F.D.N.Y.); Karin Deshore, Captain (E.M.S.); Dominick Derubbio, Battalion Chief (F.D.N.Y.); Frank Cruthers, Chief (F.D.N.Y.); Jason Charles, E.M.T. (E.M.S.); Frank Campagna, Firefighter; Ed Cachia, Firefighter; and Rich Banaciski, Firefighter. Dr. Graeme MacQueen published an article detailing more than 150 examples of WTC witnesses, including over one hundred firefighters, who reported sights or sounds of explosions on 9/11 which due to the circumstances and timing and specific details observed and reported could not be explained by plane impacts or resultant office fires. These above referenced First Responders reports on 9/11 included: "Bombs," "explosions" at the lowest level and the highest level of the buildings before the collapses, flames being blown out, a "synchronized deliberate" kind of collapse, like a "professional demolition," "pop, pop, pop, pop, pop" sounds

before the collapses, “low-level flashes,” “three floors explode,” “the antenna coming down,” like “those implosions on TV,” “popping sounds” and “explosions” “going both up and down and then all around the building,” “with each popping” “orange and then a red flash came out of the building” and “go all around the building,” “looked like it was a timed explosion,” “at the very top simultaneously from all four sides, materials shot out horizontally” before the collapse began, “boom, boom, boom, boom, and then the tower came down,” and “going all the way around like a belt, all these explosions.” These consistent specific observations would not all have been mistaken perceptions or false reports given that these reports came from professional First Responders. Such reports cannot be explained by only a gravity-driven collapse caused by plane impacts and office fires.

34b. Dr. Niels H. Harrit, along with Dr Steven Jones, chemist Kevin Ryan and others, authored one of the key scientific studies ignored by the FBI’s 9/11 Review Commission. This article was publicly available since 2009. *See*, Harrit, N.H., Farrer, J., Jones, S., “Active Thermitic Material Discovered in Dust from the 9/11 World Trade Center Catastrophe,” The Open Chemical Physics Journal, Vol. 2, pp. 7-31 (2009). According to these highly qualified scientists, WTC dust contained distinctive red/gray colored chips, which when tested, “possess a strikingly similar chemical signature” to “commercial thermite” – a high tech explosive or incendiary (depending on how it is configured). Furthermore, “[i]n addition to the red/gray chips, many small spheres” were found “in the WTC dust” which “contain the same elements as the residue of thermite,” The key findings of this analysis included:

i) the “red material . . . contains the ingredients of thermite”;

ii) “a high temperature reduction-oxidation reaction has occurred in the heated chips, namely, the thermite reaction”; and

iii) spheroids produced by the tests performed possess a “chemical signature” that “strikingly matches the chemical signature of the spheroids produced by igniting commercial thermite.”

iv) This scientific analysis concluded that “the red layer of the red/gray chips . . . discovered in the WTC dust is active, unreacted thermitic material, incorporating nanotechnology, and is a highly energetic pyrotechnic or explosive material.”

34c. Expert analysis of seismic data and the resulting conclusion that explosions occurred at WTC1 and WTC2 on 9/11 prior to the airplane impacts on WTC1 and WTC2, as well as prior to the buildings’ collapses.

Paragraph 34d of the First Amended Complaint states:

34d. The presence in all of the WTC dust of tons of previously molten iron-rich metal microspheres, the presence of which have been established by physical laboratory (electron microscope) analysis of WTC dust samples by both U.S. government and independent scientists, is a phenomenon also publicly reported by these scientists, one that would be physically impossible based on the burning of jet fuel and office contents alone, but would be expected if high-tech

thermite, thermate, or nano-thermite explosives and/or incendiaries were used which are capable of generating the extreme temperatures required to form these type of microspheres.

Paragraph 34g of the First Amended Complaint states:

34g. Testimony from experts and eye-witnesses which confirm instrument readings of extremely high temperatures exceeding 2,800ºF and fires persisting at Ground Zero for months after 9/11 that cannot be explained by burning jet fuel or building contents but which are consistent with the presence of thermate, thermite, or nano-thermite.

Paragraph 38 of the First Amended Complaint states:

38. In addition, operating engineer Mike Mulvey reported to the Lawyers' Committee in a deposition (witness interview taken under oath before a court reporter on August 2, 2019), that an eyewitness who worked at the WTC in the weeks prior to 9/11 reported to him that this eyewitness observed teams of unidentified workers coming into the WTC buildings after midnight on Saturdays repeatedly in the weeks prior to 9/11 under unusual and irregular circumstances including that these unidentified crews were not required to sign in, were not to have their presence noted in the log books, and were not to be accompanied by security staff or monitored by the operating engineers on duty, all contrary to established procedures. These crews arrived and departed in unmarked vehicles and the nature of their work was not identified. Mr. Mulvey testified that this eyewitness stated that he disclosed these facts to union officials and that these facts were reported to law enforcement authorities. On information and belief, the Lawyers' Committee asserts that these facts were reported to the FBI prior to the 9/11 Review Commission issuing its report in March of 2015.

