**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **Christine Mills et. al.,** | ) | |
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| **Plaintiffs** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **Civil Action No. 04-2205 (HHK/AK)** |
| **James Billington, Librarian, Library of Congress,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**DEFENDANT'S SUPPLEMENTAL BRIEF AS TO PLAINTIFF'S LACK OF STANDING TO SEEK INJUNCTIVE RELIEF TO COMPEL DEFENDANT TO PRODUCE EQUAL EMPLOYMENT OPPORTUNITY AND RELATED REPORTS**

On October 30, 2009, Plaintiffs moved for an injunction to require Defendant to compile and publish annual Equal Employment Opportunity ("EEO") plans and related reports pursuant to 42 U.S.C. § 2000e-16(b). Defendant opposed Plaintiffs' motion on the straightforward argument that Plaintiffs failed to demonstrate any of the four factors for obtaining an injunction. *See Chaplaincy of Full Gospel Churches v. England*, 454 F. 3d 290, 297 (D.C. Cir. 2006)(In considering a request for an injunction, the court looks at four factors: (1) plaintiffs' likelihood of success on the merits; (2) irreparable harm to the plaintiffs if the injunction is not granted; (3) substantial harm to the defendants if the injunction is granted; and (4) the public interest.) On January 8, 2010, this Court ordered Defendant to file supplemental briefing on the issue of "standing" on Plaintiffs' motion. The issue of standing is a threshold one for the courts, for a plaintiff who does not establish "standing" to bring a claim does not present a "case" or "controversy" of which a federal court may take jurisdiction within the limits of Article III of the

U.S Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). Defendant respectfully submits that Plaintiffs lack standing to seek the requested relief.

**ARGUMENT**

**I. Plaintiffs Lack Standing.**

In *Lujan v. Defenders of Wildlife*, the Supreme Court held that "the irreducible constitutional minimum of standing contains three elements." 504 U.S. at 560. To establish standing, a plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest that is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Id. (citations and internal quotations omitted). Second, there must also be a "causal connection between the injury and the conduct complained of– the injury has to be fairly . . . trace[able] to the challenged action of defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Id. (citations and internal quotations omitted). Finally, it must be "likely" as opposed to "speculative" that the injury can be redressed by a favorable decision. Id. "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998). Plaintiffs here fail to meet their burden.

As a threshold matter, Plaintiffs cannot demonstrate the "injury in fact" required for standing. "The Supreme Court has instructed that [courts] may not entertain suits alleging generalized grievances that agencies have failed to adhere to the law, but must instead focus on concrete and particularized harm." *Freedom Republicans, Inc. v. Federal Election Comm'n*, 13 F.3d 412, 415 (D.C. Cir. 1994). Plaintiffs admit that they "may not suffer a direct injury"

from Defendant's failure to publish the requested reports. Pls.' Mem. at 14. With this admission, Plaintiffs unequivocally demonstrate their lack of standing. Of course, failing to show injury, Plaintiffs cannot show causation and redressability. As to causation, courts have found this factor lacking where the causal chain of events leading to a claimant's alleged injury is "so attenuated" that the alleged injury cannot be "'fairly traceable'" to the acts of the Defendant. *Ctr. for Law & Educ. v. Dep't of Educ*., 396 F.3d 1152, 1161 (D.C. Cir. 2005) (evaluating causation in procedural standing context). Again, Plaintiffs have expressly alleged no injury so there is no causation - no harm "fairly traceable" to the acts of Defendant. Similarly, Plaintiffs cannot demonstrate redressability. This prong of the standing inquiry requires the court to ask: "'[I]f plaintiffs secured the relief they sought, … would [it] redress their injury'?" *Wilderness Soc'y v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) (*quoting Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996) (alterations in original). Plaintiffs cannot show a substantial likelihood that the relief sought would redress any injury because they have alleged none.

Notably, none of the cases on which Plaintiffs rely help them given their lack of injury, and indeed the cases appear to be inapposite. Pls.' Mem. at 2 and 12. Three of the cases address remedial relief after a finding of discrimination. In the case, *Thomas v. Washington County School Board*, 915 F.2d 922, 925 (4th Cir. 1990), the Court enjoined the defendant from engaging in discriminatory acts – specifically, nepotism and limiting the posting of job announcements. Similarly, in *Shirey v. Devine*, 670 F.2d 1188 (D.C. Cir. 1982), it was noted that courts have authority to fashion remedial relief, similar to that the Equal Employment Opportunity Commission ("EEOC") could impose by order or regulation, upon a finding that the

federal employer intentionally engaged in discrimination. 670 F.2d at 1199, n. 32 (citation omitted). Also, in *United States v. Fairfax County, VA*, 629 F.2d 932, 941-42 (4th Cir. 1980), the Fourth Circuit held that, to the extent the district court found that the defendant had engaged in discriminatory acts, it (the district court) was under "a duty to render a decree to eliminate past discrimination and bar future discrimination." As part of the remedy, the district court, the Fourth Circuit held, should have granted injunctive relief against future discrimination including requesting that the defendant comply with the record keeping and disclosure requirements of existing law. *Id.*

