IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21,	)	
Plaintiffs,	)	Case No. 1:20-cv-00730
v.	)	Hon. Christopher R. Cooper
FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
RIGHT TO RISE SUPER PAC, INC.	)	
Proposed Intervenor-Defendant.	)	

/

PROPOSED DEFENDANT INTERVENOR RIGHT TO RISE SUPER PAC, INC.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND MEMORANDUM IN SUPPORT

Right to Rise Super PAC, Inc., respectfully moves this Court to dismiss Plaintiffs' complaint for lack of standing under Rule 12(b)(1) and, with respect to Count II (the Administrative Procedures Act claim), for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A supporting memorandum of points and authorities and a proposed order accompany this motion.

Dated: June 5, 2020 Respectfully Submitted,

DICKINSON WRIGHT PLLC

/s/ *Charles R. Spies*
Charles R. Spies, Bar ID: 989020
Jessica G. Brouckaert*
1825 Eye Street, N.W., Suite 900
Washington, D.C. 20006
Telephone: (202) 466-5964
Facsimile: (844) 670-6009
cspies@dickinsonwright.com

jbrouckaert@dickinsonwright.com

Robert L. Avers*
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com

John J. Bursch*
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Attorneys for Proposed Defendant-Intervenor

**Pending Admission*

REQUEST FOR HEARING

Intervenor-Defendant Right to Rise Super PAC, Inc., respectfully requests a hearing on its Motion to Dismiss.

/s/ Charles R. Spies
Charles R. Spies, Bar ID: 989020

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 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.

/s/ Charles R. Spies
Charles R. Spies (Bar ID: 989020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and DEMOCRACY 21,	)	
Plaintiffs,	)	Case No. 1:20-cv-00730
v.	)	Hon. Christopher R. Cooper
FEDERAL ELECTION COMMISSION,	)	
Defendant,	)	
RIGHT TO RISE SUPER PAC, INC.	)	
Proposed Intervenor-Defendant.	)	

/

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RIGHT TO RISE SUPER PAC, INC.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Miscellaneous

INTRODUCTION

Right to Rise Super PAC, Inc. seeks dismissal of the complaint filed by Plaintiffs Campaign Legal Center and Democracy 21 under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Plaintiffs complaint should be dismissed under Rule 12(b)(1) because they fail to meet their burden of demonstrating standing, and should also be dismissed under Rule 12(b)(6) because both counts of their complaint fail to state a claim upon which relief may be granted.

Plaintiffs lack standing for two reasons. First, Plaintiffs allege an "informational" injury—a legal determination that Right to Rise and the other respondents in MUR 6927 violated FECA disclosure requirements. Such an injury requires proof that Plaintiffs were entitled to information which they can use to assist their voting. But all contributions and spending at issue here were publicly disclosed in 2015 and Plaintiffs do not seek information that FECA requires to be disclosed, and the elections to which any of Plaintiff's requested information would pertain are long since past. Second, Plaintiffs allege organizational standing. But they allege no concrete and particularized injury, such as direct harm to their programmatic activities or a depletion of their resources.

Plaintiffs' Administrative Procedures Act claim (Count II) also fail on the merits. The FECA displaces any APA claim, and Plaintiffs have pleaded a standalone FECA claim in their complaint (Count I).

For these reasons, and as further explained below, Right to Rise respectfully requests that this Court grant the instant motion and dismiss Plaintiffs' complaint with prejudice.

BACKGROUND

I. Right to Rise

Right to Rise was a Super PAC that independently supported Governor John Ellis "Jeb" Bush prior to and during his campaign for president during the 2016 election cycle, and as a

committee registered with the Commission publicly reported its contributions and expenditures. Right to Rise provided independent support by raising a war chest and then making independent expenditures, such as television ads, direct mail, radio ads, and billboards in support of Governor Bush or in opposition to his opponents. Right to Rise is registered as a non-profit corporation with the District of Columbia Department of Consumer and Regulatory Affairs, and registered with the Commission as an independent expenditure committee under *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

II. Plaintiffs' administrative complaints

In March 2015, Plaintiffs filed an administrative complaint with the Commission alleging that Governor Bush and "Right to Rise PAC" violated FECA, the Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101–30126, 30141–30146, by failing to comply with FECA's "testing the waters" restrictions, candidate-contribution limits, and candidate registration and reporting requirements. An entity separate from and unrelated to Right to Rise, "Right to Rise PAC" was a qualified PAC registered with the Commission, organized to support numerous candidates, and subject to federal contribution limits. In their March 2015 administrative complaint, Plaintiffs asked the Commission to find reason to believe that Governor Bush violated FECA, investigate the alleged violations, and impose sanctions against the respondents. "Right to Rise PAC" highlighted the distinction between it and Right to Rise when responding to Plaintiffs' initial administrative complaint; Plaintiffs then filed a second administrative complaint in May 2015 naming Right to Rise Super PAC, Inc. as a respondent.