Paragraph 39 of the First Amended Complaint states:

39. Notwithstanding the above facts, and the Congress' and the FBI's charge to the 9/11 Review Commission, the FBI's 9/11 Review Commission failed to address any of the publicly reported evidence, or evidence reported directly to the FBI, that the collapses of WTC1, WTC2, and WTC7 on 9/11 were due to the use of explosives and/or incendiaries that had been pre-placed in the buildings.

Paragraph 55 and 56 of the First Amended Complaint state:

55. Another category of evidence related to the 9/11 attacks ignored in the FBI 9/11 Review Commission's Report is the evidence regarding five individuals who were arrested on 9/11 after witnesses reported that at least three individuals in a white van (license number recorded) were seen celebrating and filming the WTC attack early in the morning of September 11, 2001.

56. The FBI has the names of the five individuals arrested and Plaintiffs' are in possession of several lengthy redacted investigative reports by the FBI regarding the arrest, interrogation and investigation of these individuals.

Paragraph 58 of the First Amended Complaint states:

58. According to the FBI's detailed reports, three individuals were witnessed celebrating (the FBI's term was "high-fiving") and filming the WTC during the terrorist attacks on the morning of 9/11/01 as early as the first aircraft strike at the WTC, prior to the second tower being struck by an aircraft, according to two separate eye-witnesses (and a third witness who observed their van arrive at the apartment building in question at 8:15 am on 9/11). The FBI held and interviewed the five persons arrested for some time (weeks).

Paragraphs 63-65 of the First Amended Complaint state:

63. Police and FBI investigations related to the arrest of these individuals on 9/11 are reported to have included, in addition to development of the film confiscated from the arrestees and creation of enlarged prints which showed some of the arrestees smiling as they watched one or both of the WTC towers burning, an explosives residue test on a fabric sample from a blanket found in these individuals' van and swab samples to be tested for explosive residue.

64. The white van driven by these arrestees was searched by a trained bomb-sniffing dog which yielded a positive result for the presence of explosive traces.

65. At least one WTC1 visitors' card was found in these arrestees' van. A phone number was also found in the possession of one of the arrestees which corresponded to another moving company that the FBI's Miami office believed had been used by one of the alleged 9/11 hijackers.

Paragraph 66 of the First Amended Complaint states:

66. One of the arrestees stated to the FBI that one of his coworkers told him on the morning of 9/11 that "they are taking down the second building" and he and a few of his coworkers climbed onto the roof of the company's building to observe the WTC and take photographs, and at the time he stated he thought the second WTC tower had been demolished intentionally to prevent it from tipping over.

Paragraphs 69-71 of the First Amended Complaint state:

69. Some of the FBI agents who were involved with the detention and interviews of these "high-fivers" were reported to have drawn the conclusion that these arrestees were in some way involved with the 9/11 terror attacks.

70. These arrestees were eventually released and deported, apparently against the better judgment of some of the FBI agents involved in the investigation.

71. The evidence noted above regarding these "high-fivers" was not considered by the original 9/11 Commission, and was not assessed in the later 9/11 Review Commission's Report.

Paragraphs 90-93 of the First Amended Complaint state:

90. The 9/11 Commission report concluded, including at pages 171-172 of its final report (pages 188-189 of the pdf document), that there was no evidence that the government of Saudi Arabia or Saudi government officials provided any funding for the alleged 9/11 hijackers.

91. There is, however, on information and belief, evidence known to the FBI by 2014 relating to Saudi financial and other support for the alleged 9/11 hijackers, that was not considered by the 9/11 Commission.

