No. 17-14194

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CAROL WILDING, *et al.,*

Appellants/Plaintiffs,

vs.

DNC SERVICES CORPORATION, *et al.*,

Appellees/Defendants.

Appeal from the United States District Court
for the Southern District of Florida

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

To the best of undersigned's knowledge, the following is a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have or may have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

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11. Jen Betterley, Plaintiff/Appellant.

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33. Aimee Coleman, Plaintiff/Appellant.

34. Rosalie Consiglio, Plaintiff/Appellant.

35. Daniel Cooper, Plaintiff/Appellant.

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37. Suzanne Cork, Plaintiff/Appellant.

38. Rhiannon Crandall, Plaintiff/Appellant.

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49. Tammy Deitch-Coulter, Plaintiff/Appellant.

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127. David Pyles, Plaintiff/Appellant.

128. Valerie Elyse Rasch, Plaintiff/Appellant.

129. Michael Reed, Plaintiff/Appellant.

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131. Daniel Reynolds, Plaintiff/Appellant.

132. Stanley Rifken, Plaintiff/Appellant.

133. Diane Robinson, Plaintiff/Appellant.

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164. Rebecca White-Hayes, Plaintiff/Appellant.

165. Carol Wilding, Plaintiff/Appellant.

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169. Gregory Witkowski, Plaintiff/Appellant.

170. Emma Young, Plaintiff/Appellant.

171. United States District Court Senior Judge William J. Zloch.

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Statement Regarding Oral Argument

Plaintiffs request oral argument and believe that argument should be heard. The district court entertained approximately four hours of oral argument from counsel for the parties prior to entering the Final Order of Dismissal, which is the subject of this appeal. At the close of the hearing, the district court indicated that argument had been "very helpful" while characterizing the issues before it as "complex." (Doc. 54, pg. 109). Plaintiffs believe that oral argument will also assist this Court in understanding the nature and substance of the issues *sub judice*.

I. STATEMENT OF JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and the district court's Final Order of Dismissal in favor of Defendants/Appellees, DNC Services Corporation ("DNC") and Deborah Wasserman Schultz ("Wasserman Schultz") (collectively, "Defendants"). (Doc. 62[1]). As this Court previously found in its order entered January 10, 2018, there is diversity jurisdiction over the action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d).

II. STATEMENT OF THE ISSUES

This appeal presents the following questions:

(1) Do Plaintiffs, who are donors to Senator Bernie Sanders's campaign for the 2016 presidential nomination, donors to the DNC, and members of the Democratic Party, have Article III standing to bring suit against the DNC and its former chairperson for violating their charter obligation to conduct the Democratic Party presidential nominating process in an impartial and evenhanded manner while making material misrepresentations and omissions concerning this fact?

(2) In the alternative, should the district court's Final Order of Dismissal have granted Plaintiffs leave to amend the operative complaint for purposes of clarifying and/or supplementing their allegations with respect to Plaintiffs' standing to bring suit?

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[1] References to docket entries of lower court documents are noted as "Doc. ___."

Plaintiffs respectfully ask this Court to answer Question 1 in the affirmative or, alternatively, Question 2 in the affirmative, and reverse the district court's Final Order of Dismissal accordingly.

III. STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Court Below

This action was filed on June 28, 2016, on behalf of three proposed classes: (1) donors to Senator Bernie Sanders's 2016 presidential campaign; (2) donors to the Democratic National Committee; and (3) members of the Democratic Party. (Doc. 1). The Complaint and subsequently filed First Amended Complaint (Doc. 8) assert five claims against the DNC and its former chairwoman, Congresswoman Deborah "Debbie" Wasserman Schultz, based on their failure to conduct the 2016 Democratic Party presidential nominating process in a fair and evenhanded manner, as required by the Charter of the Democratic Party. These claims are for: (1) fraud; (2) negligent misrepresentation; (3) statutory deceptive conduct; (4) unjust enrichment; and (5) breach of fiduciary duty. There is also a sixth claim based on the negligent failure to safeguard personal and financial information of DNC donors.