In their second administrative complaint, filed in May 2015, Plaintiffs alleged that Governor Bush and Right to Rise violated FECA by failing to comply with the "testing the waters" restrictions, candidate-contribution limits, and so-called "soft money" prohibitions. Plaintiffs also alleged that Governor Bush established, financed, maintained, and controlled Right to Rise in

violation of FECA. Again, Plaintiffs asked the Commission to investigate the alleged violations and impose sanctions against the respondents—including Right to Rise.

Plaintiffs' March 2015 and May 2015 administrative complaints were collectively designated by the Commission as Matter Under Review ("MUR") 6927. As Right to Rise explained when it responded to MUR 6927 before the Commission, there was no legal basis for either administrative complaint. For example, the majority of the allegations in the administrative complaints rely on the false premise that Governor Bush was a candidate for federal office during the relevant time. But Governor Bush was not a candidate for federal office at that time under FECA or corresponding regulations, so FECA's registration and reporting requirements had not yet been triggered. Plaintiffs apparently disagree with the fact that Governor Bush was not a candidate at that time as FECA defines the term. And, as further explained below, their alleged informational injury fails to satisfy Article III standing requirements because their alleged informational deprivation is contingent on a legal determination by the Commission that Governor Bush was a candidate under FECA; the Commission has never made such a determination.

Likewise, Right to Rise explained that the complaints were bereft of evidence that Governor Bush used any Right to Rise funds for "testing the waters" activities, and that Governor Bush was not subject to the soft money ban because, as previously discussed, he was not a candidate under FECA at that time. Indeed, just one month before Plaintiffs filed their initial administrative complaint, the Commission acknowledged in a separate manner—involving Hillary Clinton and a Super PAC advocating for her—that its regulations concerning a candidate's interaction with independent expenditure-only committees such as Right to Rise—*i.e.*, Super PACs—do not extend to *potential* candidates who have made no decision to run for federal office

and remain as private citizens. MUR 6775, Ready for Hillary PAC, Factual and Legal Analysis, Feb. 12, 2015.

Right to Rise asked the Commission to dismiss the matter. As is its prerogative, the Commission has yet to take public action on MUR 6927.

III. The Commission

The Commission is an independent agency vested with statutory authority over FECA's administration, interpretation, and civil enforcement. To that end, Congress granted many authorities to the Commission, including the authority to: "administer, seek to obtain compliance with, and formulate policy with respect to [FECA]," 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out [FECA]," *id*. §§ 30107(a)(8), 30111(a)(8); and to investigate alleged violations of FECA, *id*. § 30109(a)(1)-(2). Congress also granted the Commission with "exclusive jurisdiction" to commence civil enforcement actions in the United States district courts for FECA violations. *Id*. §§ 30106(b)(1), 30109(a)(6).

Under FECA, the Commission itself consists of six voting members "appointed by the President, by and with the advice and consent of the Senate," no more than three of which "may be affiliated with the same political party." *Id*. § 30106(a)(1). As for its official actions, FECA requires that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of [FECA] shall be made by a majority vote of the members of the Commission," with the exception that certain actions, such as enforcement decisions, may only be made with "the affirmative vote of 4 members of the Commission." *Id*. § 30106(c).

FECA allows persons who believe a FECA violation has occurred to file an administrative complaint with the Commission. 52 U.S.C. § 30109(a)(1); 11 C.F.R. § 111.4. Upon reviewing the complaint and any response, the Commission considers whether there exists "reason to believe" that respondent violated FECA. 52 U.S.C. § 30109(a)(2). If at least four Commissioners vote to

find reason to believe the respondent violated, or is about to violate, FECA, the Commission may investigate. *Id*. §§ 30106(c), 30109(a)(2). Likewise, if at least four Commissioners affirmatively vote to find no reason to believe that respondent violated, or is about to violate, FECA, the Commission may dismiss. *Id*. Administrative investigations under these provisions remain confidential until the Commission completes its administrative process. *Id*. § 30109(a)(12).