92. A lawsuit by numerous 9/11 survivors and family members of 9/11 victims, as well as affected businesses and insurance companies, currently pending in the United States District Court in the Southern District of New York (consolidated case No. 03-MDL-1570, example associated case No. 1:02-cv-06977-GBD-SN) has resulted in a court order allowing limited jurisdictional (related to immunity issues) discovery by the plaintiffs regarding Saudi connections to the 9/11 terrorist attacks, including discovery regarding Saudi Arabia's connections to a suspected Saudi intelligence officer, as well as regarding a suspected Saudi consular official, whose alleged ties to hijackers Khalid al-Mihdhar and Nawaf al-Hazmi are referenced in the Twenty-Eight Pages of the Joint Congressional Inquiry. In that case, the plaintiffs allege that Defendant Kingdom of Saudi Arabia bears responsibility for the 9/11 Attacks because its agents and employees directly and knowingly assisted the hijackers and plotters who carried out the attacks. U.S. District Judge George Daniels, in his ruling allowing limited jurisdictional discovery held that: "Neither the 9/11 Commission Report, nor any other governmental report, adequately and specifically refutes Plaintiffs' allegations that [the Saudi intelligence officer] was tasked by [the Saudi consular official] at the behest of a more senior Saudi official, with providing substantial assistance to [alleged 9/11 hijackers] Hazmi and Mihdhar."

93. This Southern District of New York lawsuit by 9/11 survivors and family members of victims against various Saudi defendants and the court's ruling allowing limited jurisdictional discovery has, on information and belief, also resulted in agreements by the Department of Justice to review three "tranches" of FBI documents for production of non-privileged documents (either non-classified or to be declassified) to the 9/11 family plaintiffs in that case, documents in the FBI's possession related to the Saudi intelligence officer, the Saudi consular official, and/or Saudi financing and support for the alleged 9/11 hijackers including FBI witness interviews known as "302s." The Lawyers' Committee and the other Plaintiffs herein have not been given access to these FBI

documents but based on information and belief Plaintiffs here expect that discovery would show that one or more of these three "tranches" of FBI documents include post-2004 developed FBI evidence that Saudi officials provided material support to some of the alleged 9/11 hijackers, as well as pre-2004 developed FBI evidence of Saudi support for the alleged 9/11 hijackers, some of which evidence documents were source material for the Twenty-Eight Pages of the Joint Congressional Inquiry but on information and belief were not provided to the original 9/11 Commission. If, as expected, some of this FBI evidence in these three "tranches" post-dates the original 9/11 Commission, which closed its work in 2004, then such evidence could not have been provided to or considered by the 9/11 Commission.

Paragraph 94 of the First Amended Complaint states:

94. A review of the 2015 FBI 9/11 Review Commission Report on its face indicates that the steps taken by the 9/11 Review Commission in doing its work in response to the mandate from Congress did not include reviewing and developing a written assessment of the three "tranches" of FBI documents recently referenced by the DOJ in the lawsuit by the 9/11 family members against the Saudis, and at minimum does not make clear that all the FBI source evidence documents for the Twenty-Eight Pages were assessed by the 9/11 Review Commission (or provided to the original 9/11 Commission). Although the issue of the production of these "tranches" of documents by the DOJ to the 9/11 family member plaintiffs in the New York case is recent, on information and belief these "tranches" of documents, or major portions of them, have been in the possession of the FBI during the time period relevant to the work of the 9/11 Review Commission (2004-2015), and contain evidence falling within the mandate from Congress at issue here. As one basis for this conclusion, Dan Christensen of the *Florida Bulldog,* an investigative news organization, reported, in an article entitled "New FBI document shows active probe of support network for 9/11 hijackers in 2012" that as late as October 2012, federal prosecutors and FBI agents in New York City were actively exploring filing charges against a suspect for providing material support to the 9/11 hijackers and other crimes. The article quotes former Senator Bob Graham as stating "This has never been disclosed before and it's to the contrary of almost everything the FBI has produced so far that has indicated that 9/11 is history." Former Senator Graham, who co-chaired Congress's Joint Inquiry into the terrorist attacks, added "'It's interesting that it took them 11 years to get there, and a FOIA to get this information to the public.'" The aforementioned 9/11 related evidence was not assessed in the 9/11 Review Commission's Report.

Paragraph 104 of the First Amended Complaint states:

104. In a 2018 Freedom of Information Act request response from the FBI to Eugene F. Laratonda III, the FBI disclosed that it had in the possession of the FBI at least 13 compact discs (CDs) containing video files, and 100 or more

> videos, that fell into Mr. Laratonda's request for all video from September 11, 2001 within a one mile radius of the Pentagon.
>
> Paragraph 102 of the First Amended Complaint states:
>
> 102. The 9/11 Commission did not consider all of the videos obtained by the FBI from, and of, the Pentagon and surrounding area on 9/11, including but not limited to videotape(s) from the Sheraton Hotel security camera(s) overlooking the Pentagon. 9/11 Pentagon and surrounding area video evidence was also not assessed in the FBI 9/11 Review Commission's Report.