On July 22, 2016, Defendants moved to dismiss the case based on insufficient service of process. (Doc. 9). While preparing their response to the motion, Plaintiffs learned of the sudden death of their process server, Shawn Lucas (from whom they

intended to submit a declaration), and notified the district court of this circumstance in their response. (Doc. 24). The district court then scheduled an evidentiary hearing on the Defendants' motion, which took place August 23, 2016. Plaintiffs proffered evidence of proper service, including video of a DNC employee accepting legal papers from Mr. Lucas in the lobby of the DNC's headquarters in Washington, D.C. (Doc. 68). On August 30, 2016, the district court issued an order requiring Plaintiffs to re-serve the Defendants, on the basis that it could not find that the DNC employee "was the correct recipient of service of process for either Defendant under any applicable rule," but in the order, the court admonished the DNC "that it will not tolerate the conduct in which Defendant DNC engaged in this instance." (Doc. 40, pg. 9).

Upon re-service of process, Defendants filed their second motion to dismiss, invoking Federal Rules of Civil Procedure 9, 12(b)(1), 12(b)(6), and 23, while arguing various grounds including Plaintiffs' lack of standing, failure to state a cause of action, and insufficient class allegations. (Docs. 44-47). After the motion was fully briefed, on April 25, 2017, the district court heard approximately four hours of oral argument. (Doc. 54).

Approximately five weeks after the hearing, a series of disturbing events experienced by Plaintiffs and their counsel prompted them to file a motion for court-ordered protection from threats and harm. (Doc. 57). For example, Plaintiffs'

counsel's office in Miami received a voice-masked telephone call from an anonymous caller asking about the lawsuit, with a caller ID that matched the Aventura, Florida office of Congresswoman Wasserman Schultz. (Doc. 57). The DNC and Wasserman Schultz asserted that the telephone call was a "spoofing incident" but that they were "very concerned" and referred the matter to the Capitol Police. (Doc. 56, pg. 2).

Plaintiffs' counsel's employee who answered the telephone call was later visited at her mother's home by an unknown woman who asked for her by name and left a "Florida Democratic Legislative Campaign Committee" Vote-By-Mail Application, even though the employee is registered as "No Party Affiliation," not as a Democrat. (Doc. 57). Meanwhile, Plaintiffs' counsel received threatening telephone calls and emails, and one of the named Plaintiffs had her home vandalized and computer tampered with. (Doc. 57).

Given the foregoing events as well as the previous sudden death of their process server, and the well-publicized, unsolved murder of Seth Rich in 2016 (Rich was a 27-year-old DNC data analyst who has been alleged in the media to have been connected to, or responsible for, the leaking of internal DNC emails to WikiLeaks), Plaintiffs asked the district court to order that Plaintiffs, Plaintiffs' counsel, and their families be protected by the United States Marshall Service. (Doc. 57). On June 15, 2017, the district court denied the motion while stating it was "sensitive to Plaintiffs' current allegations and concerns." (Doc. 60).

On August 25, 2017, the district court issued a final order dismissing the case. (Doc. 62). In the order, the district court concluded that Plaintiffs had failed to properly plead a basis for federal jurisdiction and, notwithstanding this pleading deficiency, could not establish Article III standing for any of their claims.

Plaintiffs filed this appeal on September 8, 2017.

B. Statement Of Facts

The following facts are taken from the First Amended Complaint (Doc. 8), which was operative at the time the Court entered its Final Order of Dismissal.[2]

The DNC is the formal governing body for the United States Democratic Party. (Doc. 8, ¶156). The DNC is responsible for coordinating strategy in support of Democratic Party candidates for local, state, and national office. (Doc. 8, ¶156).

As part of its duties, the DNC organizes the Democratic National Convention every four years to nominate and confirm a candidate for President, and establishes rules for the state caucuses and primaries that choose delegates to the convention. (Doc. 8, ¶157).