In the majority of matters, the law is clear and the Commission unanimously agrees whether to find reason to believe a respondent violated FECA. But there are instances when the Commissioners vote in such a way that the Commission deadlocks—meaning that there are not four votes to find reason to believe that a violation occurred, and likewise there are not four votes to dismiss the matter, either. Among the many reasons for such an impasse: Commissioners might not believe that a respondent's actions violate FECA, Commissioners may believe a gray area of law is better resolved with a prospective policy statement, or Commissioners may believe that the questioned conduct is not an enforcement priority. In any event, if the Commission does not find through an affirmative vote of at least four Commissioners reason to believe that a respondent violated FECA within five years of the date of the alleged violation, the Commission may *not* proceed with investigation of, or enforcement against, that respondent. 52 U.S.C. § 30145. Any attempt to proceed with an investigation of, or enforcement against, a respondent without the affirmative vote of at least four Commissioners is contrary to FECA's express language. As a result, such an impasse serves as the functional equivalent of the dismissal of an administrative complaint five years from the date of the alleged violation. 52 U.S.C. § 30145.

IV. Plaintiffs' claims

FECA authorizes a complainant to challenge the Commission's handling of their administrative complaint by filing an action in this Court in two, limited scenarios. The first is if the Commission decides to dismiss their administrative complaint. 52 U.S.C. § 30109(a)(8)(A).

The second is if the Commission fails "to act on [the administrative] complaint during the 120-day period beginning on the date the [administrative] complaint is filed." *Id*. Significantly, this 120-day period is *not* a timetable within which the Commission must resolve an administrative complaint; it is merely a jurisdictional threshold before which the complainant may not file suit. *E.g., FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986) ("unequivocally" rejecting the contention "that [FECA] required the Commission to act within 120 days or within an election cycle.").

Plaintiffs, apparently frustrated that the Commission does not agree with their legal theory or does not consider this matter a priority, filed this suit on March 13, 2020. Plaintiffs allege two counts. In Count 1, Plaintiffs claim that "Defendant's failure to act on plaintiffs' administrative complaint within 120 days of their filing was contrary to law" under FECA § 30109(a)(8). Compl. at ¶ 37, ECF No. 1. In Count 2, Plaintiffs claim the Commission violated the APA, the Administrative Procedure Act, 5 U.S.C. § 706(1), because it "unlawfully withheld and unreasonably delayed agency action" by not acting on the complaints within 120 days of their filing. Compl. at ¶ 39, ECF No. 1.

As of the filing of this motion, the Commission has not filed a responsive pleading, and it is unlikely to do so for lack of four votes to take action.[1] But Right to Rise moved to intervene on June 5, 2020, and it seeks dismissal under Federal Rules of Civil Procedure 12(b)(1) and (6).

[1] The Commission cannot authorize its general counsel to defend a civil suit unless four Commissioners vote to authorize such a defense. 52 U.S.C. § 30106(c). The Commission consisted of only three Commissioners from September 2019 through May 20, 2020. While the Senate recently approved a fourth Commissioner, it remains unlikely the Commission will defend the instant suit, as one of the four Commissioners "took the unprecedented step of refusing to allow the [Commission] to defend itself in court." Caroline Hunter, *How My FEC Colleague is Damaging the Agency and Misleading the Public* (Oct. 22, 2019), https://politi.co/2zRfIJY.

ARGUMENT

Plaintiffs' complaint should be dismissed for lack of jurisdiction and failure to state a claim. Plaintiffs lack Article III standing because they failed to establish any concrete and particularized injury. And FECA precludes Plaintiffs' APA claim because FECA provides a specific and adequate judicial-review provision.

I. Plaintiffs lack standing.

A. Plaintiffs are required to establish Article III standing.

Plaintiffs allege the Commission's handling of their administrative complaints was contrary to law and has deprived them "of full disclosure about the activities undertaken by Bush and his agents to establish [Right to Rise], as well as the nature of the ongoing relationship between [Right to Rise] and the Bush campaign." Compl., ECF No. 1, at ¶¶ 9, 37. Those allegations are false. More important, they are insufficient to show that Plaintiffs have standing.

Federal courts may only decide "actual ongoing controversies." *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (cleaned up). Where a plaintiff lacks standing, there is no such controversy. To that end, Plaintiffs bear the burden of establishing that this Court has subject matter jurisdiction over this case—a burden that includes demonstrating that Plaintiffs have standing. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015); *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 231 (1990).

