

Honorable John C. Coughenour

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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

11 ELIZABETH A. CAMPBELL, SEATTLE  
12 CITIZENS AGAINST THE TUNNEL, *et al.*,

13 Plaintiffs,

14 v.

15 PETER JILIK, in his official capacity as  
16 urban-area engineer of the Federal  
Highway Administration, *et al.*,

17 Defendants.

C09-1305-JCC

**ORDER**

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19 This matter comes before the Court on Defendant's motion to dismiss for lack of subject-matter  
20 jurisdiction. (Dkt. No. 10). In addition to Defendant's motion, the Court has also considered Plaintiff's  
21 response (Dkt. No. 27), and Defendant's reply (Dkt. No. 29). The Court finds that oral argument is  
22 unnecessary, and, for the reasons explained below, hereby GRANTS Defendant's motion. The Court  
23 therefore DISMISSES this matter in its entirety, without prejudice and without costs or fees to any party.  
24 The Court therefore STRIKES Plaintiff's pending motion for a preliminary injunction. (Dkt. No. 9).

1 **I. BACKGROUND**

2 Plaintiffs filed the complaint in this matter in September 2009.<sup>1</sup> Plaintiff Elizabeth Campbell  
3 signed the complaint, purporting to do so not only on her own behalf, but also on behalf of Seattle  
4 Citizens Against the Tunnel and two additional named plaintiffs: Harvey Friedman and Sharon Price. The  
5 complaint describes Ms. Campbell as “a concerned citizen seeking answers for [sic] the Defendants,  
6 answers that have been withheld from the public at large.” (Complaint 2 (Dkt. No. 1)). Seattle Citizens  
7 Against the Tunnel is described as “a citizens group concerned with transportation choices,  
8 environmental issues, and fiscal issues posed by the large public project[,]” while the two additional  
9 named plaintiffs are described just as the complaint described Ms. Campbell: “concerned citizens seeking  
10 answers for [sic] the Defendants, answers that have been withheld from the public at large.” (*Id.* 2).

11 The substance of the complaint deals with plans to perform substantial construction on  
12 approximately one mile of the Alaskan Way Viaduct. Plaintiffs take particular issue with the Federal  
13 Highway Administration’s decision to evaluate the construction of the one-mile segment as a distinct  
14 project—independent of more comprehensive construction plans for the viaduct as a whole. Plaintiffs also  
15 take issue with a 2009 environmental assessment of the construction plans. Under the National  
16 Environmental Policy Act, *codified at* 42 U.S.C. § 4321 *et seq.*, the Highway Administration must perform  
17 an environmental assessment before undertaking any major project. After conducting its review of the  
18 then-proposed construction plans for the one-mile segment at issue, the Highway Administration issued a  
19 finding of no significant impact. Plaintiff argues that these decisions were “arbitrary, capricious, an abuse  
20 of discretion, and otherwise not in accordance with law.” (Complaint 5 (Dkt. No. 27)). In March 2010, six  
21 months after filing the complaint, Plaintiff moved for a temporary restraining order, asking this Court to  
22 enjoin construction during the pendency of this litigation. (Dkt. No. 9).

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24 <sup>1</sup>Plaintiffs no longer appear *pro se*. Washington State attorney Jill Smith filed a notice of appearance with this Court  
25 on April 16, 2010. (Dkt. No. 17). Ms. Smith therefore prepared and signed Plaintiffs’ response to Defendant’s motion to  
dismiss. (Dkt. No. 27). No amended complaint has been filed, nor have Plaintiffs filed a motion seeking leave to file an  
amended complaint.

1 Defendant filed the motion to dismiss now before the Court in April 2010. Defendant argues that  
2 dismissal is warranted on several independent grounds—among them, improper and untimely service of  
3 the complaint, lack of personal jurisdiction, and lack of subject-matter jurisdiction. (Motion 4–10 (Dkt.  
4 No. 10)). Plaintiff filed a timely opposition brief in May 2010, arguing against all of Defendant’s  
5 theories of dismissal. (Dkt. No. 27). Because the Court dismisses this matter for lack of subject-matter  
6 jurisdiction, it declines to address Defendant’s other proposed grounds of dismissal. *See Steel Co. v.*  
7 *Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) (discussing “the rule that Article III  
8 jurisdiction is always an antecedent question” which a federal court must resolve before passing on to  
9 consider any other issues).