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[2] On January 10, 2018, this Court granted Plaintiffs/Appellants leave to file its Second Amended Complaint, which it found sufficient to establish minimal diversity under the Class Action Fairness Act. The Second Amended Complaint amends the allegations in regards to the parties' respective citizenships but is otherwise identical to the First Amended Complaint.

The DNC is governed by the Charter and Bylaws of the Democratic Party. These governing documents expressly obligate the DNC to maintain a neutral posture with respect to candidates seeking the party's nomination for President during the nominating process. (Doc. 8, ¶159). For instance, Article 5, Section 4 of the Charter states, *inter alia*, that "the Chairperson shall exercise impartiality and evenhandedness as between the Presidential candidates and campaigns" and that "[t]he Chairperson shall be responsible for ensuring that the national officers and staff of the Democratic National Committee maintain impartiality and evenhandedness during the Democratic Party Presidential nominating process." (Doc. 8, ¶159).

At the time the suit was filed, Wasserman Schultz was the chairwoman of the DNC. (Doc. 8, ¶158). And from the very beginning of the 2016 presidential race, Wasserman Schultz consistently and publicly affirmed the DNC's impartiality and evenhandedness with respect to the nominating process for the Democratic presidential nominee, including through the following statements in the media:

- "I count Secretary Clinton and Vice President Biden as dear friends, but no matter who comprises the field of candidates it's my job to run a neutral primary process and that's what I am committed to doing."

- "the DNC runs an impartial primary process."

- "the DNC runs an impartial primary process, period."

- "the Democratic National Committee remains neutral in this primary, based on our rules."
- "even though Senator Sanders has endorsed my opponent, I remain, as I have been from the beginning, neutral in the presidential Democratic primary."

(Doc. 8, ¶160).

However, in reality, the DNC was biased in favor of one candidate – Hillary Clinton – from the beginning and throughout the process. (Doc. 8, ¶161). The DNC devoted its considerable resources to supporting Clinton above any of the other Democratic candidates. (Doc. 8, ¶161). Via its public claims to being neutral and impartial, the DNC actively concealed its bias from its own donors as well as donors to the campaigns of Clinton's rivals, including Senator Bernie Sanders. (Doc. 8, ¶161).

The truth of the DNC's bias in favor of Hillary Clinton emerged in June 2016 when, among other internal DNC documents, an internal DNC memorandum dated May 26, 2015, came into the public domain. (Doc. 8, ¶¶162-167). The memorandum stated, *inter alia*, that "[o]ur goals in the coming months will be to frame the Republican field and the ***eventual nominee*** early and to ***provide a contrast between the GOP field and [Hillary Clinton].*** " (emphasis added). (Doc. 8, ¶167). The DNC memorandum further advised that the DNC, "[u]se specific hits to muddy the waters around ethics, transparency and campaign finance attacks on [Hillary Clinton.]."

(Doc. 8, ¶167). In order to "muddy the waters" around Hillary Clinton's perceived vulnerabilities, the DNC memorandum suggested "several different methods" of attack including: (a) "[w]orking through the DNC" to "utilize reporters" and create stories in the media "with no fingerprints"; (b) "prep[ping]" reporters for interviews with GOP candidates and having off-the-record conversations with them; (c) making use of social media attacks; and (d) using the DNC to "insert our messaging" into Republican-favorable press. (Doc. 8, ¶167).

By the date of the DNC memorandum, the Democratic presidential nomination field already included, in addition to Clinton, Bernie Sanders, who announced his candidacy on April 30, 2015. (Doc. 8, ¶168). And at the time, there was also widespread speculation that others would soon enter the primary race, including Joe Biden, Lincoln Chafee, Martin O'Malley, Elizabeth Warren, and Jim Webb. (Doc. 8, ¶168).

Despite there being every indication that the 2016 Democratic primary would be contested by multiple candidates, including Bernie Sanders, the DNC memorandum makes no mention of any Democratic candidate except Hillary Clinton, and builds the DNC's election strategy on the assumption that Hillary Clinton will be the nominee, with no doubts attached. (Doc. 8, ¶169). Rather than reflecting an "impartial" or "evenhanded" approach to the nominating process, as required by the Charter, the DNC memorandum strongly indicates that the DNC's entire approach to

the process was guided by the singular goal of elevating Hillary Clinton to the general election contest. (Doc. 8, ¶169).