To survive a motion dismiss challenging standing, Plaintiffs' complaint "must contain sufficient factual matter, accepted as true, to 'state a claim [of standing] that is plausible on its face.'" *Arpaio*, 797 F.3d at 19 (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Plaintiffs "must allege in [their] pleading the facts essential to show jurisdiction," *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936), and "the necessary factual predicate may not be gleaned from the briefs and arguments," *FW/PBS*, 493 U.S. at 235 (cleaned

up). In determining whether Plaintiffs have met their burden to prove standing, this Court "may look beyond the allegations contained in the complaint" to "materials outside the pleadings." *Flores ex rel. J.F. v. District of Columbia*, 437 F. Supp. 2d 22, 28-29 (D.D.C. 2006) (cleaned up).

Further, while "[a]ny person" who believes that FECA was violated may file an administrative complaint with the Commission, 52 U.S.C. § 30109(a)(1), only those administrative complainants with constitutional standing may seek judicial review of the Commission's actions under 52 U.S.C. § 30109(a)(8). Both this Court and the D. C. Circuit consistently hold that plaintiffs cannot rely on FECA alone to satisfy Article III standing requirements when challenging the Commission's treatment of an administrative complaint under 52 U.S.C. § 30109(a)(8). *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997); *Citizens for Responsibility & Ethics in Washington v. FEC*, 799 F. Supp. 2d 78, 85 (D.D.C. 2011) ("*CREW 2011*"); *Judicial Watch, Inc. v. FEC*, 180 F.3d 277 (D.C. Cir. 1999).

To demonstrate Article III standing, Plaintiffs must establish that: "(1) [they] 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 Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). In cases where, as here, plaintiffs' "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, it is substantially more difficult to establish injury in fact. *Common Cause*, 108 F.3d at 417 (cleaned up).

B. Plaintiffs have not suffered a legally cognizable informational injury.

An Article III injury may arise in the form of an informational injury when a statute "'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)). To allege an informational injury sufficient to satisfy the concrete and particularized injury prong of Article III standing, Plaintiffs must allege two things: (1) they have been "directly deprived of information that must be disclosed under a statute," *CREW v. U.S. Dep't of the Treasury, IRS*, 21 F. Supp. 3d 25, 32 (D.D.C. 2014); and (2) the information would be useful to useful to Plaintiffs in voting, *see Common Cause*, 108 F.3d at 418 (administrative complainant must show the information sought "is both useful in voting and required by Congress to be disclosed").

Plaintiffs failed to sufficiently allege informational injury under either element of that test. Plaintiffs seek a legal determination that Right to Rise and the other respondents in MUR 6927 violated FECA, but they do not seek information that FECA requires to be disclosed. Moreover, the information allegedly sought would not help Plaintiffs' voting, as Governor Bush has not been a candidate for office since suspending his presidential campaign more than four years ago on February 20, 2016. So Plaintiffs lack standing, and their complaint should be dismissed.

1. Plaintiffs' administrative complaints seek a legal determination—not to uncover new information.

Plaintiffs have not pled a true informational injury. Plaintiffs allege they suffered an informational injury and are entitled to "full disclosure about the activities undertaken by Bush and his agents to establish Right to Rise Super PAC, as well as the nature of the ongoing relationship between the super PAC and the Bush campaign." Compl., ECF No. 1, at ¶ 9. Plaintiffs further allege that they lack information, for instance, about whether Right to Rise's expenditures should be deemed "coordinated" with the Bush campaign, or whether its contributors "earmarked" their contributions specifically for support of the Bush campaign." *Id*. And Plaintiffs claim they are legally entitled to all that information under FECA. *Id*. But Right to Rise and the other respondents filed public reports and disclosed all information FECA requires.

As just explained, an informational injury for Article III standing purposes requires Plaintiffs to allege they are "directly deprived of information that must be disclosed under a statute." *CREW*, 21 F. Supp. 3d at 32 (D.D.C. 2014); *ASPCA v. Feld Entm't, Inc*., 659 F.3d 13, 23 (D.C. Cir. 2011) (quoting *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006)). So, "the nature of the information allegedly withheld is critical to the [court's] standing analysis." *Common Cause*, 108 F.3d at 417. A plaintiff has suffered no injury and thus has no standing if the relevant statute does not require the information's disclosure or the allegedly withheld information is already available to plaintiff. Both of these points are true here.

To begin, Plaintiffs do not seek new factual information that must be disclosed under FECA, but rather a legal determination from the Commission that Right to Rise or the other respondents violated the law. For example, while Plaintiffs claim that they are deprived of information regarding "the activities undertaken by Bush and his agents to establish Right to Rise Super PAC and the Bush campaign," Compl. at ¶ 9, ECF No. 1, FECA does not require the disclosure of the referenced information, other than the filing of a Statement of Organization, 52 U.S.C. § 30103, and ongoing reports of contributions and expenditures, 52 U.S.C. § 30104, which were filed in compliance with FECA.

