, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER
1101 14th St., NW, Ste. 400
Washington, D.C. 20005

CATHERINE HINCKLEY KELLEY
1101 14th St., NW, Ste. 400
Washington, D.C. 20005

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463,

Defendant

and

HILLARY FOR AMERICA
P.O. Box 5256
New York, NY 10185-5256

CORRECT THE RECORD
800 Maine Avenue SW, Suite 400
Washington, D.C. 20024

Defendant-Intervenors.

Civil Action No. 1:19-cv-02336-JEB

REPLY IN SUPPORT OF DEFENDANT-INTERVENORS' SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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APA	Administrative Procedure Act
CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
CTR	Correct the Record
E&J	Explanation and Justification
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971, as amended
HFA	Hillary for America
MUR	Matter Under Review
SOR	Statement of Reasons

INTRODUCTION

Plaintiffs' facial APA claim represents yet another attempt by CLC, a campaign finance reform advocacy organization, to force the FEC to re-write the coordination rules to its liking. In 2005, CLC tried to convince the FEC to write a rule that would have treated the costs to produce an unpaid online communication as "coordinated expenditures" or "in-kind contributions." The FEC wrote no such rule. Having tried and failed to secure the rule it wanted in 2005, CLC tried again in 2016 by filing an administrative complaint against Intervenors, alleging that they violated the coordination rules under the same theory CLC advanced in the 2005-2006 rulemaking. The FEC dismissed Plaintiffs' administrative complaint. Plaintiffs later challenged the FEC's decision to dismiss under FECA, but this Court found that they lacked standing. *See* Op. on Mot. for Summ. J., ECF No. 46. Now, Plaintiffs continue to press for the same rule here, by attempting to dress up their challenge to the FEC's decision to dismiss as a "facial" APA claim.

Plaintiffs' APA claim should be dismissed because Plaintiffs lack Article III standing. Their asserted injury is not imminent, and their generalized grievance against the FEC's non-enforcement of the coordination rules, *see* Pls.' Supp. Br., ECF No. 50 at 18, is not caused by the rules themselves, nor is it redressable by this Court. In addition, this Court lacks jurisdiction over Plaintiffs' APA claim because it challenges a non-binding interpretation that does not amount to "final agency action." To the extent Plaintiffs' challenge 11 C.F.R. §§ 100.26, 109.20, and 109.21 directly, the statute of limitations bars their claim.

Plaintiffs can seek to rewrite FEC regulations, but not through this lawsuit. They could follow what this Court has already identified as a path to enforcement: they could file an administrative complaint "against an entity that does not already disclose its expenditures under separate FECA provisions—for example, an individual spender." Op. on Mot. for Summ. J. ECF No. 46 at 2. If the FEC dismisses their complaint, then they could sue the FEC for failure to act,

and on those facts, unlike in this case, they may have standing. They could petition the FEC for amendment or rescission of the rules, and if the Commission fails to adopt Plaintiffs' proposed amendment, then they could challenge the existing rules directly in court. *Peri & Sons Farms, Inc. v. Acosta*, 374 F. Supp. 3d 63, 77 (D.D.C. 2019), *appeal dismissed sub nom., Peri & Sons Farms, Inc. v. Scalia*, No. 19-5113, 2019 WL 6218269 (D.C. Cir. Oct. 24, 2019). But Plaintiffs cannot make an end-run around the Article III standing problems in this case and the APA's jurisdictional demands by now pursuing a facial APA challenge, when this Court has already found that they lack standing to bring a FECA claim. Because this Court lacks jurisdiction to consider Plaintiffs' APA claim, it should be dismissed in its entirety.

ARGUMENT

"[C]ourts 'have an independent obligation to determine whether subject-matter jurisdiction exists,'" and that obligation must be discharged before ruling on the merits. *Brown v. Jewell*, 134 F. Supp. 3d 170, 176 (D.D.C. 2015) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)) (dismissing claims for lack of subject-matter jurisdiction). "A claim that the court lacks jurisdiction under Article III of the Constitution may not be waived, since the jurisdiction at issue goes to the foundation of the court's power to resolve a case." *Doe by Fein v. D.C.*, 93 F.3d 861, 871 (D.C. Cir. 1996). The plaintiff bears the burden of establishing standing, and the evidence required to carry the plaintiff's burden "grows heavier at each stage" of litigation. *Freedom Watch, Inc. v. McAleenan*, 442 F. Supp. 3d 180, 186 (D.D.C. 2020). At summary judgment, plaintiffs must set forth specific evidence that establishes standing for each claim and disposes of any remaining, genuine issues of material dispute. *See* Fed. R. Civ. P. 56. Plaintiffs have failed to meet their burden.

