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
455 Massachusetts Ave., NW
Ste. 600
Washington, D.C. 20001

Proposed
Defendant-Intervenors.

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

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

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AIPAC	American Israel Public Affairs Committee
APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act
CLC	Campaign Legal Center
CTR	Correct the Record
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971
HFA	Hillary for America
MUR	Matter Under Review

INTRODUCTION

Defendant-Intervenors Hillary for America ("HFA") and Correct the Record ("CTR") hereby respectfully submit this supplemental memorandum in further support of their motion for summary judgment. This Court should grant summary judgment in favor of Defendant-Intervenors because Plaintiffs do not have standing under the Administrative Procedure Act ("APA") to bring "as-applied" or "facial" challenges to the FEC's longstanding interpretation of 11 C.F.R. §§ 100.26, 109.20, and 109.21 (collectively, the "Coordination Regulations") related to the treatment of input costs for internet activity.

With respect to their as-applied challenge, Plaintiffs have conceded, as they must, that their "standing to bring their APA claim . . . rests on the same theories of standing as the FECA [Federal Election Campaign Act of 1971, as amended] claim." Pls. MTD Opp. at 15 n.6. This Court has already held that the "theories of standing" underlying Plaintiffs' FECA claim are insufficient. *See* ECF Nos. 45, 46. Moreover, the APA provides no independent basis for jurisdiction and thus cannot supply the elements that were missing from Plaintiffs' Article III standing to bring a FECA claim. Just as Plaintiffs lack the constitutionally-required injury to bring their FECA claim, they lack standing to bring an APA claim, too.

Plaintiffs' "facial" APA claim asks this Court to invalidate the Commission's longstanding interpretation of the Coordination Regulations on a conjectured theory of injury that assumes Plaintiffs' worst-case scenarios will eventually come to pass. This Court should reject Plaintiffs' claim, because there is no evidence in the record of any actual or imminent injury, only factually

unsupported speculation. Plaintiffs clearly lack Article III standing, and this Court should grant Defendant-Intervenors' motion for summary judgment in full.[1]

BACKGROUND

On December 2, this Court granted Defendant-Intervenors' motion for summary judgment on Count I of Plaintiffs' Amended Complaint, which alleged that the FEC's decision to dismiss Plaintiffs' administrative complaint in Matter Under Review ("MUR") 7146 was arbitrary, capricious, and contrary to law in violation of 52 U.S.C. § 30109(a)(8)(A). The Court found that Plaintiffs lacked standing to bring the FECA claim alleged in Count I. *See* ECF Nos. 45, 46.

Now under scrutiny is Count II of Plaintiffs' Amended Complaint, which, according to Plaintiffs, contains two types of claims under the APA: (1) a "facial" APA claim, alleging that the FEC's construction of the Coordination Regulations as applied to internet communications is arbitrary, capricious, an abuse of discretion, and contrary to law, *see* Am. Compl. ¶ 112; and (2) an as-applied challenge, in which Plaintiffs claim that the controlling Commissioners' reliance on the same construction of the Coordination Regulations to find no "reason to believe" in MUR 7146 is arbitrary, capricious, an abuse of discretion, and contrary to law. *Id.* ¶ 113. Because Plaintiffs lack standing to bring these claims, too, this Court should grant Defendant-Intervenors' motion for summary judgment in full.

[1] Given the limited scope of the supplemental briefing ordered by the Court, *see* ECF No. 46, this memorandum does not address the merits of Plaintiffs' APA claim. If the Court reaches the merits of that claim—and it should not, because Plaintiffs lack standing—it should grant summary judgment in favor of Defendant-Intervenors for the reasons set forth in Defendant-Intervenors' summary judgment briefing. *See* ECF Nos. 38-1 at 27-55, 44 at 11-29.

LEGAL STANDARD

To demonstrate Article III standing, a plaintiff bears the burden of specifically establishing that: "(1) [the plaintiff] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). "Further, in order to secure judicial review under the APA, the plaintiff must satisfy the additional requirement of prudential standing." *American Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 95 (D.D.C. 2000). The D.C. Circuit has cautioned that, in cases like this one, where the plaintiffs' "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult" to prove. *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (quoting *Lujan*, 504 U.S. at 562) (emphasis in original). A "deficiency on any one of the three prongs suffices to defeat standing." *Citizens for Resp. and Ethics in Wash.* ("*CREW*") *v. FEC*, 799 F. Supp. 2d 78, 85 (D.D.C. 2011) (quoting *U.S. Ecology, Inc. v. U.S. Dept. of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000)).