Similarly, Plaintiffs allege that they were deprived of information regarding "the nature of the ongoing relationship between [Right to Rise] and the Bush campaign." Compl. at ¶ 9, ECF No. 1. But FECA does not require the disclosure of the relationship between Right to Rise and the Bush campaign, with the exception of expenditures to common vendors—which both Right to Rise and Right to Rise PAC disclosed on their respective reports to the Commission in accordance with 52 U.S.C. § 30104. The media also covered that information in its extensive reporting of the activities of both Right to Rise and the Bush campaign, and Plaintiffs cited those reports

extensively in their administrative complaints. Compl., Ex. A (May 2015 Admin. Compl.) ¶¶ 4-5, 8-9, 11-26, ECF No. 1-1; Compl., Ex. B (March 2015 Admin. Compl.) ¶¶ 4-9, 11-16, 18-21, ECF No. 1-2.

Plaintiffs also allege that they lack information about whether "Right to Rise's expenditures should be deemed 'coordinated' with the Bush campaign." Compl. at ¶ 9, ECF No. 1. That allegation merely underscores what Plaintiffs really seek in this suit: a legal determination by the Commission that Right to Rise and the Bush campaign "coordinated." Right to Rise and the respondents vehemently deny the coordination allegations before the Commission. But the point is that alleged deprivation of a legal determination is not alleged deprivation of information.

Finally, Plaintiffs allege that they are deprived of information regarding "whether [Right to Rise's] contributors 'earmarked' their money specifically for support of the Bush campaign." Compl. at ¶ 9, ECF No. 1. But the only informational tangentially related to that allegation and subject to disclosure is that information relating to contributions and expenditures by Right to Rise—all of which was publicly disclosed in accordance with FECA, 52 U.S.C. § 30104.

It is well-settled that a plaintiff may not allege an informational injury if, as here, it merely seeks a legal determination. *Wertheimer v. FEC*, 268 F.3d 1070, 1074–75 (D.C. Cir. 2001) (no informational standing to pursue a legal determination that expenditures were "coordinated" when all relevant expenditures had been publicly disclosed); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178–79 (D.D.C. 2013) (no informational standing to pursue legal determination that publicly reported expenditures exceeded applicable limitations); *CREW 2011*, 799 F. Supp. 2d at 88–89 (no informational standing to pursue legal determination that publicly reported expenditures were "inkind contributions"). *But see Campaign Legal Center, et al. v. FEC & Hillary for America, et al.*, No. CV 19-2336 (JEB), 2020 WL 2996592, at *6 (D.D.C. June 4, 2020) (finding informational

injury where plaintiffs were not seeking information that under existing rules is already required to be disclosed) (cleaned up). Put another way, Plaintiffs have no legally cognizable interest in learning solely "whether a violation of the law has occurred," *Common Cause*, 108 F.3d at 418, or in having the Commission "get the bad guys," *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013) (internal quotation marks omitted). *See also Common Cause*, 108 F.3d at 418 ("Nothing in FECA requires that information concerning a violation of the Act as such be disclosed to the public. Indeed, even if FECA did require such disclosure, we doubt whether this requirement could create standing. To hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred would be tantamount to recognizing a justiciable interest in the enforcement of the law. This we cannot do.").

Just as in those cases, Plaintiffs seek only legal determinations, such as whether the respondents coordinated in violation of FECA, or whether Governor Bush was a candidate under FECA at the time of the events alleged in the administrative complaints. Plaintiffs do not seek factual information; they're frustrated that there are not four affirmative votes to find reason to believe that Right to Rise violated FECA. The fact that the Commission has not taken public action on MUR 6927 does not confer an informational injury upon Plaintiffs. The information FECA requires to be disclosed has been disclosed, Plaintiffs have not sustained an informational injury, and their complaint must be dismissed for lack of standing.

2. Even if Plaintiffs obtain new information, such information will not be useful in their voting.

In addition to requesting a legal determination rather than information, Plaintiffs cannot show that any new information would be useful in their voting. That lack is fatal, because such a showing is required to demonstrate informational injury sufficient to support judicial review under 52 U.S.C. § 30109(a)(8).