In mid-June 2016, more information came into the public domain further evidencing that the DNC devoted its resources to propelling Hillary Clinton's candidacy ahead of all of her rivals, even if this meant working directly against the interests of Democratic Party members, including Bernie Sanders's supporters. (Doc. 8, ¶170-171). That additional information included: (a) a "private and confidential" memorandum to Secretary of Defense Ashton Carter from a senior advisor regarding appointments to the Joint Chiefs of Staff; (b) fee, travel, and lodging requirements for Hillary Clinton's paid speeches; (c) Hillary Clinton's tax returns; and (d) thousands of pages of research, apparently prepared by DNC staff as well as Hillary Clinton's campaign staff, relating to Clinton's candidacy including her "vulnerabilities," potential attacks, rebuttals, policy positions, and opposition research on the other Democratic candidates. (Doc. 8, ¶170).

The information that came into the public domain also included multiple spreadsheets of donors to the DNC and other organizations, including the Clinton Foundation, containing personal information such as names, email addresses, and phone numbers. (Doc. 8, ¶ 170).

The DNC actively concealed its bias from its own donors as well as donors to campaigns of Hillary Clinton's rivals, including Bernie Sanders. (Doc. 8, ¶ 161). In

making donations to Sanders's campaign and the DNC, Plaintiffs relied on the Defendants' false statements and omissions, to their injury. (Doc. 8, ¶¶ 188, 195).

C. Statement Of Standard Of Review

Review of a trial court's dismissal based on a plaintiff's lack of standing is *de novo*. *See Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005); *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cty.*, 122 F.3d 895, 903 (11th Cir. 1997).

IV. SUMMARY OF THE ARGUMENT

The district court erroneously found that Plaintiffs lack Article III standing with respect to each of their claims against the Democratic National Committee and its former chairwoman. As donors to the Sanders campaign and the DNC, Plaintiffs paid money in reliance on the belief that the DNC was running a fair primary process. They are seeking damages based on the Defendants' failure to do so, while making material misrepresentations and omissions about the primary process instead. Loss of money has been held to be the "classic form" of "injury in fact" necessary to establish standing under the Supreme Court's three-pronged analysis. The remaining two prongs — that the injury must be (1) "fairly traceable" to the Defendants' conduct; and (2) likely to be redressed by a favorable judicial decision, are also easily satisfied in this case. Alternatively, to the extent the district court viewed any elements

establishing Plaintiffs' standing to have been inadequately pled, its order dismissing the claims should have permitted them at least one opportunity to amend.

As discussed in further detail below, Plaintiffs respectfully request that the Final Order of Dismissal be reversed.

V. ARGUMENT

A. Plaintiffs' Allegations Meet Each Of The Requirements For Article III Standing Under The Supreme Court's *Lujan* Test

"Standing frequently has been identified by both justices and commentators as one of the most confused areas of the law." Erwin Chemerinsky, *Federal Jurisdiction* § 2.3, pg. 37 (Aspen Publishers 4th ed. 2003). Professor Chemerinsky characterizes the doctrine and its application as "erratic, even bizarre," marked by "seeming incoherence" and inconsistent standards. *Id.* He suggests blame for the disarrayed state of standing doctrine should be laid at the feet of the Supreme Court, which "many commentators believe. . . has manipulated standing rules based on its views of the merits of particular cases." *Id.*; *see also* Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* § 6.3, pg. 327 (West Publishing Co. 2d ed. 1993) ("the judge-made standing rule is a control mechanism used to limit the types of issues that may be brought before the courts").

In *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), the Supreme Court re-affirmed the tripartite doctrine of standing it had articulated 24 years earlier in *Lujan*

v. Defenders of Wildlife, 504 U.S. 555 (1992). To wit, standing requires the plaintiff to present a "case or controversy" capable of being adjudicated by the federal courts under the jurisdiction granted to them by Article III of the Constitution, which means that the plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S.Ct. at 1547 (citing *Lujan*, 504 U.S. at 560).