The APA grants no independent subject-matter jurisdiction over challenges to final agency action; plaintiffs bringing such claims must still rely on a separate substantive statute to establish jurisdiction, and they must still have Article III standing. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977). Because Plaintiffs in this case claim an injury resulting from the deprivation of information allegedly required to be disclosed under FECA, they must prove standing under FECA in order to have standing to sustain their APA claim on summary judgment.

ARGUMENT

Plaintiffs lack standing to bring their APA claims for several reasons. First, Plaintiffs cannot use the APA simply to make an end-run around FECA and obtain the same relief they sought from FECA's judicial review provisions. *See* 5 U.S.C. § 704; *CREW v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017). Second, Plaintiffs must establish an informational injury under FECA to have standing to sue under the APA, and they have utterly failed to do so. With respect to their as-applied APA claim, this Court has already found that Plaintiffs failed to establish informational injury in the context of MUR 7146. They do not lack any factual information; they seek only to have the law enforced. Plaintiffs' facial APA challenge—which still requires them to prove that they have suffered or will suffer a concrete, imminent informational injury under FECA—must be dismissed because it is far too speculative to be cognizable. Each of these arguments is discussed in further detail below.

I. FECA provides the exclusive avenue for Plaintiffs to seek review of the FEC's decision to dismiss the administrative complaint in MUR 7146.

To the extent Plaintiffs' APA claim seeks the same relief as their FECA claim—that the Court review and reverse the FEC's dismissal of their administrative complaint because of the Plaintiffs' contention that the Commissioners' interpretation of the Coordination Regulations as applied in MUR 7146 was arbitrary, capricious, or contrary to law—it is barred by FECA. *See* Pls.' Mot. for Summ. J. at 51, ECF No. 35.

As discussed extensively in Defendant-Intervenors' prior briefing, judicial review of final agency action is available under the APA only where such action is "made reviewable by statute" and there is "no other adequate remedy in a court." 5 U.S.C. § 704.[2] Courts in this Circuit have

[2] *See also, e.g.*, Def.-Int. Mot. for Summ. J., ECF No. 38-1 at 53-55.

repeatedly held that FECA provides an adequate remedy at law and is the exclusive vehicle for challenging the FEC's decision to dismiss an administrative complaint. *See* ECF No. 38-1 at 43-45; *see also CREW*, 243 F. Supp. 3d at 104 (dismissing counts seeking relief under the APA because the relief sought was "precisely the relief sought by the plaintiffs [under FECA]," and "the APA is not intended to 'duplicate existing procedures for review of agency action'") (quoting Bowen v. Massachusetts, 487 U.S. 879, 903 (1988)).

When, as here, Plaintiffs lack standing to challenge the FEC's dismissal under FECA, they cannot simply "make an end run around the [FECA] scheme established by Congress" by bringing a duplicative claim under the APA. *CREW v. FEC*, 363 F. Supp. 3d 33, 44 (D.D.C. 2018). To the extent their APA claim seeks the same relief as their FECA claim (which is precisely the case here), it is precluded as a matter of law and should be dismissed. *See CREW*, 243 F. Supp. 3d at 104-105 (dismissing "the portions" of two counts "seeking relief under the APA").

II. Plaintiffs lack standing to bring their APA claim.

A. The APA does not confer independent subject-matter jurisdiction.

As the Supreme Court held over forty years ago, the APA does not independently grant federal courts subject-matter jurisdiction over challenges to final agency action. *See Califano*, 430 U.S. at 107; *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 183 (D.C. Cir. 2006) (explaining the APA "is not a jurisdiction-conferring statute"); *Rasmussen v. United States*, 421 F.2d 776, 779 (8th Cir. 1970) ("It is quite clear from the text of the APA that it alone will not supply standing to obtain judicial review."). Plaintiffs alleging a violation of the APA must accordingly rely on a separate substantive statute to establish jurisdiction. *See, e.g.*, *Trudeau*, 456 F.3d. at 185 ("[B]ecause the APA neither confers nor restricts jurisdiction, we must still determine whether some other statute provides it."). This mandate comes from the text of the APA itself, which states:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ***within the meaning of a relevant statute***, is entitled to judicial review thereof." 5 U.S.C. § 702 (emphasis added). Notably, the D.C. Circuit has firmly rejected attempts to "in effect delete" that precise phrase from the APA when plaintiffs have sought to anchor jurisdiction under the APA alone. *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955).