## 10 **II. FEDERAL JURISDICTION & STANDING**

11 Federal courts are courts of limited subject-matter jurisdiction. *Marbury v. Madison*, 5 U.S. 137,  
12 174 (1803). As the Supreme Court has affirmed many times, “Article III § 2 of the Constitution confines  
13 the federal courts to adjudicating actual ‘cases’ and ‘controversies.’ *Allen v. Wright*, 468 U.S. 737, 750  
14 (1984); *see also Muskrat v. United States*, 219 U.S. 346 (1911) (refusing to adjudicate what the Court  
15 characterized as a congressional request for an advisory opinion). The Supreme Court has described this  
16 requirement as promoting the value of democratic self-government: “[C]onstitutional limitations on  
17 federal-court jurisdiction [are] . . . founded in concern about the proper—and properly limited—role of  
18 the courts in a democratic society.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal citation omitted).

19 It is an absolute prerequisite to federal subject-matter jurisdiction that the plaintiff before the  
20 court have constitutional standing. As the Supreme Court has stated, “The core component of the  
21 requirement that a litigant have standing to invoke the authority of a federal court is an essential and  
22 unchanging part of the case-or-controversy requirement under Article III.” *Daimler-Chrysler Corp. v.*  
23 *Cuno*, 547 U.S. 332, 342 (2006). The Supreme Court articulated the requirements for Article III  
24 standing in *Lujan v. Defenders of Wildlife*:

1 [T]he irreducible constitutional minimum of standing contains three elements. First, the  
2 plaintiff must have suffered an injury in fact—an invasion of a legally protected interest  
3 which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or  
4 hypothetical. Second, there must be a causal connection between the injury and the  
5 conduct complained of—the injury has to be fairly traceable to the challenged action of  
the defendant, and not the result of the independent action of some third party not before  
the court. Third, it must be likely, as opposed to merely speculative, that the injury will  
be redressed by a favorable decision.

6 *Lujan*, 504 U.S. 555, 560–61 (1992) (internal citations and markings omitted). The party invoking  
7 federal jurisdiction has the burden of establishing each of the three elements: “Since they are not mere  
8 pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be  
9 supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*,  
10 with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504  
11 U.S. at 561.

#### 12 **A. Associational Standing**

13 An association of individuals can invoke the jurisdiction of the federal courts under two separate  
14 theories. First, the association can sue based on injuries it has suffered to its own interests, independent  
15 of any harm its members might have suffered. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363,  
16 379 (1982) (finding that a civil-rights organization committed to helping people find housing in  
17 integrated communities had standing to invoke the protections of the Fair Housing Act because of the  
18 resources the organization expended to detect and combat discriminatory practices). When an  
19 association invokes this first theory, this Court analyzes the association’s jurisdictional arguments using  
20 the typical standing analysis, evaluating whether the association has itself suffered a legally cognizable  
21 injury, which was caused by the defendant, and which an order of the Court is likely to redress. *See*  
22 *Coleman*, 455 U.S. at 378–79 (“In determining whether [the association] has standing under the Fair  
23 Housing Act, we conduct the same inquiry as in the case of an individual[.]”).

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1 Under the second theory of associational standing, an organization can sometimes litigate the  
2 rights of its injured members, even if the organization itself has not suffered any injury. *See, e.g., United*  
3 *States v. SCRAP*, 412 U.S. 669, 683–90 (1973) (finding that an environmental-advocacy group had  
4 standing to litigate its members’ interests in clean forests and waterways in the District of Columbia  
5 metropolitan area, even though the organization itself had not suffered any injury). The Supreme Court  
6 stated the modern requirements for this second theory of associational standing in *Hunt v. Washington*

7 *State Apple Advertising Commission*:

8 [A]n association has standing to bring suit on behalf of its members when: (a) its  
9 members would otherwise have standing to sue in their own right; (b) the interests it  
10 seeks to protect are germane to the organization’s purpose; and (c) neither the claim  
11 asserted nor the relief requested requires the participation of individual members in the  
12 lawsuit.<sup>2</sup>

13 *Hunt*, 432 U.S. 333, 343 (1977).