I. Plaintiffs lack Article III standing.

Plaintiffs have failed to establish that their alleged "broader" APA injury—whether informational or organizational—is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) (courts may "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect"). Plaintiffs have not put forth any specific evidence that they face a future risk of harm based on the challenged regulations. Indeed, Plaintiffs claim that the FEC rules have allowed for "gross abuse" for the past fourteen years. Pls.' Opp'n to Int. Cross-Mot. for Summ. J., ECF No. 42 at 14. Yet, the *only* example of "gross abuse" or concrete "harm" Plaintiffs can point to is MUR 7146 (Correct the Record), where Plaintiffs failed to prove an informational injury because every single expenditure CTR made had been disclosed, and Plaintiffs could not "seriously claim to be in the dark as to the relationship between CTR and HFA or unaware that CTR has made numerous coordinated expenditures on HFA's behalf." Op. on Mot. for Summ. J., ECF No. 46 at 13.

Moreover, as Plaintiffs' authority attests, although an increase in risk of harm can sometimes satisfy the standing inquiry, "the governing standard is not easily met." *Pub. Citizen, Inc., v. Trump*, 297 F. Supp. 3d 6, 21 (D.D.C. 2018). "To satisfy this test, Plaintiffs must aver facts or proffer evidence sufficient to show both a '*substantially* increased risk of harm' and a '*substantial* probability of harm with that increase taken into account.'" *Id*. at 21-22. The most Plaintiffs do here is to merely state that there is a "substantial" risk of harm. Pls.' Supp. Br., ECF No. 50 at 17. Their "proof" of an imminent or impending injury is a statement "that regulated entities will do what the rules permit." *Id*. at 20. Bare conclusions like this have never been sufficient to confer standing. *Pub. Citizen, Inc.*, 297 F. Supp. 3d at 19 (The Court "may not,

however, assume the truth of 'mere conclusory statements,' and it must reject vague and 'overly speculative' predictions about 'future events.'" (citations omitted)).

Plaintiffs severely undermine their own argument on this point by simultaneously claiming that the so called "loophole" they assail has no binding effect. *See* Pls.' Mot. for Summ. J., ECF No. 35 at 28. Whatever truth there is to the maxim that "regulated entities will do what the rules permit," *see* Pls.' Supp. Br., ECF No. 50 at 20, the fact that two former FEC Commissioners announced their interpretation of FEC regulations in a SOR does not mean that the whole FEC must follow that interpretation in future cases. The SOR in MUR 7146 offers no immunity to others who seek to engage in the types of conduct Plaintiffs identify in their brief. *See* Pls.' Mot. for Summ. J., ECF No. 35 at 18 (citing *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 & 453 (D.C. Cir. 1988) for the proposition that a SOR is "not law" and does not create "binding legal precedent or authority for future cases").

Without support, Plaintiffs assume that outside organizations that are not already required to disclose their activity to the FEC will engage in massive coordination with candidates based on a non-binding, non-authoritative, SOR issued by two *former* FEC Commissioners. That the complaint against CTR and HFA was dismissed offers little comfort to different, non-disclosing entities who might seek to emulate CTR's conduct, as CTR's activities were the subject of no fewer than five administrative complaints (including the administrative complaint underlying this litigation), *see* Am. Compl. ¶ 72 (referencing MURs 6940, 7097, 7160, and 7193), and CTR has been litigating this matter in various venues for almost five years. Moreover, the FEC is at full strength now and staffed with new Commissioners: the two controlling Commissioners from MUR 7146 are gone, and the two who voted for enforcement in this matter remain. Other regulated entities undoubtedly know that CLC and other campaign finance watchdog groups stand ready to

file administrative complaints against them, and that even if the Commission dismisses a complaint, that decision to dismiss is subject to review in federal court under 52 U.S.C. § 30109.

Plaintiffs identify by name certain nonprofit groups that they claim "routinely post polling results, opposition research, and similar materials on their own websites and Twitter feeds." Pls.' Supp. Br., ECF No. 50 at 14. But Plaintiffs provide no reason to believe that their activity is being coordinated with campaigns, and so present no real evidence that non-disclosing groups are taking advantage of the interpretation advanced in the controlling Commissioners' SOR. If such evidence does exist, then Plaintiffs are not without recourse: they can file an FEC complaint against those entities. To the extent Plaintiffs are concerned that regulated entities have incentive to "hide" this activity, Plaintiffs still have recourse: they could petition the FEC for amendment or rescission of the rules.

In the end, Plaintiffs' claim rests on a "long string of "ifs": Plaintiffs will be harmed *if* the current Commissioners adopt the same interpretation as the two former Commissioners; *if* regulated entities coordinate with campaigns on certain activities and *if* those activities are displayed online; *if* those entities are not already required to report their activity to the FEC; *if* those entities fail to disclose the expenditures despite the risk of FEC action; and *if* the undisclosed information is not otherwise available publicly. *Pub. Citizen, Inc.*, 297 F. Supp. 3d at 22. *Am. Family Life Assur. Co. of Columbus v. F.C.C.*, 129 F.3d 625, 630 (D.C. Cir. 1997) (no standing or live controversy where "[a]ny assessment of the impact of the Commission's ruling thus necessarily entails a long string of 'ifs.'"); *see also Shipbuilders Council of Am. v. United States*, 868 F.2d 452, 457 (D.C. Cir. 1989). Plaintiffs provide no evidence that these "ifs" are certainly impending.