To allege an injury that is concrete and particularized for informational standing under FECA, plaintiffs must establish not only that they failed to obtain information that must be publicly disclosed by statute, but must also establish that "the disclosure they seek is related to their informed participation in the political process." *Nader*, 725 F.3d at 230; *accord Common Cause*, 108 F.3d at 418 (administrative complainant must show that the information sought "is *both* useful in voting *and* required by Congress to be disclosed" (emphasis added)).

Nonprofit corporations like the Plaintiffs that cannot vote, have no members who vote, and cannot engage in partisan political activity, do not suffer a particular injury. *CREW v. FEC*, 475 F.3d 337, 339 (D.C. Cir. 2007) ("*CREW 2007*"). Campaign Legal Center merely seek disclosure "to support its administrative practice…and defend campaign finance," while Democracy 21 seeks disclosure to "carry out...its public education efforts, reports and statements…" and "to assist members of the media with research" both injuries that are neither sufficiently concrete nor particularized to confer standing. Compl. ¶¶ 18, 21. *Nader*, 725 F.3d at 229-30. Lacking a role in voting and disclaiming any intent to be involved in electoral campaigns, it is undisputed that Plaintiffs are not seeking information that would help them in any way related to voting. *FEC v Akins*, 524 U.S. 11, 20-25 (1998).

There is an extensive line of decisions implementing the D.C. Circuit's requirement for personal voting or political participation for plaintiffs to have informational injury under FECA. *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39, 48 (D.D.C. 2004) (value of mailing list would have no concrete effect on plaintiffs' voting); *Alliance for Democracy v FEC*, 362 F. Supp. 2d 138 (D.D.C. 2005) (same); *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 46 (D.D.C. 2003); *CREW v. FEC*, 401 F. Supp. 2d 115, 121 (D.D.C. 2005) ("*CREW/ATR*") (information about the value of a list could not have been useful to the plaintiff in voting), aff'd, *CREW 2007*, 475 F.3d 337; *CREW*

v. FEC, 267 F. Supp. 3d 50, 54-55 (D.D.C. 2017) (information sought would not be used to evaluate candidates or causes, and publicizing violations constituted an insufficient interest in seeing the law obeyed). *But see Campaign Legal Center v FEC*, 245 F. Supp. 3d 119, 127 (D.D.C. 2017) (recognizing informational injury despite no alleged effect on voting where FECA mandated disclosure).

Here, Plaintiffs cannot allege that knowing the details of Governor Bush or his agents' involvement in the establishment of Right to Rise about which they complain would directly and concretely affect their voting, because Plaintiffs are not voters, and the complaint does not allege that Plaintiffs have voting members. But even if Plaintiffs had members who voted, the complaint fails to illustrate how the information sought would be used to inform their voting choices today. The complaint does not allege that anyone associated with Plaintiffs would vote differently depending on the Commission's determination that circumstances relating to the establishment of Right to Rise were unlawful. Nothing in Plaintiffs' allegations indicate that such information would even be useful in voting, which is required to demonstrate informational injury sufficient to obtain judicial review under 52 U.S.C. § 30109(a)(8).

Simply pointing to a general public interest in the legal declaration Plaintiffs seek is not enough. Plaintiffs must make a particularized showing of *their* personal injury from the alleged FECA violations, and purported missing information, to have standing. In *FEC v. Akins*, for instance, the plaintiffs challenged the Commission's dismissal of an administrative complaint making allegations about the failure of the American Israel Public Affairs Committee ("AIPAC") to register with the FEC as a "political committee" and "make disclosures regarding its membership, contributions, and expenditures that FECA would otherwise require." 524 U.S. at 13. The plaintiffs argued that "the information would help them (and others to whom they would

communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Id*. at 21. The Court agreed that the alleged injury was "concrete and particular." *Id*.

In contrast here, details about the establishment of Right to Rise are already public or otherwise available to Plaintiffs. In fact, Plaintiffs' administrative complaints to the Commission cited extensively to public news reports on that very subject. Compl., Ex. A (May 2015 Admin. Compl.) ¶¶ 4-5, 8-9, 11-26, ECF No. 1-1; Compl., Ex. B (March 2015 Admin. Compl.) ¶¶ 5-9, 11-16, 18-21, ECF No. 1-2. Plaintiffs' complaint fails to show how, if these details were reiterated, it would be useful to Plaintiffs in voting, even if each had members who voted—which they have not even alleged.

Plaintiffs are not political committees, cannot vote, and the complaint lacks any claim that Plaintiffs have members who vote. Nor do Plaintiffs allege how any information they might obtain would be useful to voting in a particularized way. As a result, they cannot show injury.