For that reason, when plaintiffs allege violations of the APA and claim jurisdiction based on informational standing, courts turn to the substantive underlying statute the plaintiffs claim has been violated to determine whether it confers a right to the information plaintiffs allegedly seek. In *Center for Biological Diversity v. Bernhardt*, 442 F. Supp. 3d 97 (D.D.C. 2020), for example, the plaintiffs alleged violations of both the Endangered Species Act and the APA and claimed an informational injury. Because the Court found the substance of the Endangered Species Act did not support Plaintiffs' alleged informational injury, and the plaintiffs had alleged no unique harm arising from the claimed violation of the APA, the court found the plaintiffs lacked standing to pursue either of their claims, dismissing both. *Id.* at 107, 114. Similarly, in *Electronic Privacy Information Center ("EPIC") v. Presidential Advisory Commission on Election Integrity*, 878 F.3d 371 (D.C. Cir. 2017), the plaintiffs alleged a violation of the APA, but the underlying statute plaintiffs alleged was violated was Section 208 of the E-Government Act of 2002. *Id.* at 397. Because the Court ultimately found that Section 208 of the E-Government Act did not provide a basis for the plaintiffs' alleged informational injury, the court found the plaintiffs lacked standing to pursue their APA claim. *Id.* at 378.

B. Plaintiffs lack standing to bring an "as-applied" APA claim because they lack standing under FECA.

Plaintiffs' alleged informational injury must be considered in the specific context of FECA—the statute from which Plaintiffs' alleged lack of information arises. Plaintiffs themselves

acknowledge this fact, as they concede that their "standing to bring their APA claim . . . rests on the same theories of standing as the FECA claim." Pl. Mot. for Summ. J. Reply at 5. This Court has already held that 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* Op. on Mot. for Summ. J. And for good reason: to prove informational injury under Article III, a "plaintiff must show that (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure. *EPIC*, 878 F.3d at 378. Courts do not permit plaintiffs to allege and establish informational injuries as a matter of course; rather, "[i]nformational standing arises 'only in very specific statutory contexts' where a statutory provision has 'explicitly created a right to information.'" *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 97 (D.D.C. 2000) (quoting *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 502 (D.C. Cir. 1994)). Because Plaintiffs do not have standing merely to learn whether a violation of the law has occurred, which is what they seek here, they plainly lack standing under both FECA and the APA as applied to this case.

Both substantively and procedurally, this case is remarkably similar to *Free Speech for People v. FEC*, in which the plaintiffs challenged the FEC's dismissal of their administrative complaint under FECA and the APA. There, the court, after finding that the plaintiffs had not suffered an informational injury under FECA, properly concluded it "need not reach" the plaintiffs' arguments on their APA claim because the plaintiffs simply lacked standing to proceed. 442 F. Supp. 3d 335, 341 n. 6 (D.D.C. 2020). Here, too, because Plaintiffs conclusively failed to establish an informational injury under FECA, and because Plaintiffs alleged no other injury

uniquely attributable to their claimed violation of the APA, their claim under the APA must be dismissed.

At bottom, what Plaintiffs want is for their interpretation of FECA to be enforced. 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 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"); *Arpaio v. Obama*, 27 F. Supp. 3d 185, 202 (D.D.C. 2014) (explaining a plaintiff's disagreement with a law which "causes [him] to expend resources in a manner that he deems suboptimal" does not state an injury-in-fact), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015). 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." *Bernhardt*, 442 F. Supp. 3d at 111.

C. Plaintiffs lack standing to bring a "facial" APA challenge.

Plaintiffs also bring a "facial" challenge under the APA, alleging that they will suffer a "broader informational injury" presumably "because, in their opinion, the Commissioners' announced view of the law *could* affect their right to disclosure outside the context of this particular administrative proceeding." Op. at 21 (emphasis added). As with their FECA claim, Plaintiffs fail to establish that they have suffered or will imminently suffer an informational injury-in-fact. Their supposed "broader informational injury" suffers from at least two defects. First, Plaintiffs have failed to provide any evidence of such an injury, or even allege it with any specificity in their

complaint. Second, Plaintiffs' "broader informational injury" is not imminent and is instead too speculative to be cognizable under Article III.