The district court concluded that the Plaintiffs could not satisfy the constitutional test for standing based on the allegations of their complaint. As discussed below, the district court was incorrect, because all three elements are easily met.

1. Injury In Fact

Loss of money has been referred to as the "classic form" of injury in fact. *See Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005); *see also Chevron Corp. v. Donziger*, 833 F.3d 74, 120 (2d Cir. 2016) ("Any monetary loss suffered by the plaintiff satisfies the injury-in-fact element.").

Plaintiffs who are donors to the Sanders campaign or the DNC have incurred an injury in fact, because they paid money, in the form of donations, based on the belief that the Democratic presidential nominating process was fair and evenhanded – a

belief that was propagated and confirmed by Defendants' misrepresentations and omissions.

Additionally, Plaintiffs have standing with respect to their common-law claims (Counts I, II, IV, and V) because, "[v]iolations of common law rights protected by the common law of property, contract, torts and restitution are sufficient for standing purposes." *U.S. v. Real Property, All Furnishings Known as Bridwell's Grocery*, 195 F.3d 819, 821 (6th Cir. 1999); *see also Levine v. Nat'l Railroad Passenger Corp.*, 80 F. Supp. 3d 29, 36 (D.D.C. 2015) ("A legally cognizable interest means an interest recognized at common law or specifically recognized as such by the Congress." (citations omitted)).

With respect to the breach of fiduciary duty claim (Count V), the district court held that Plaintiffs could not establish an injury in fact because the claim constitutes a "generalized grievance." (Doc. 62 at 15-19). This was an erroneous legal conclusion, because it analyzed the claim as one brought by voters dissatisfied with the political process. *See id.* (drawing analogies to *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193 (2d Cir. 2001); *Becker v. Fed. Election Comm'n*, 230 F.3d 381 (1st Cir. 2000)). To the contrary, the claim was pled as a breach-of-fiduciary cause of action brought by members of a political party against the party's governing organization and chairwoman. The district court's order failed to contend with an entire line of cases recognizing fiduciary duties owed from executives to the members of a political party.

See U.S. v. Halloran, 821 F.3d 321, 339-40 (2d Cir. 2016); *U.S. v. Smith*, 985 F. Supp. 2d 547, 602 (S.D.N.Y. 2014); *U.S. v. Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982) ("(t)he county committee (of the Republican Party) and its chairman are . . . trustees of party interests for the registered voters of the party in that county." (quoting *In re Application of Roosevelt*, 160 N.Y.S.2d 747, 749-50 (N.Y. Sup. Ct. 1957) (internal quotation marks omitted)); *Harding v. Harrington*, 484 N.Y.S.2d 571, 573 (N.Y. Sup. Ct. 1984) ("Members of a political party have a right to nominate presidential electors irrespective of their leaders' view or the success of their leaders' political negotiations; and party officials who have the power to call such a meeting necessary to such purpose have a fiduciary obligation to party members to do so."). Indeed, the recognition of a legal duty owed from a political party's leaders to its members is simply not logically compatible with the notion that a breach of such duty is incapable of presenting an injury in fact sufficient to confer Article III standing on the party members. To be sure, as the Final Order of Dismissal observes, the breach of the particular duty at issue in this case – that is, the duty owed from the DNC and its Chairwoman to members of the Democratic Party – affected a great number of people dispersed throughout the political process. (Doc. 62 at 16-17). But the Supreme Court has explicitly advised that, "[t]he fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo*, 136 S.Ct at 1548 n.7. In other words, simply because the harm

from a defendant's conduct may be dispersed on a wide scale and cause injury to an enormous number of people does not render the harm a mere "generalized grievance," which would effectively make the defendant "too big to fail."