In pointing only to speculative harm in this matter,[1] CLC has proven no such immediate impact on its activities. CLC has not stated that it will change its programming or strategy because of the possibility that a nonprofit group or foreign national might make coordinated communications with a federal candidate. Rather, CLC's harm depends on its predictions about nonprofits and foreign nationals actually coming to fruition. Only then would CLC have to allegedly use additional resources to achieve its aims and suffer a harm. When a plaintiff is not "directly regulated by the rules they challenge," standing is "'substantially more difficult' to establish," and Plaintiffs here have not met that heightened burden. *Shays v. FEC*, 337 F. Supp. 2d 28, 44 (D.D.C. 2004) (quoting *Lujan v. Defenders of Wildlif*e, 504 U.S. 555, 562 (1992)).

Plaintiffs have also failed to prove the causation and redressability requirements for Article III standing. Without an imminent injury, or an injury-in-fact at all, Plaintiffs assert nothing more than generalized grievances, which "are not the kinds of harms that confer standing." *FEC v. Akins*, 524 U.S. 11, 23 (1998); *see also Am. Farm Bureau. v. EPA*, 121 F. Supp. 2d 84, 98 (D.D.C. 2000) ("Plaintiffs' argument for informational standing [under the APA] presses . . . the same generalized grievance [in seeing the law enforced] that the court has already rejected."). At bottom, Plaintiffs disagree with how the FEC has enforced the regulations, *see* Am Compl. ¶ 110; Pls.' Supp. Br., ECF No. 50 at 18, and they seek to rewrite the coordination rules to their liking. However, it is black-letter law that a general interest in seeing the law followed is insufficient to establish Article III standing. *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (explaining that a claim that a

[1] Neither the district court opinion nor the circuit court opinion in *EMILY's List v. FEC* directly affect this matter. However, a similar principle of avoiding speculation and hypothetical scenarios applies to (1) a court's assessment of a plaintiff's standing, and (2) a court's review of the merits of a facial claim. *See EMILY's List v. FEC*, 569 F. Supp. 2d 18, 49 (D.D.C. 2008), (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-450 (2008), overruled by 581 F.3d 1 (D.C. Cir. 2009)).

law "has not been followed" is "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past"). Plaintiffs' "informational challenge is tantamount to an abstract interest in enforcement of the law—which does not create standing—and not an information-based, particularized injury created by Defendant's alleged conduct—which can, where properly statutorily authorized, create standing." *Ctr. for Biological Diversity v. Bernhardt*, 442 F. Supp. 3d 97, 111 (D.C. Cir. 2020), *appeal docketed*, No. 20-5088 (D.C. Cir. Apr. 13, 2020).

II. This Court lacks jurisdiction over Plaintiffs' APA claim.

In their attempt to dress up their challenge to the FEC's dismissal of their complaint as a facial APA claim, Plaintiffs constantly shift their position on whether they are challenging the controlling Commissioners' *interpretation* of the coordination rules as announced in MUR 7146, or the coordination rules themselves. *Compare* Pls.' Supp. Br., ECF No. 50 at 20 to ECF No. 42 at 19-24; *see also Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) ("*CREW 2015*") (dismissing APA claim). When it accords with Plaintiffs' legal theory, such as when they argue that regulated entities "will do what the *rules* permit," they appear to be challenging the regulations themselves. *See* Pls.' Supp. Br., ECF No. 50 at 20 (emphasis added). At other times, when a direct challenge to the regulations would be inconvenient—such as on the merits of their APA claim—they argue they are challenging only the controlling Commissioners' *interpretation* of the rules Pls. Opp'n to Int. Cross-Mot. for Summ. J., ECF No. 42 at 19-24.

Either way, Plaintiffs' APA claim fails. Under the APA, Plaintiffs could challenge a regulation, binding policy, or some other "final agency action." But here, Plaintiffs challenge an interpretation that, under their own arguments, is not binding precedent. *See* Pls. Opp'n to Int.

Cross-Mot. for Summ. J., ECF No. 42 at 3 (criticizing Intervenors for relying on "FEC materials emerging from non-precedential tie votes"). Accordingly, Plaintiffs do not have a cause of action under the APA. To the extent Plaintiffs claim to challenge FEC regulations directly, their APA claim is time-barred because the regulations they challenge were promulgated over six years ago, and the applicable statute of limitations has now expired.

A. Plaintiffs do not challenge any binding final agency action.

In their supplemental brief, Plaintiffs state that their facial APA claim is distinct from their failed FECA claim, because it challenges the validity of the FEC's coordination regulations, "to the extent that they have been *authoritatively construed* to incorporate an exemption encompassing all 'input expenses' for coordinated internet communications." Pls.' Supp. Br., ECF No. 50 at 1 (emphasis added). But Plaintiffs point to the controlling Commissioners' SOR in MUR 7146 as the source of the announcement of this so-called "authoritative" construction. *See, e.g.*, Am. Compl., ECF No. 15, at ¶ 90 ("Based on this [referencing MUR 7146] unbounded and unprecedented expansion of the internet exemption…."); ¶ 91 ("The controlling Commissioners thus expanded the so-called 'internet exception' to exempt coordinated spending with any nexus—however remote or incidental—to any eventual covered internet communication."). This is a problem for Plaintiffs, because the controlling Commissioners' SOR in MUR 7146 is neither "authoritative" nor "binding" on future decisions of the FEC, as Plaintiffs themselves have said. Because Plaintiffs fail to identify any authoritative, binding, "final agency action" of the Commission to support their facial APA challenge, this Court lacks jurisdiction.