C. Plaintiffs lack standing because their programmatic activities are not directly and adversely affected by the alleged agency delay.

An organizational plaintiff may have standing to sue on its own behalf "to vindicate whatever rights and immunities the association itself may enjoy" or, under proper conditions, to sue on its members' behalf asserting the members' individual rights. *Common Cause*, 108 F.3d at 417 (citation omitted). Where an organization sues on its own behalf, it must establish "concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interest . . . . Indeed, [t]he organization must allege that discrete programmatic

concerns are being directly and adversely affected by the challenged action." *Id*. at 417 (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)).

Where an organization sues on behalf of its members, it must demonstrate that "(a) its members would otherwise having standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id*. at 417 (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Plaintiffs, in addition to alleging an informational injury, allege organizational harm. Compl. ¶¶ 19, 22. But Plaintiffs do not claim to be a trade association or to have any members, so they cannot establish associational standing. Instead, they must meet the rigorous requirements to establish organizational standing. *Hunt*, 432 U.S. at 343. Plaintiffs fail in that regard, too.

Plaintiff's vague claim to organizational standing is captured in two paragraphs of Plaintiffs' complaint: "When such disclosure information is unavailable, inadequate, or inaccurate…it impedes the ability of Democracy 21 to fulfill its mission and causes Democracy 21 to divert resources and funds from other organizational needs." Compl. ¶ 22. Likewise, Campaign Legal Center asserts "When inadequate disclosure of federal campaign finance activity makes it difficult to ascertain the nature of a candidate's financial support…reporters often contact CLC for guidance…This work requires CLC to divert resources and funds from other organizational needs." Compl. ¶¶ 19, 22. There are numerous shortcomings in these allegations.

To begin, as a factual matter, all of Right to Rise's political activities were publicly disclosed. So the assertion that Governor Bush's operations were outsourced to a Super PAC without *disclosure* is false. What's more, to the extent that reporters were contacting Plaintiffs for guidance about Right to Rise and Governor Bush's activities, Plaintiffs could have pointed them

to the organizations' FEC reports or to any of the many press reports about Right to Rise and Governor Bush that Plaintiffs cited in their administrative complaint. There was no injury involving Plaintiffs having to provide such information to reporters.

Most important, Plaintiffs' asserted injuries are insufficient to meet the requirements for organizational standing. Plaintiffs' complaint does not allege that their resources have been diminished. Nor does the complaint allege concrete and direct harm to their programmatic activities. Those shortcomings are fatal in this context. *Common Cause*, 108 F.3d at 417.

Plaintiffs make the general assertion that they use information obtained from campaign finance reports in assisting the media with research, educational efforts, the FEC rulemaking process, and public statements. Compl., ¶¶ 15, 16, 17, 19, 20, 21. But these allegations do not offer any specific information as to how any particular activity was hampered by Right to Rise's alleged inadequate disclosure. Plaintiffs lack organizational standing in this case for the same reasons the plaintiffs in *CREW/ATR* failed to establish standing: they have not suffered direct or concrete injury to their programmatic activities. *CREW/ATR*, 401 F. Supp. 2d 115. In *CREW/ATR*, the district court held that the plaintiff non-profit organization had not sufficiently identified any programmatic activities adversely affected by the Commission's dismissal of its administrative complaint, nor could it, since the organization already possessed the information it sought. *Id*. at 121.

So too here. Plaintiffs have not "specified any programmatic concerns that have been concretely and directly impacted adversely by the FEC's actions," nor have they articulated a "particular plan" for using information they might gain if they prevailed in this suit. *Id*. at 122-23. Furthermore, while the court in *CREW/ATR* acknowledged "that it may be difficult to detail how information will be used when a plaintiff does not yet possess that information," here, as in

CREW/ATR, "such hardship is not implicated [because plaintiffs are] already privy to the information that [they could] seek[]." *Id*. Plaintiffs lack injury in fact sufficient to confer organizational standing.

Finally, Plaintiffs have failed to meet Article III's causation and redressability requirements. "When plaintiffs' claim hinges on the failure of the government to prevent another party's injurious behavior, the 'fairly traceable' and redressability inquiries appear to merge." *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 418 (D.C. Cir. 1994). Causation and redressability both focus on the causal connection between a plaintiffs' injury and the defendant's allegedly unlawful act. *See id*. Causation "turns on the causal nexus between the agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and judicial relief." *Id.* (citation omitted). Here, Plaintiffs cannot show how the Commission's actions are "fairly traceable" to any information deprivation. And as noted above, the judicial relief Plaintiffs request will not result in the disclosure of any additional information.