2. Causal Connection

In order to satisfy the second element, what *Lujan* calls the "causal connection" prong of standing, the plaintiff's injury must be "fairly traceable to the challenged action of the defendant[.]" *Lujan*, 504 U.S. at 560; *see also Spokeo*, 136 S.Ct. at 1547. This Circuit has characterized the "fairly traceable" standard of causation as "something less than the concept of 'proximate cause.'" *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006) (citation and internal quotation marks omitted); *accord Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013) (collecting cases; "we, like other courts, have noted that, particularly at the pleading stage, the 'fairly traceable' standard is not equivalent to a requirement of tort causation" (citations and internal quotation marks omitted)).

Causation sufficient for standing is also clearly satisfied in this case, because the Plaintiffs' injuries are "fairly traceable" to the Defendants' conduct. Whether it is loss of money or invasion of their common-law rights, these injuries are attributable to the Defendants' failure to conduct the primary process in a fair and evenhanded manner and their misrepresentations/omissions concerning the process and failure to disclose to Plaintiffs that the DNC was working actively for Hillary Clinton and

undermining Bernie Sanders. The operative complaint plainly alleges that the Plaintiffs who donated money to Sanders or the DNC took action in reliance on the Defendants' misrepresentations/omissions concerning the Democratic primary process. (Doc. 8 ¶¶ 188, 195).[3]

3. Redressability

The third and final element of standing, "redressability," is "established when a favorable decision would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Hollywood*

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[3] To the extent the district court found that the Plaintiffs did not plead reliance with sufficient specificity to satisfy the causal connection element of standing (*see* Doc. 62 at 13-14), it should have granted them leave to amend instead of entering a Final Order of Dismissal. *See* Section V.B, *infra*.

Furthermore, the Final Order of Dismissal erroneously suggests there can only have been a causal connection between the Defendants' conduct and Plaintiffs' injury if Plaintiffs "read the DNC's charter or heard the statements they now claim are false before making their donations" or otherwise "took action in reliance on the DNC's charter or the statements identified in the First Amended Complaint[.]" (Doc. 62 at 13). The requirement that Plaintiffs have relied on identifiable, affirmative misrepresentations of Defendants in order to possess standing, however, is not well-founded, because it would eliminate the possibility of claims based on fraudulent omissions. *See Woods v. On Baldwin Pond, LLC*, 634 Fed. Appx. 296, 297-98 (11th Cir. Dec. 31, 2015) ("Florida law recognizes that fraud can occur by omission"; "Florida law does not recognize a stark distinction between fraud by commission and fraud by omission.") (citation omitted).

Mobile Estates Ltd. v. Seminole Tribe of Fla., 641 F.3d 1259, 1266 (11th Cir. 2011). "Generally, any person whose injury can be redressed by a favorable judgment has standing to litigate . . ., and injuries compensable in monetary damages can always be redressed by a court judgment." *Wernsing v. Thompson*, 423 F.3d 732, 745 (7th Cir. 2005) (citation and internal quotation marks omitted); *see also Cardenas v. Smith*, 733 F.2d 909, 914 (D.C. Cir. 1984) ("A damage claim, by definition, presents a means to redress an injury.").

Here, those Plaintiffs who donated money to the Sanders campaign or the DNC suffered financial injury, and have asked that their injury be redressed by a damages award against the DNC and its former chairwoman. Plainly, they have met the definition of a redressability for purposes of standing.

In connection with the breach of fiduciary duty claim (Count V), the district court expressed "serious doubts" and "grave questions" on the issue of redressability, specifically whether a court could "impose liability for the DNC's alleged decision to associate with a particular standard-bearer in a manner not otherwise prohibited by law." (Doc. 62 at 19). However, the invocation of the DNC's constitutional right of association well overstates the power of the First Amendment, which has never sanctioned lying, cheating, or stealing. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, *Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake"); *Gertz v. Robert*