The APA provides a cause of action to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Review under the APA is limited to "final agency action" for which there is no other adequate remedy in court. *Id.* at § 704. "Whether there has been 'agency action' or 'final agency action' within the meaning of

the APA are threshold questions; if these requirements are not met, the action is not reviewable." *Fund for Animals, Inc. v. Bureau of Land Mgmt.*, 460 F.3d 13, 28 (D.C. Cir. 2006). Agency action, in order to be "final" and reviewable under the APA, "must mark the consummation of the agency's decision[-]making process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted).

To bring a facial APA claim, Plaintiffs must challenge an FEC action that will have binding legal effect on them in the future. *See id*. An FEC deadlock can create agency action that has binding legal effect on the parties involved in the administrative action. *See Public Citizen, Inc. v. Fed. Energy Regul. Comm'n*, 839 F.3d 1165, 1170 (D.C. Cir. 2016) (citing *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). The FEC's decision to dismiss an administrative complaint is the consummation of the administrative matter and has binding legal effect *on the complainants* even if the decision to dismiss occurs as a result of a deadlocked vote. *Id*. (explaining that the FEC engages in final agency action when, after receiving a complaint alleging certain types of campaign finance violations, it deadlocks about whether probable cause exists to proceed with an investigation). In deadlocked decisions to dismiss, the dissenting Commissioners "constitute a controlling group *for purposes of the decision,* their rationale necessarily states the agency's reasons *for acting as it did*" in that particular administrative action. *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476 (emphases added). Such a decision to dismiss is reviewable under FECA's judicial review mechanism because it constitutes final agency action with binding legal effect on the parties involved. *See* 52 U.S.C. § 30109(a)(8)(C).

But deadlocked decisions to dismiss are not binding precedent for future FEC action. As Plaintiffs forcefully contend in their briefing: "Legal interpretations advanced by fewer than four Commissioners are not binding and do not set agency precedent." Pls. Opp'n to Int. Cross-Mot. for Summ. J., ECF No. 42 at 26; *see also* 52 U.S.C. § 30106(c) ("All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission."). Indeed, FECA's enforcement scheme is structured to prevent fewer than four Commissioners from entrenching their interpretations of the law. *See Common Cause*, 842 F.2d at 449 n. 32 ("[S]uch an [SOR] would not be binding legal precedent or authority for future cases. The statute clearly requires that for any official Commission decision there must be at least a 4-2 majority vote.").

In Plaintiffs' administrative action, the FEC's four Commissioners deadlocked 2-2 on whether to find reason to believe that CTR and/or HFA had violated any provision of FECA. As a result, the FEC dismissed Plaintiffs' administrative complaint. AR372-75. Controlling Commissioners Petersen and Hunter subsequently issued a SOR, which explained that their decision to dismiss was "consistent with Commission precedent" and followed the Commission's "traditional approach to input costs." *See* AR391-93 (Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Federal Election Committee, Aug. 21, 2019). Though the decision to dismiss Plaintiffs' complaint in MUR 7146 resulted from a deadlock, it constituted final agency action within the context of Plaintiffs' enforcement decision, and it would have been reviewable pursuant to FECA's special judicial review procedures if plaintiffs had standing. *See* 52 U.S.C. § 30109(a)(8)(C); *cf. Hispanic Leadership Fund, Inc. v. Fed. Election Comm'n*, 897 F. Supp. 2d 407, 428 (E.D. Va. 2012).

But Plaintiffs insist—as they must—that their APA claim is distinct from a challenge to the FEC's decision to dismiss their administrative complaint; instead they claim to challenge the *interpretation* of the regulations announced by the controlling Commissioners in the SOR because they allege that interpretation is the cause of "broader informational injury" Plaintiffs may suffer sometime in the future. *See* Am. Compl., ECF No. 15, at 28 ¶ 112; Pls.' Supp. Br., ECF No. 50 at 2, 15-18. But, as Plaintiffs well know, the two controlling Commissioners' interpretation of the coordination regulations in MUR 7146 is neither authoritative nor binding on the Commission's decision-making in future cases. Accordingly, even if former Commissioners Petersen and Hunter and Intervenors believed that they were following the Commission's "traditional approach" when they opined that input costs for online communications are exempt from the coordination rules, the controlling Commissioners' interpretation, by itself, does not bind a future FEC. Neither the controlling Commissioners nor Intervenors can announce binding rules for the Commission. Outside of the controlling Commissioners' decision to dismiss the administrative complaint in MUR 7146, which Plaintiffs lack standing to challenge, *see* Op. on Mot. for Summ. J, ECF No. 46, no "legal consequences will flow" from the controlling Commissioners' interpretation. *See Bennett*, 520 U.S. at 177-78. The controlling Commissioners' interpretation does not represent the "consummation of the agency's decisionmaking process," except with respect to the Plaintiffs and MUR 7146. *Id.* at 178.