1. Plaintiffs have failed to prove, or even allege, a "broader informational injury."

At summary judgment, Plaintiffs must carry the heavy burden of setting forth specific evidence that establishes *each element* of Article III standing and disposes of any remaining genuine issues of material dispute. *See* Fed. R. Civ. P. 56. Plaintiffs have utterly failed to carry that burden. There is not a single statement in the Amended Complaint alleging that Plaintiffs will suffer any informational injury outside the scope of MUR 7146 as a result of the Commissioners' interpretation of the Coordination Regulations. Plaintiffs' Amended Complaint never once articulates what Plaintiffs' "broader informational injury" might be: when it will occur, how it will occur, or how and to what extent it will cause a concrete harm to Plaintiffs Kelley and CLC.

Instead, the Amended Complaint focuses entirely on the meritless informational injury Plaintiffs claimed to have suffered as a result of the Commission's dismissal of their administrative complaint against HFA and CTR:

> Plaintiffs have suffered as a result, because they, as well as the public, have been deprived of disclosure about the scale and scope of CTR's expenditures coordinated with the Clinton campaign—which, in turn, has deprived plaintiffs of key information about the sources of the Clinton campaign's financial support, as well as the size and purposes of the campaign's expenditures").

Am. Compl. ¶ 11.

> Plaintiffs' inability to obtain required disclosure information about the extent and character of the coordination between CTR and the Clinton campaign, "transaction by transaction," is a central element of the relief sought here—not a justification for dismissal.

Id. ¶ 95. In fact, only four of the 113 paragraphs in Plaintiffs' Amended Complaint relate to their "facial" APA claim, and none articulate the broader injury Plaintiffs now claim they will suffer as

a result of the FEC's longstanding interpretation of the Coordination Regulations. *See id*. ¶¶109-112. Defendant-Intervenors should be granted summary judgment on this basis alone.

2. Plaintiffs' contemplated injury is based entirely on conjecture and speculation.

Even if this Court were to find that Plaintiffs have alleged an informational injury to support their facial APA challenge, the injury would be far too speculative to be cognizable. A hallmark principle of Article III standing is that a plaintiff must have suffered (or imminently will suffer) an "injury in fact" which is concrete, particularized, and actual or imminent, not conjectural, speculative, or hypothetical. *Lujan*, 504 U.S. at 562.

In *Lujan*, the seminal case on this issue, the Supreme Court held that the respondents lacked standing because the injuries they articulated—that administrative action might deprive them of the opportunity to see endangered species in other countries in the future—was too conjectural and hypothetical to satisfy Article III's concrete and particularized injury-in-fact requirement. *Id*. Consistent with this, and in the specific context of facial challenges to regulations, courts have rejected claims founded on purely speculative harm. *See, e.g.*, *EMILY's List v. FEC*, 2008 U.S. Dist. LEXIS 58046, *84 (D.D.C. July 31, 2008) (stating "[i]n the context of considering a challenge to a state election law on its face, rather than in the context of an actual election, the Supreme Court has recently noted that '[i]n determining whether a law is facially invalid, [the Court] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.'"). Facial challenges must be supported by concrete evidence of injury—not speculative, worst-case assumptions premised on third-party actions.

Future injury can sometimes serve as a basis for standing, but it must be concrete, particularized, and imminent. "An actual or imminent injury is certainly impending and immediate—not remote, speculative, conjectural, or hypothetical." *People for the Ethical*

Treatment of Animals v. U.S. Dept. of Agric., 797 F.3d 108 (D.C. Cir. 2015). To have standing based on a future injury, "threatened injury must be certainly impending to constitute injury in fact" or there must be a "substantial risk that the harm will occur." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). Courts in this Circuit have routinely rejected as insufficient allegations of standing similar to those articulated by Plaintiffs here, on the grounds that they are "overly speculative" because they are based on "links which are predictions of future events (especially future actions to be taken by third parties)." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (citation and quotation marks omitted). For example, in *Judicial Watch v. FEC*, 293 F. Supp. 2d 41, 48 (D.D.C. 2003), the plaintiff argued that he suffered an informational injury because he was unable to use information from an FEC investigation to amass a defense against a possible future enforcement action. The court found that this purported injury was "speculative at best" because the plaintiff had "put forth no evidence that an investigation of his contributions is ongoing; he merely state[d] that one [wa]s *possible*. Future, speculative injury does not satisfy the test for standing as articulated by the Supreme Court in *Lujan*." *Id*. at 48.