14 Under either theory of associational standing, “an organization’s abstract concern with a subject  
15 that could be affected by an adjudication does not substitute for the concrete injury required by Article  
16 III.” *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976); *see also Schmier*  
17 *v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 823 (9th Cir. 2002) (“A mere interest in a  
18 problem, no matter how long-standing the interest and no matter how qualified the organization is in  
19 evaluating the problem, is not sufficient by itself to render the organization adversely affected or  
20 aggrieved.” (internal markings omitted)).

## 21 **B. Standing and Democratic Self-Government**

22 Article III standing promotes several important constitutional values—perhaps none more so  
23 than separation of powers and democratic self-government. As the Supreme Court has explained, the  
24 “law of Article III standing is built on a single basic idea—the idea of separation of powers.” *Allen*, 468

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25 <sup>2</sup>The Supreme Court clarified that the third requirement is prudential in nature in *United Food & Commercial*  
26 *Workers v. Brown Group, Inc.*, 517 U.S. 544, 556–57 (1996). Because the requirement “rest[s] on less than constitutional  
necessity,” Congress can waive it by statute without running afoul of Article III. *Id.* at 558.

1 U.S. at 752. Federal courts therefore analyze questions of constitutional standing with the limited role of  
2 a non-elected federal judiciary squarely in mind, heeding the Supreme Court’s admonition that all  
3 questions of standing “must be answered by reference to the Article III notion that federal courts may  
4 exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a  
5 system of separated powers and the dispute is one traditionally thought to be capable of resolution  
6 through the judicial process.” *Allen*, 468 U.S. at 752 (internal citations and markings omitted).

7         The separation-of-powers principle inherent in Article III creates a ban on “generalized  
8 grievances shared in a substantially equal measure by all or a large class of citizens.” *Warth*, 422 U.S.  
9 at 499. The ban on generalized grievances sometimes operates to leave citizens without the ability to  
10 initiate judicial review of potentially unlawful behavior by officials in the political branches. *See Allen*,  
11 468 U.S. at 754 (“This Court has repeatedly held that an asserted right to have the Government act in  
12 accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”). This  
13 outcome is entirely appropriate in a constitutional system built upon separation of powers: “To permit a  
14 complainant who has no concrete injury to require a court to rule on important constitutional issues in  
15 the abstract would create the potential for abuse of the judicial process, distort the role of the judiciary  
16 in its relationship to the executive and legislature, and open the judiciary to an arguable charge of  
17 providing ‘government by injunction’” *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S.  
18 208, 222 (1974); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the*  
19 *Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (“[T]he law of standing roughly  
20 restricts courts to their traditional undemocratic role of protecting individuals and minorities against  
21 impositions of the majority, and excludes them from the even more undemocratic role of prescribing  
22 how the other two branches should function in order to serve the interest *of the majority itself.*”  
23 (emphasis in original)).

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1 **III. LEGAL STANDARD**

2 A motion to dismiss for lack of subject-matter jurisdiction arises under Federal Rule of Civil  
3 Procedure 12(b)(1). If the moving party confines its attack to the four corners of the complaint, it has  
4 mounted a “facial attack” on the plaintiff’s assertion of federal subject-matter jurisdiction. A facial attack  
5 challenges the sufficiency of the complaint itself, requiring the Court to accept the allegations contained  
6 therein as true and to draw all reasonable inferences in favor of the non-moving party. *Doe v. Holy See*,  
7 557 F.3d 1066, 1073 (9th Cir. 2009). This Court confines its inquiry to the complaint itself, and must not  
8 consider material outside the pleadings: “[S]tanding is determined as of the date of the filing of the  
9 complaint. The party invoking the jurisdiction of the court cannot rely on events that unfolded after the  
10 filing of the complaint to establish its standing.” *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005); *see*  
11 *also Lujan*, 504 U.S. at 570 n.4 (1992) (“The existence of federal jurisdiction normally depends on the  
12 facts *as they exist when the complaint is filed.*”) (emphasis in original).