Since MUR 7146 was decided in 2016, the composition of the FEC has nearly completely changed. The FEC is now at full strength with six Commissioners, and both of the controlling Commissioners from MUR 7146 have since resigned.[2] The only remaining Commissioners who

[2] Press Release, *Caroline C. Hunter to depart Federal Election Commission*, Federal Election Commission (June 26, 2020), https://www.fec.gov/updates/caroline-c-hunter-depart-federal-

took part in reviewing Plaintiffs' administrative complaint are the two who agreed with Plaintiffs' view (Commissioners Weintraub and Walther). Plaintiffs' facial APA claim must challenge binding final agency action for this Court to have jurisdiction. An interpretation of a regulation announced in a SOR issued by two Commissioners does not meet that standard. Indeed, there is no reason to believe the Commission will follow this interpretation in the future, since its advocates have departed the Commission while the two Commissioners who opposed it remain in office.

Plaintiffs' facial claim is materially distinct from those alleged in the cases upon which they principally rely. In *Shays III*, for example, it was clear that the plaintiff was challenging "final agency action" because the plaintiff challenged FEC regulations after the rulemaking procedure had been completed. *See Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("*Shays III*"). The same was true in *Van Hollen v. FEC*, 851 F. Supp. 2d 69, 72 (D.D.C. 2012), *rev'd sub nom.*, *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) where then-Representative Chris Van Hollen, Jr. brought an APA lawsuit directly challenging an FEC rule limiting donor reporting requirements applicable to corporations and labor unions making "electioneering communications." This court lacks jurisdiction because Plaintiffs do not challenge final agency action under the APA.

B. Plaintiffs' facial APA claim is time-barred.

1. Plaintiffs challenge regulations that went into effect decades ago.

To the extent Plaintiffs try to frame their claim as a direct challenge to the validity of FEC regulations, with no remaining challenge to the dismissal of their FEC complaint, their claim is barred by the statute of limitations. *See, e.g.*, Pls.' Supp. Br., ECF No. 50 at 29 (suggesting

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election-commission/; Press Release, *Matthew Petersen to depart Federal Election Commission*, Federal Election Commission (Aug. 26, 2019), https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/.

Plaintiffs' complaint raises "an APA challenge to the facial validity of agency rules"). Facial challenges to an agency regulation must be filed within six years of the promulgation of the challenged regulation. *See* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); *P & V Enters. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 140-42 (D.D.C. 2006), *aff'd*, 516 F.3d 1021 (D.C. Cir. 2008) (holding that § 702 operates to waive the government's sovereign immunity but § 2401(a) is 'a condition to the waiver of sovereign immunity and thus must be strictly construed.'").

That six-year limit "must be strictly construed," because statutes of limitations are "a condition to the waiver of sovereign immunity." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990); *P & V Enters.*, 466 F. Supp. 2d at 142; *see also Ctr. For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006) ("Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." (citation omitted)); *Peri & Sons Farms, Inc.*, 374 F.Supp.3d at 77 (citing to government's sovereign immunity and dismissing under § 2401(a) because, otherwise, regulations would "be exposed to never-ending facial challenges from those subject to them. For that reason, allowing the exception to be invoked here would 'frustrate Congress's objective that facial challenges to a regulation be confined to a limited period.'").

If Plaintiffs claim to challenge the regulations directly, then the statute of limitations has expired. Plaintiffs' APA claim would challenge regulations that date back decades; indeed, the latest version of those regulations has been in effect since 2006 and revised no later than 2010. *See* 11 C.F.R. § 109.21; *see also* Coordinated Communications, 75 Fed. Reg. 55947 (Sept. 15, 2010), https://sers.fec.gov/fosers/showpdf.htm?docid=5395#page=13. Plaintiffs did not file their lawsuit

bringing a "civil action against the United States," *see* 28 U.S.C. § 2401(a)—and thereby toll the statute of limitations—until 2019, well after the six-year statute of limitations had already expired.

2. Plaintiffs' claim does not fit into any exception to the application of the statute of limitations.

There are only two exceptions that would allow Plaintiffs to challenge the validity of agency regulations after the statute of limitations has expired, and Plaintiffs do not satisfy either one. *First*, a litigant directly appealing an agency's denial of their petition for amendment or rescission of a rule may also raise facial challenges to the rule itself. *Peri & Sons Farms, Inc.*, 374 F. Supp. 3d at 75. *Second*, a litigant who has been personally injured by the application of agency action "may at the same time" challenge the action directly "on the ground that the issuing agency acted in excess of its statutory authority in promulgating them." *P & V Enters.*, 466 F. Supp. 2d at 143 (quoting *NLRB v. Fed. Labor Rels. Auth.*, 834 F.2d 191, 195 (D.C.Cir.1987)). Courts narrowly construe the second exception. *Peri & Sons Farms, Inc.*, 374 F. Supp. 3d at 75, 76-77 ("[W]here the statute of limitations at issue is jurisdictional, the Court must start with a presumption that this 'narrow' exception does not apply."). To meet the injury requirement of the second exception, the litigant must have standing to bring an as-applied challenge to the agency action. *Id.* In other words, "a facial challenge to a regulation can be brought outside § 2401(a)'s limitations period when it is accompanied by an as-applied challenge, but not on its own." *P & V Enters.*, 466 F. Supp. 2d at 142.