As in *Judicial Watch*, Plaintiffs' contemplated injury falls short of this clear line. In all of the extensive briefing in this case, Plaintiffs have barely mentioned any broader informational injury that might underpin their facial APA claim. In the few instances where Plaintiffs have done so, the asserted injury is clearly neither concrete nor imminent. It is instead based entirely on hypothetical circumstances that depend on the actions of third parties over which Plaintiffs have no control. For example, Plaintiffs' opposition to the motion to dismiss uses the following example:

> Indeed, the abuses sanctioned by this construction of the rules go far beyond even the egregious scheme alleged here. For example, **it would appear to permit a "dark money" nonprofit, even one funded by foreign nationals, to mount an undisclosed $100**

> **million public relations campaign in full coordination with the federal candidate it seeks to elect**—avoiding the FEC's coordination rules on the pretext that some small portion of the effort will appear online.

ECF No. 27 at 45 (emphasis added). But to offer such a hypothetical is not the same as proving the occurrence, or the imminent occurrence, of any actual injury. Furthermore, there is no evidence that the injuries Plaintiffs have imagined in this case are "certainly impending" nor is there any basis to conclude that there is a "substantial risk that harm will occur" to Plaintiffs.

Notably, Plaintiffs' facial APA claim acknowledges that the Commissioners' interpretation of the Coordination Regulations is longstanding and "has been the Commission's consistent position since the 2006 internet rulemaking." Am. Compl. ¶ 110. In other words, the Commissioners have interpreted the Coordination Regulations in a manner that allows for "gross abuse" of the campaign finance laws for the past fourteen years. Yet, the *only* example of "gross abuse" or concrete "harm" Plaintiffs can point to is MUR 7146, 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. at 13. Simply put, Plaintiffs' alleged "harm" amounts to nothing more than a series of worst-case assumptions that the record fails to support.

When courts have found a valid informational injury under FECA, they have done so on facts entirely distinguishable from those involved in this case. In *FEC v. Akins*, 524 U.S. 11, 13 (1998), for example, the plaintiffs sought access to information about the AIPAC's "membership, contributions, and expenditures"—information the plaintiffs would not have access to if the Commission determined that that AIPAC was not a "political committee." Plaintiffs were unable to obtain concrete information such as "names and addresses of contributors" and "lists of donors

giving in excess of $200 per year," among other actionable information. *Id*. at 14-15. Under these circumstances, the Supreme Court concluded the plaintiffs' inability to obtain this information, and consequent inability to evaluate federal candidates for office who accepted contributions from AIPAC, amounted to a genuine injury-in-fact. *Id.* at 20-21.

Similarly, in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), a member of Congress challenged the FEC coordination regulation known as the "90/120-day rule" because it only prohibited coordinated advertisements referring to a clearly identified candidate from running in the candidate's jurisdiction within 90 days (for House and Senate candidates) or 120 days (for Presidential and Vice Presidential candidates) of an election. Outside of the 90/120-day windows, the challenged regulation merely prohibited coordinated advertisements that distributed candidate materials or expressly advocated the election or defeat of a clearly identified candidate. *Id.* at 922. Shays argued that the rule should be stricter: the 90/120-day windows "were unsupported by the evidence, violating the APA, and that the lax standard applying outside the windows was both unexplained and contrary to BCRA's purpose." *Id*. The D.C. Circuit applied *Akins* to find that Shays had standing because the regulation he challenged meant that presidential candidates were not required to report certain expenditures as contributions, which resulted in a concrete "deni[al] [of] information" that would make it more difficult for him to "evaluate candidates for public office." *Id*. at 923. In *Shays* though, it was *certain*, not merely speculative, that communications were actually being distributed outside of the 90/120-day window that were not being reported as "contributions." *Id*. at 922. Indeed, the FEC defended the 90/120-day windows on the ground that "the record showed that the *vast majority* of candidate advertising occurred within those periods [90 and 120 days before an election]," not that unreported communications outside of those windows were not occurring. *Id*. (emphasis added).

By contrast, Plaintiffs in this case have not proven that they have been deprived, or will imminently be deprived, of any information required to be disclosed by FECA. Plaintiffs merely speculate that such an injury could occur in a number of conjectural, doomsday scenarios that have no basis in the record.[3] Plaintiffs' reliance on the fact that non-profit organizations and individuals spend money to influence elections, *see* Pl. Mot. for Summ. J. at 54 n.7, only highlights the speculative nature of their injury. That spending has no bearing on such groups' proclivity to use unpaid online activity to skirt the coordination rules.