13 This Court must resolve challenges to its jurisdiction before addressing the case on its merits, and  
14 even before resolving challenges to personal jurisdiction. *See Steel Co. v. Citizens for a Better*  
15 *Environment*, 523 U.S. 83, 93–102 (1998); *accord United States v. Lopez*, 577 F.3d 1053, 1066 (9th Cir.  
16 2009). The requirement that federal courts first resolve jurisdictional questions is reflected in a long line of  
17 cases. *See, e.g., Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) (citing *Capron v. Van*  
18 *Noorden*, 6 U.S. 126 (1804), for the proposition that a federal court must resolve jurisdictional questions  
19 before considering a case’s merits, and describing the requirement as “springing from the nature and limits  
20 of the judicial power of the United States,” and “inflexible and without exception.”). This Court would run  
21 the risk of acting beyond the scope of its constitutionally authorized powers if it were to proceed to  
22 consider the merits while jurisdictional issues remain in doubt. As the Supreme Court has stated, “For a  
23 court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no  
24 jurisdiction to do so is, by very definition, for a court to act *ultra vires.*” *Steel Co.*, 523 U.S. at 101–02.

1           If this Court lacks subject-matter jurisdiction, its duty is clear, and it performs that duty without  
2 discretion: As the Supreme Court explained as long ago as 1868, “Without jurisdiction, the court cannot  
3 proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, *the only*  
4 *function remaining to the Court is that of announcing the fact and dismissing the cause.*” *Ex parte*  
5 *McCardle*, 74 U.S. 506, 514 (1868) (emphasis added).

#### 6 **IV. DISCUSSION**

7           This Court lacks jurisdiction to adjudicate Plaintiffs’ claims. Plaintiffs Elizabeth Campbell,  
8 Harvey Friedman and Sharon Price plead nothing more than that they are “concerned citizens” who have  
9 filed this lawsuit in their search for “answers that have been withheld from the public at large.”

10 (Complaint 2 (Dkt. No. 1)). Seattle Citizens Against the Tunnel is described in equally cursory terms:

11 The complaint avers nothing more than that it “is a citizens group concerned with transportation choices,  
12 environmental issues, and fiscal issues posed by [the] large public project.” (*Id.*). The complaint nowhere  
13 recounts whether the named plaintiffs are members of the citizens group. Indeed, the complaint nowhere  
14 recounts the names of any of the group’s members, or whether the group has any members at all. (*Id.*).

15           Most importantly, the complaint nowhere pleads facts tending to establish that any of the  
16 plaintiffs have suffered “an injury in fact—an invasion of a legally protected interest which is (a)  
17 concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504  
18 U.S. at 560 (internal citations and markings omitted). The three individual plaintiffs aver only that they  
19 are “concerned citizens.” Plaintiffs’ concern does not rise to the level of a particularized injury, as all  
20 residents in the Seattle metropolitan area share a concern that construction on the Alaskan Way Viaduct  
21 be performed in an environmentally sensitive manner. Plaintiffs therefore allege nothing more than a  
22 “generalized grievance, shared in a substantially equal measure by all or a large class of citizens.” *See*  
23 *Warth*, 422 U.S. at 499. The three individual plaintiffs’ allegations of injury therefore cannot confer  
24 jurisdiction on this Court.