Plaintiffs have never made any representation that they have petitioned the FEC for amendment or rescission of the regulations they challenge, so the first exception is unavailable to them. However, in their Supplemental Brief, Plaintiffs appear to argue that they fall into the second exception because the controlling Commissioners "applied" the Commission's interpretation of the coordination regulations when the FEC dismissed Plaintiffs' administrative complaint. Pls.'

Supp. Br., ECF No. 50 at 3 n.2. Plaintiffs are wrong. An application without an injury is not enough to circumvent the statute of limitations; Plaintiffs must have been injured by the application. *See NLRB Union*, 834 F.2d at 195 ("[A] party who *possesses standing* may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them.") (emphasis added); *Weaver v. Fed. Motor Carrier Safety Admin*., 744 F.3d 142, 145 (D.C. Cir. 2014) ("[W]hen an agency seeks to apply the rule, those *affected* may challenge that application on the grounds that it 'conflicts with the statute from which its authority derives.'") (emphasis added) (quoting *NLRB*, 834 F.2d at 196); *Peri & Sons Farms, Inc.*, 374 F. Supp. 3d at 75 (noting that *Weaver* suggests that the injury exception does not apply to every situation in which regulation "has been 'applied' in some sense"); *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 904 F.3d 1014, 1018 (D.C. Cir. 2018) ("*CREW 2018*") ("[T]he law is well-settled that those *adversely affected* by an agency's application of a rule may challenge that application on the ground that it conflicts with the statute from which its authority derives.") (internal quotation marks omitted) (emphasis added); *P & V Enters.*, 466 F. Supp. 2d at 143 (finding that a litigant must be "personally 'injured by agency action'" to establish standing to bring an as-applied challenge to a regulation).

Applying the injury exception to a plaintiff who has not been injured would cause a narrow exception to completely swallow the statute of limitations rule. *See Peri & Sons Farms, Inc.*, 374 F. Supp. 3d, 77 (D.D.C. 2019). 3d at 77 ("[A]pplying the exception here would effectively nullify the six-year statute of limitations."). Indeed, the injury exception has historically been invoked when a party sought to facially challenge an agency action as a defense in an enforcement proceeding. *NLRB Union*, 834 F.2d at 195 (noting that "[a] challenge of this sort might be raised, for example, by way of defense in an enforcement proceeding"). Thus, not only is the exception

narrow, but in its earliest invocations, the party invoking it was necessarily injured by its application.

a. The regulations did not cause an informational injury.

Plaintiffs do not have an as-applied informational injury. They claim the same informational injury to establish standing for their facial APA challenge that this Court has already rejected. As the Court determined, Plaintiffs have no informational injury because CTR publicly disclosed all its expenditures. *See* Op. on Mot. for Summ. J., ECF No. 46 (finding Plaintiffs' alleged informational injury under FECA is insufficient to state an injury-in-fact in the context of MUR 7146, and thus insufficient to establish standing); *see infra* Part II.B.2.b. (discussing Plaintiffs' lack of organizational standing).

To the extent Plaintiffs have asserted an as-applied challenge under the APA, that claim cannot overcome Plaintiffs' failure to bring their claim within the statute of limitations either. That claim would be unsupported by any injury, just like Plaintiffs' FECA claim. Furthermore, APA review is not available when Congress has created another specific, "adequate remedy," and FECA would be an adequate remedy for an as-applied challenge here. 5 U.S.C. § 704; *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009); *see, e.g.*, *Citizens for Resp. & Ethics in Wash., v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017) ("*CREW 2017*") (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (dismissing claims challenging FEC's dismissal of the plaintiffs' administrative complaint because FECA provides a procedure for challenging such an action and "the APA is not intended to 'duplicate existing procedures for review of agency action'"). Without an injury, Plaintiffs' APA challenge is nothing more than a policy disagreement. *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 799 F. Supp. 2d 78, 89 (D.D.C. 2011) ("*CREW 2011*"); *see also Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 343 (D.D.C. 2020).

Plaintiffs attempt to re-litigate whether they have an as-applied informational injury by arguing that they lack information about the purpose of certain CTR expenditures. Pls.' Supp. Br. ECF No. 50 at 12 n.5. Their argument is unsupported. Plaintiffs argue that HFA could not report receiving an in-kind contribution in the form of David Brock's personal services as "In-kind contribution–salary" because FEC policy provides that "salary can only describe disbursement to a staff member." *Id*. CLC's argument turns the "purpose" requirement into a hyper-formulaic requirement where each disbursement or in-kind contribution can have only one proper description. This is simply not the case. All FECA requires is a statement of the "purpose" of the disbursement, 52 U.S.C. § 30104(b)(5)(A), and the FEC advises that the purpose is acceptable if it is "sufficiently specific to make the purpose of the disbursement clear." Statement of Policy: "Purpose of Disbursement" Entries for Filings with the Commission, 72 Fed. Reg. 887, 887 (Jan. 9, 2007). The FEC's non-exhaustive list of examples of acceptable "purposes" does not purport to provide an exclusive definition of the term "salary," nor does it foreclose a committee from using "salary" as a description for a disbursement to a person who is not on the committee's payroll. *See id*. at 887 (stating that the list provides "examples of descriptions that would be generally sufficient" and "generally insufficient"). Reporting "in kind-salary" as the purpose of a disbursement would be "sufficiently specific" to make the purpose clear in a situation where a third party's payment of its employee's salary is an in-kind contribution to the committee, because the employee was doing work for the committee.

b. The regulations did not cause an organizational injury.