At this point, the record in this case is closed. The only remaining issue is a legal question about whether Plaintiffs have proven standing to bring their APA claim. Plaintiffs cannot rely on hypothetical scenarios in lieu of concrete evidence of injury at summary judgment. Yet, even after several rounds of briefing, Plaintiffs have proved nothing more than a "mere interest" in a completely speculative problem. *See United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 689 n.14 (1973). Informational harm to plaintiffs is simply not "certainly impending." *Clapper*, 568 U.S. 432. Plaintiffs have not proven the actual or imminent informational injury required for standing.

[3] There are a number of regulatory provisions that block the march of Plaintiffs' imagined parade of horribles. For example, Plaintiffs caution that foreign money will seep into U.S. elections, but there is a separate ban on foreign nationals, directly or indirectly, making expenditures. 52 U.S.C. § 30121(a)(1). BCRA also prohibits federal candidates and political parties from "directing" or "controlling" soft money and soft money organizations. *Id.* § 30125(a), (e). Further, Plaintiffs act as if all spending will migrate online where it will be totally unregulated. In reality, the Commission subjects most Internet communications to the coordination regulations, not to mention all television and radio ads, and all other forms of "public communications," which continue to occur.

III. Plaintiffs have not proven that they have suffered or will suffer a cognizable or imminent harm to support their standalone APA claim.

The second prong of the informational injury test turns the Court's attention to the relationship between the plaintiff's asserted informational injury and "type of harm Congress sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017); *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). At summary judgment, plaintiffs must prove particularized harm by affidavit or with "specific facts" in the record. *Lujan*, 504 U.S. at 561. This test spells doom for Plaintiffs, because even if Plaintiffs had proven a concrete, identifiable informational injury to support their standalone APA claim—and they have not—they would still lack standing because they have not proven a concrete, cognizable Article III harm as a result of any informational injury.

Plaintiffs did not submit any affidavits in support of their motion for summary judgment, *See* ECF No. 35, and the declarations they submitted in response to Defendant-Intervenors' motion to dismiss are woefully inadequate to prove standing to bring a standalone facial APA claim. *See* ECF Nos. 27-1, 27-2. As with Plaintiffs' complaint, neither declaration provides any specificity about the informational injury Plaintiffs would suffer outside of the denial of their complaint in MUR 7146.

A. Plaintiff Catherine Hinckley Kelley

Plaintiff Kelley's declaration contains one vague sentence about the informational injury she *could* suffer: she believes that the FEC's failure to investigate MUR 7146 has "created a roadmap for other campaigns and political committees to evade disclosure laws in a similar fashion." ECF No. 27-1 at ¶ 9. This unsupported conjecture suffers from numerous flaws. First, Kelley's declaration does not state that she is likely to suffer an injury as a result of the FEC's

interpretation of the Coordination Regulations, only that she could suffer injury as a result of the "FEC's failure to investigate the allegations in [MUR 7146]." *Id*. These allegations support an as-applied challenge (which Kelley also lacks standing to bring), not a facial challenge. Second, Kelley's declaration never states that her injury is imminent or that she will be deprived of information that would inform how she would cast her vote.

B. Plaintiff CLC

Plaintiff CLC is required to demonstrate that its alleged deprivation of information has caused or will imminently cause a concrete and particularized harm to the organization. The D.C. Circuit "has distinguished between organizations that allege that their activities have been impeded from those that merely allege that their mission has been compromised." *Food & Water Watch, Inc.*, 808 F.3d at 919. To that end, "an organization does not suffer an injury in fact where it 'expend[s] resources to educate its members and others' *unless doing so* subjects the organization to 'operational costs beyond those normally expended.'" *Id*. at 920 (alteration in original) (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). Just as CLC's informational injury is completely speculative, so too is the notion that it would be required to divert resources to counteract any such injury. As explained in Defendant-Intervenors' prior briefing, CLC has not offered any proof that researching information about an organization's or candidate's unreported activity would be outside of the scope of its routine activities or create additional operational costs that would divert resources from other activities. *See, e.g.*, ECF No. 38-1 at 23-26.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant-Intervenors' Motion for Summary Judgment in full and deny Plaintiffs' Motion for Summary Judgment.

December 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020, 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.

By: /s/ *Marc Erik Elias*

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