1 The allegations of injury of Seattle Citizens Against the Tunnel fare no better. Because the  
2 complaint fails to identify any of the group’s members, the group cannot invoke this Court’s jurisdiction  
3 in order to litigate the rights of injured members: The group’s claim to standing necessarily therefore  
4 stands or falls on alleged injury to the group itself.<sup>3</sup> The complaint nowhere identifies a single  
5 expenditure of funds or any other expenditure of energies or resources that the group has incurred  
6 because of the challenged action. In fact, the *only* information offered in the complaint about Seattle  
7 Citizens Against the Tunnel is that it is “a citizens group concerned with transportation choices,  
8 environmental issues, and fiscal issues posed by this large public project.” (Complaint 2 (Dkt. No. 1)).  
9 This broad description establishes nothing more than that the group holds an “abstract concern with a  
10 subject that could be affected by an adjudication.” *See Simon*, 426 U.S. at 41. The law on this point is  
11 clear: The group’s abstract concern “does not substitute for the concrete injury required by Article III.”  
12 *Id.*; *see also Schmier*, 279 F.3d at 823 (“A mere interest in a problem . . . is not sufficient by itself to  
13 render [an] organization adversely affected or aggrieved.” (internal markings omitted)).

14 Plaintiffs’ arguments to the contrary miss the point of the standing analysis. Plaintiffs nowhere  
15 identify a concrete injury they allege to have suffered. Instead, they rest on an argument that they have  
16 suffered “procedural injuries.” (Response 6 (Dkt. No. 27)). According to Plaintiffs, they successfully  
17 alleged particularized injury by pleading that the Highway Administration failed to comply with the  
18 requirements of the National Environmental Policy Act. According to Plaintiffs, nothing more is  
19 required to successfully invoke this Court’s jurisdiction. As they argue, “These ‘procedural injuries,’  
20 that is, the NEPA rules that have been violated, do affect Plaintiffs’ concrete interests.” (*Id.*) Plaintiffs  
21 offer this argument without offering a citation to a single case or other legal authority. (*Id.*)  
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23 <sup>3</sup>Assuming *arguendo* that the three individual plaintiffs are members of Seattle Citizens Against the Tunnel, the  
24 group’s claim to standing nonetheless fails. Because the three individual plaintiffs have failed to allege a concrete and  
25 particularized injury, the citizens group cannot invoke this Court’s jurisdiction in order to litigate their claims. *See Hunt*, 432  
U.S. at 343 (“[A]n association has standing to bring suit on behalf of its members when, [*inter alia*], *its members would otherwise have standing to sue in their own right.*”) (emphasis added).

1 Plaintiffs’ argument fails. A party cannot defeat the Article III standing requirement of a  
2 concrete and particularized injury by simply asserting that it has suffered a “procedural injury.” As the  
3 Supreme Court stated in its 2009 term:

4 [D]eprivation of a procedural right without some concrete interest that is affected by the  
5 deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.  
6 Only a person who has been accorded a procedural right to protect *his concrete interests*  
7 can assert that right without meeting all the normal standards for redressability and  
8 immediacy.

9 *Summers v. Earth Island Institute*, -- U.S. --, --, 129 S.Ct. 1142, 1151 (2009) (emphasis in original;  
10 internal markings omitted).

11 Plaintiffs therefore cannot seek relief from this Court, which “exercise[s] power only in the last  
12 resort, and as a necessity[.]” *See Allen*, 468 U.S. at 752. If this Court were to interfere with the ongoing  
13 political process to grant Plaintiffs their requested relief, it would “open the judiciary to an arguable  
14 charge of providing ‘government by injunction.’” *See Schlesinger*, 418 U.S. at 222. The requirement  
15 that a plaintiff enjoy constitutional standing before invoking this Court’s jurisdiction prevents such an  
16 undesirable outcome. Because Plaintiffs’ complaint nowhere identifies any concrete, particularized harm  
17 that they have suffered because of the actions of the Highway Administration, this Court lacks subject-  
18 matter jurisdiction. Having concluded that it lacks the power to declare the law in this matter, “the only  
19 function remaining to the Court is that of announcing the fact and dismissing the case.” *See Ex parte*  
20 *McCardle*, 74 U.S. at 514.

## 21 **V. CONCLUSION**

22 For the aforementioned reasons, the Court hereby GRANTS Defendant’s motion to dismiss.  
23 (Dkt. No. 10). The Court DISMISSES this matter without prejudice, and without costs or fees to any  
24 party.

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SO ORDERED this 25th day of June, 2010.

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JOHN C. COUGHENOUR  
United States District Judge

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