Plaintiffs' organizational standing argument also fails. The test applied to determine whether a plaintiff has organizational standing is indeed distinct from the test applied to determine whether they have informational standing. But when both theories of standing are based on allegations of the same injury, and that injury is not cognizable, both theories of standing must fail.

See, e.g., *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm.* 878 F.3d 371, 379 (D.C. Cir. 2017) (dismissing both organizational and informational standing claims because both were rooted in the same "non-existent" informational interest); *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 424 F.Supp.3d 26, 33 (D.C. Cir. 2020), *appeal docketed*, No. 20-5051 (D.C. Cir. Mar. 11, 2020) (noting that the plaintiffs theories of organizational standing all "stem[med] from the FBI's failure to disclose the desired information" and "[s]ince the organizations h[ad] suffered no informational injury . . . , the alternative theories also fail[ed]") (emphasis omitted). That is exactly what has happened here. In support of both theories of standing—organizational and informational—Plaintiffs rely on the same injury, which the Court has already rejected as non-cognizable. *See* Pls.' Supp. Br., ECF No. 50 at 23-24 (describing the injury underlying Plaintiffs' organizational standing claim as "CLC's inability to access FECA disclosure information"). Because Plaintiffs have "identifie[d] no organizational harm unrelated to [their] alleged informational injury," and they cannot "ground organizational injury on a non-existent interest," their organizational standing claim must fail. *Elec. Priv. Info. Ctr.*, 878 F.3d at 377-78, 379.

The cases Plaintiffs cite on this point do not advance their argument. For instance, *Friends of Animals v. Jewell*, 828 F.3d 989, 994 (D.C. Cir. 2016), does not address organizational standing because the plaintiff only appealed the district court's decision that it lacked informational standing. After agreeing with the district court that the plaintiffs lacked an informational injury, *id.* at 993, the court noted that a case cited by the plaintiffs appeared to conflate informational and organizational standing, *id.* at 994 (discussing *Am. Canoe Assoc., Inc. v. City of Louisa Water and Sewer Comm'n*, 389 F.3d 536, 544–47 (6th Cir. 2004)). *American Canoe Association* "conflated" informational and organizational standing because the court applied the test for informational standing and called it organizational. 389 F.3d at 544–47. It does not stand for the proposition that

the theories of organizational and informational standing are so distinct that an informational injury claim that does not support the latter can nonetheless support the former. Similarly, the plaintiffs in *Center for Biological Diversity v. United States Department of State*, No. CV 18-563, 2019 WL 2451767, at *2 (D.D.C. June 12, 2019), did not assert organizational standing. The court discussed organizational standing only in the context of dismissing the defendant's argument that an organization can never assert informational standing without also satisfying the requirements of organizational standing. *Id.* 2-3. Last, Plaintiffs imply that *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*"), applies a different standard for determining an whether an informational injury is cognizable for the purposes of organizational standing. But Plaintiffs quote a non-binding dubitante to do so. *See* Pls.' Supp. Br., ECF No. 50 at 23 (citing *PETA*, 797 F.3d at 1103 (Millett, J., dubitante).

Even if Plaintiffs' debunked claim of informational injury could somehow support organizational standing, Plaintiffs' theory of organizational standing would still fail. A plaintiff asserting organizational standing must first establish that the challenged interpretation "injured the organization's interest" and, second, that the "organization used its resources to counteract that harm." *PETA*, 797 F.3d at 1094. To satisfy the first prong of organizational standing, CLC must show a "direct conflict between the defendant's conduct and the organization's mission." *Id*. at 1095. To show a direct conflict, CLC cannot rely solely on injuries to the organization's activities or resources. *See Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) ("If the challenged conduct affects an organization's activities, but is neutral with respect to its substantive mission, then it is entirely speculative whether the challenged practice will actually impair the organization's activities."). Instead, CLC must show a direct and distinct injury to its mission, in addition to a tangible impact on its activities or allocation of

resources. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) ("[I]n those cases where an organization alleges that a defendant's conduct has made the organization's *activities* more difficult, the presence of a direct conflict between the defendant's conduct and the organization's *mission* is necessary—though not alone sufficient—to establish standing.").