In the case, *Cleveland Branch, National Association for the Advancement of Colored People v. City of Parma, Ohio*, 263 F.3d 513, 523-526 (6th Cir. 2001), the Sixth Circuit held that a party need only establish standing at the time a complaint is filed, but the Court also discussed the requirement of injury for purposes of a party establishing standing. The "concrete and actual" injury at issue in the case had nothing to do with the defendant's reporting requirements under Title VII, or an underlying challenge based on these requirements, but instead, was based on the NAACP's evidence showing that, at the time the complaint was filed, the complainant had been injured by "employment practices that classified black applicants in a way that deprived them of an opportunity to compete for municipal jobs in Parma." *Id.* at 526. Similarly, the injury in the case, *Gray v. Greyhound Lines, East*, 545 F.2d 169 (D.C. Cir. 1976), brought pursuant to Title VII, was based on alleged discriminatory hiring practices, not statutory reporting requirements. The case, *Equal Employment Opportunity Commission v. Rogers Bros., Inc.*, 470 F.2d 965 (5th Cir. 1972), addresses the EEOC's standing to seek judicial relief against an employer's "willful noncompliance" with the reporting requirements of Title VII. *Id.* at 966, n.3, citing to 42 U.S.C. § 2000e-9(b). Such standing, however, is expressly conferred by statute on the EEOC. *Id.* Private individuals, like Plaintiffs, do not have such standing.

In this instance, Plaintiffs fail to show standing for purposes of obtaining the injunctive relief they seek. Therefore, their request for such relief should be denied. Also, as explained below, it is doubtful that Plaintiffs can bring an independent cause of action under Title VII to compel Defendant to produce the reports.

**II. Plaintiffs have no private right of action to bring a claim for production of the reports.**

It is a well-settled principle of constitutional law that federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They may exercise only as much jurisdiction as is granted to them under the Constitution and by Congress. *See id.* Plaintiffs bear the burden of establishing the federal jurisdiction upon which their suit relies. *See id.* When a plaintiff sues the federal government, jurisdiction additionally depends upon a waiver of sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (holding that scope of sovereign immunity limits court's jurisdiction); *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (the United States' consent to be sued is a prerequisite for jurisdiction); *First Va. Bank v. Randolph*, 110 F.3d 75, 77 (D.C. Cir. 1997). That is, the United States, as a sovereign, is "immune from suit save as it consents to be sued. . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. . ." *U.S. v. Sherwood*, 312 U.S. 584, 769 (1941). The "grant of a right of action [against the United States] must be made with *specificity*." *U.S. v. Testan*, 424 U.S. 392, 400 (1976)(emphasis added). Stated another way, a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969)).

Case law demonstrates that the Courts have consistently refused to imply private rights of action against the United States or to ignore a condition on a sovereign immunity waiver when the statute and legislative history either were silent or indicated congressional intent not to grant

the right requested. *See, e.g. United States v. Mottaz*, 476 U.S. 834, 844-48 (1986)(government waived its sovereign immunity in Quiet Title Act only with respect to one class of cases because United States not mentioned as a potential party with regard to other class); *Lehman v. Nakshian*, 453 U.S. 156, 160-70 (1981)(Age Discrimination in Employment Act's language, structure and legislative history indicated Congress's intent that waiver of United States' sovereign immunity from suits under the Act was conditioned on alleged discrimination victim having no right to jury trial); *Patentas v. United States*, 687 F.2d 707, 710-713 (3d Cir. 1982)(no explicit congressional intent in language or legislative history of Ports and Waterways Safety Act of 1972 to waive immunity from private lawsuits against Coast Guard to require it to fulfill statutory responsibilities).

Title VII creates a private right of action for federal employees to challenge discriminatory practices in federal employment, upon exhaustion of administrative remedies. 42 U.S.C. § 2000e-16(c). Plaintiffs point to no express waiver of the United States' sovereign immunity under the statute creating a private right of action to compel the Library to produce the requested reports. Given that a silent statute cannot justify a private right of action against the United States, Plaintiffs have not established jurisdiction to proceed with any independent claim for relief in this regard, to the extent they are alleging one. For this reason as well, Plaintiffs' claim for injunctive relief should be denied.

## CONCLUSION

As noted in Defendant's opposition memorandum, Plaintiffs have failed to provide this Court with any reason why an injunction is warranted. Their lack of standing underscores this point. Accordingly, this Court should deny Plaintiffs' Motion.

Respectfully Submitted,

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