There is no way for all of these specific alleged facts in this sampling from the First Amended Complaint, and the remainder of the allegations in this Complaint, to be taken as true by the Court and there remain a basis for the Court to grant Defendants' Motion, as a motion to dismiss, on the grounds that Defendants fully complied with the mandate from Congress in question. That is, Defendants cannot prevail on the merits at the motion to dismiss stage by simply making broad self-serving fact assertions in their Memorandum that are directly contradicted by the numerous, specific, and detailed allegations presented in the First Amended Complaint (which must be taken as true at this stage).

In addition, Defendants cannot prevail on this argument even if they wish their motion to be treated as a motion for summary judgment given that they have not complied with the rules of procedure applicable to summary judgment motions. This Court's Standing Order states:

> Motions to Dismiss
> (A) In General - The parties are reminded that a motion to dismiss under Rule 12(b)(6) or a motion for judgment on the pleadings under Rule 12(c) presenting matters outside the pleadings may be converted to a motion for summary judgment. FED. R. CIV. P. 12(d). If a motion to dismiss presents matters outside the pleadings, all parties must comply fully with the instructions set forth below regarding motions for summary judgment.

Standing Order at ¶ 13.

> All Other Cases (LCvR 7(h))
> (i) Each party submitting a motion for summary judgment [must] attach a statement of material facts for which that party contends there is no genuine

> dispute, with specific citations to those portions of the record upon which the party relies in fashioning the statement. The party opposing the motion must, in turn, submit a statement enumerating all material facts which the party contends are genuinely disputed and thus require trial. The parties are strongly encouraged to carefully review Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145 (D.C. Cir. 1996).
> (ii) The parties must furnish precise citations to the portions of the record on which they rely; the Court need not consider materials not specifically identified. See also FED. R. CIV. P. 56(c)(1).
> (iii) The moving party's statement of material facts shall be a short and concise statement, in numbered paragraphs, of all material facts as to which the moving party claims there is no genuine dispute. The statement must contain only one factual assertion in each numbered paragraph.
> (iv) The party responding to a statement of material facts must respond to each paragraph with a correspondingly numbered paragraph, indicating whether that paragraph is admitted or denied. If a paragraph is admitted only in part, the party must specifically identify which parts are admitted and which parts are denied.

Standing Order at ¶ 14(B).

The Defendants' instant Motion to Dismiss is not captioned as a summary judgment motion and does not comply with the above procedural requirements for summary judgment motions (which failure to comply also precludes Plaintiffs from submitting a meaningful response to this motion as if it were a summary judgment motion).

Even if the Defendants had complied with the rules applicable for summary judgment motions, the Defendants make admissions in their Memorandum that would result in summary judgment being granted for the Plaintiffs. Defendants state in their Memorandum at (pdf court paginated) page 21 "Indeed, as the Review Commission noted, the appropriations acts and the explanatory statements did not even provide the Review Commission with the means to review all of the evidence in the possession of the FBI." Thus, if the mandate from Congress at issue is, as Plaintiffs explain herein, enforceable, Defendants have essentially admitted that the FBI and its 9/11 Review Commission failed to comply with the requirement to assess all 9/11 evidence known to the FBI (even just the 9/11 evidence already in the FBI's possession).

In addition, and perhaps even more disturbing than the revelation that the FBI has yet to evaluate all of the 9/11 evidence already in its possession, is the following statement in the Defendants' Memorandum (page 21 of the court paginated pdf): "[T]hose instructions [from Congress] should not be construed so as to require the FBI with investigating theories that would undermine the 9/11 Committee report's underlying finding that 9/11 attacks "were carried out by various groups of Islamist extremists . . . [and] driven by Usama Bin Laden." Thus, not only is it clear that the FBI failed to evaluate even the 9/11 evidence already in its possession, it appears from Defendants' own admission in its Memorandum that there was an agency bias against assessing and reporting to Congress and the public any evidence that would have shown that the conclusions of the original 9/11 Commission regarding who was responsible for the 9/11 attacks was in error (or incomplete).

Plaintiffs respectfully request that this court take judicial notice of each of the government and publicly available academic records referenced *supra* and in the Defendants' Memorandum (some of which are quite voluminous), or in the alternative, allow Plaintiffs to submit such documents in an evidentiary hearing.

For the all of the above reasons, Defendants' Motion to Dismiss should be denied.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss. In the event that this Court does not find the facts alleged in the First Amended Complaint and herein and the materials submitted herewith and requested to be judicially noticed to be sufficient to establish Plaintiffs' standing, Plaintiffs respectfully request that the Court provide Plaintiffs an opportunity to submit additional and more detailed standing

evidence via an evidentiary hearing or in the alternative via submission of standing declarations from Plaintiffs.

Respectfully submitted,

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