CLC cannot establish a "direct conflict" between its alleged injury and its mission because the information sought in MUR 7146 was publicly available. Because CLC could obtain CTR's disbursement information by visiting the FEC's website, the only injury CLC could assert is to its resources; its mission was not impeded. *See* Pls.' Supp. Br., ECF No. 50 at 24 (claiming that Plaintiffs' inability to obtain information from FEC reports "make[s] it more difficult for CLC to find information about federal campaign spending" and "forc[es] it to divert staff resources to fill in the informational gaps through other, more time-consuming means"). Those allegations are insufficient to establish a direct causal link between the Commission's interpretation of MUR 7146 and CLC's mission. *See Nat'l Treasury Emps. Union*, 101 F.3d at 1430 (explaining that an effect on an activity an organization performs in order to achieve their mission is not a "direct causal link" between the challenged action and an injury to the organization's mission).

3. The authority cited in Plaintiffs' supplemental brief is inapposite.

Plaintiffs rely on cases that are completely distinguishable from this one. The cases generally fall into three categories: (1) they do not involve APA claims; (2) if they involve APA claims, they were brought within six years of the issuance of the challenged regulations; or (3) if they involve APA claims and were brought outside the statute of limitations, they satisfy the injury exception to the statute of limitations because the plaintiffs had standing.

To start, *Akins*, 524 U.S. at 20, dealt only with a FECA challenge—the appropriate statutory vehicle to challenge the Commission's decision rather than an APA challenge—and the

Court found an injury where the organization at issue failed to disclose campaign related contributions at all. But here, the Court already determined that Plaintiffs do not have standing under FECA. Op. on Mot. for Summ. J., ECF No. 46. It remains undisputed that CTR publicly disclosed every expenditure, down to the dollar. *Id*. at 4. Unlike the plaintiffs in *Akins*, Plaintiffs here are able "to obtain information" that would "help them . . . evaluate candidates for public office." *Id*. at 21.

While plaintiffs appear to rely on *CREW 2018*, 904 F.3d at 1018 for the proposition that the Court can find that they have standing to bring their APA claim even though they lacked standing to bring their FECA claim, *see* Pls.'' Supp. Br., ECF No. 50 at 29, *CREW 2018* does not stand for that proposition at all. The plaintiff in *CREW 2018* did not abandon its FECA challenge; the plaintiff had standing to bring it and won. Indeed, the court specifically noted that the plaintiff's informational injury persisted, and that supported the APA claim. *CREW 2018,* 904 F.3d at 1018.

Plaintiffs' reliance on *Shays III*, 528 F.3d at 923 and *Van Hollen,* 851 F. Supp. 2d at 78, is unavailing here. In both cases, plaintiffs challenged regulations within six years of their promulgation. *See Complaint, Shays v. FEC*, No. 1:06-cv-01247 (D.D.C. July 11, 2006) (challenging regulations adopted in 2006); *Compare Van Hollen*, 851 F. Supp. 2d at 75 ("On December 26, 2007, the FEC promulgated the new regulation, 11 C.F.R. § 104.20, which is at issue in this suit.") *with* Compl., *Van Hollen v. U.S. Fed. Elec. Comm.*, No. 11-cv-00766, 2011 WL 9203740 (D.D.C. April 21, 2011). Thus, although plaintiffs needed to establish standing to facially challenge the regulations, they did not need to prove the additional burden attendant with section 2401(a), specifically that they suffered an as-applied injury. Plaintiffs cannot simply pluck a potential consequence of the challenged regulations out of the air and call it an injury after the statute of limitations has already expired; section 2401(a) strictly prohibits such a claim. It does

not matter for this Court's analysis that the plaintiffs in *Shays III* and *Van Hollen* suffered from general information injuries, because those cases facially challenged regulations within the timeframe Congress contemplated.

Finally, Plaintiffs' reliance on *CREW 2017*, 243 F. Supp. 3d at 101, is inapposite. There, the court focused on the "effect" of the application of the rule to plaintiffs. *Id*. at 101-02. The court found that the plaintiffs were unable to obtain the information they sought and dismissed the defendant's argument that the plaintiff lacked standing. *Id*. Here, in contrast, this Court has already held that Plaintiffs do not lack any information and thus do not have standing. *See* Op. on Mot. for Summ. J., ECF No. 46.

Ultimately, Plaintiffs have alleged the same injury for their facial APA challenge that they alleged for their FECA claim. This Court has already ruled on the matter, finding that no injury exists because Plaintiffs have not been denied information supporting an informational or organizational injury. *Id.*; *see also Free Speech for People*, 442 F. Supp. 3d at 341 n.6. Because they cannot meet their burden of establishing an injury caused by the FEC's purported application of the rule they challenge, Plaintiffs cannot rely on the second exception to the statute of limitations in order to bring their APA claim. *P & V Enters.*, 466 F. Supp. 2d at 143 ("The plaintiffs have not cited, and this Court cannot find, any Circuit precedent to support the proposition that a facial challenge to a regulation may be brought outside of the statutory limitations period if it is unaccompanied by an as-applied challenge or an appeal of a petition for amendment or rescission that has been denied."). Like their FECA claim, Plaintiffs' purported APA challenge must be dismissed.

CONCLUSION

Because Plaintiffs lack Article III standing and the Court lacks jurisdiction over Plaintiffs' APA claim, Defendant-Intervenors' Motion for Summary Judgment should be granted in full.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, that I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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