Welch, Inc., 418 U.S. 323, 340 (1974) ("But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."). And this is true regardless of whether the lying, cheating or stealing is being carried out under the pretext of "politics," "donations," or the public interest. *See*, *e.g.*, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 624 (2003) ("Consistent with our precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used."); *U.S. v. Smith*, 985 F. Supp. 2d 547, 605-606 (S.D.N.Y. 2014) ("Just because this alleged *quid pro quo* arrangement involved political-party officials, they are not entitled to immunity for their actions under the guise of protected speech."); *Nat'l Fed. of the Blind v. F.T.C.*, 420 F.3d 331, 333-334 (4th Cir. 2005) (upholding FTC regulation on "telemarketing practices as they apply to charitable fundraising"); *Gospel Missions of Am., a Religious Corp. v. City of Los Angeles*, 419 F.3d 1042, 1050 (9th Cir. 2005) ("Nor does GMA explain why solicitations by a panhandler, church member or political activist cannot constitutionally be subject to some regulation.").

In sum, Plaintiffs have alleged judicially redressable injuries in fact that are fairly traceable to the Defendants' conduct. The district court's order dismissing their claims for lack of standing was in error and should be reversed.

B. In The Alternative, The District Court's Final Order Of Dismissal Should Have Afforded Plaintiffs An Opportunity To Amend

In the alternative to reversing the district court's dismissal for lack of standing, this Court should remand with instructions to permit Plaintiffs an opportunity to amend their allegations regarding standing.

"Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Polich v. Burlington Northern, Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Here, the district court entered a Final Order of Dismissal without affording Plaintiffs leave to amend the complaint, meaning that Plaintiffs never had an opportunity to supplement or clarify their allegations in response to the district court's findings on standing. Especially in light of the district court's suggestion that the element of causal connection was not alleged with sufficient specificity (*see* Doc. 62 at 13-14), it was improper to dismiss the action without allowing Plaintiffs at least one chance to amend their allegations to cure any deficiencies in the pleadings regarding standing.[4]

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[4] Plaintiffs had previously amended the original Complaint as a matter of right, under Federal Rule Civil Procedure 15(a)(1), and then only to drop certain named class representatives who were delegates for Bernie Sanders to the 2016 Democratic [...continued]

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully ask this Court to vacate the district court's Final Order of Dismissal in its entirety or with instructions that the district court grant Plaintiffs leave to amend.

DATED: January 19, 2018

RESPECTFULLY SUBMITTED,

By: Jared H. Beck

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National Convention but were threatened with de-credentialing if they continued to pursue the action as named plaintiffs. None of the substantive allegations were amended at that time.

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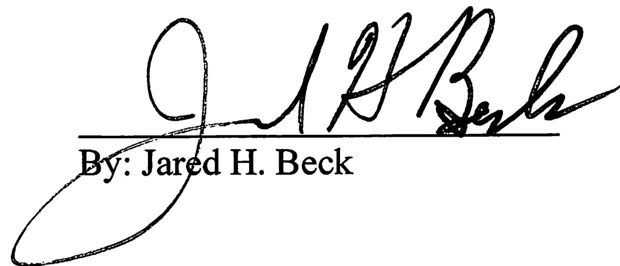
VII. CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the type-volume limitations set forth in FED. R. APP. P. 32(a)(7)(B)(i). This brief contains 4,507 words (exclusive of the cover page, corporate disclosure statement, table of contents, table of authorities, statement with respect to oral argument, and any certificates of counsel), based upon the word counting function of Microsoft Word.



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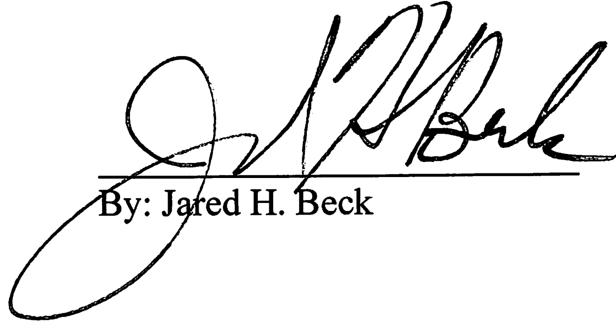
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document was served by U.S. First Class Mail on all counsel of record identified on the attached Service List.



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