II. FECA precludes Plaintiffs' APA claim.

Plaintiffs' APA claim should also be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[2] Courts consistently reject APA claims when alleged in parallel with claims under FECA § 30109(a)(8)(A).[3]

A. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a complaint" and asks whether the plaintiff has properly stated a claim. *Browning*

[2] To the extent this Court determines that Plaintiffs have standing, Right to Rise anticipates challenging the merits of Plaintiffs' FECA claim at the summary judgment stage.

[3] Plaintiffs' APA claim could also be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction rather than under Rule 12(b)(6); courts have "not always been consistent in maintaining the[] distinctions" between those two rules in analogous cases. *Sierra Club v. Jackson*, 648 F.3d 848, 853 (D.C. Cir. 2011) (cleaned up).

v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002). Dismissal is appropriate "when a complaint fails 'to state a claim upon which relief can be granted.'" *Strumsky v. Wash. Post Co.*, 842 F. Supp. 2d 215, 217 (D.D.C. 2012) (quoting Fed. R. Civ. P. 12(b)(6)).

B. FECA provides the exclusive vehicle for judicial review of the Commission's administrative matters.

Plaintiffs rely on the APA as an independent legal basis for challenging the Commission's inaction on Plaintiffs' administrative complaints within 120 days of their filing. Compl. ¶ 39, ECF No. 1 (citing APA, 5 U.S.C. § 706(1)). But it is well-settled that administrative claimants like Plaintiffs may not rely on the APA in the circumstances presented here because FECA, 52 U.S.C. 30109(a)(8), provides an adequate and exclusive mechanism for judicial review of Commission enforcement decisions. *CREW v. FEC*, 363 F. Supp. 3d 33, 44 (D.D.C. 2018) ("*CREW 2018*"); *CREW v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017) ("*CREW/Crossroads GPS*"); *CREW v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) ("*CREW/AAN*"). As a result, Plaintiffs' APA claims should be dismissed with prejudice under Rule 12(b)(6).

Judicial review of an agency action under the APA is available only where the action is "made reviewable by statute" and there is "no other adequate remedy." 5 U.S.C. § 704. "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). As a result, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Id*. (cleaned up); *accord CREW v. U.S. Dep't of Justice*, 846 F.3d 1235, 1244-45 (D.C. Cir. 2017) ("*CREW 2017*") (same). Indeed, where separate review procedures exist, "Congress did not intend to permit a litigant challenging an administrative denial to utilize simultaneously both the [separate statutory] review provision and the APA." *El Rio Santa Cruz*

Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs., 396 F.3d 1265, 1270 (D.C. Cir. 2005) (cleaned up).

"When considering whether an alternative remedy is 'adequate' and therefore preclusive of APA review, [courts] look for 'clear and convincing evidence' of 'legislative intent' to create a special, alternative remedy and thereby bar APA review." *CREW 2017*, 846 F.3d at 1244 (quoting *Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009)). When determining whether the APA provides a proper basis for judicial review, the Supreme Court has instructed courts to examine the relevant statute's language, structure, and legislative history. *Block v. Cmty. Nutrition Inst*., 467 U.S. 340, 349-350 (1984). The D.C. Circuit has identified that "legislative intent" where, for example, "Congress has provided 'an independent cause of action or an alternative review procedure.'" *CREW 2017*, 846 F.3d at 1245.

Even a cursory review of FECA's detailed provisions for judicial review of allegations that the Commission failed to act on an administrative complaint provides clear and convincing evidence of the legislative intent necessary to preclude APA review. *See* 52 U.S.C. § 30109(a)(8). Under § 30109(a)(8), Congress set forth the scope of judicial review available in actions challenging alleged Commission impropriety regarding its handling of administrative complaints. To that end, § 30109(a)(8) expressly provides that (1) the statutory cause of action is available only to an aggrieved complainant; (2) the Commission must have allegedly failed to act on that claimant's administrative complaint; (3) any such request for judicial review must be filed with this Court; (4) the relief available is a declaration that "the failure to act is contrary to law" and an order "direct[ing] the Commission to conform with such declaration within 30 days"; and (5) a claimant has a private right of action if the Commission fails to conform with the judicial declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C).

Because FECA contains explicit and detailed review provisions, there is an "adequate remedy" as the APA describes. 5 U.S.C. § 704. That means FECA's "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" precludes other forms of judicial review, like APA review. *Block*, 467 U.S. at 349. Where Congress has "fashion[ed] . . . an explicit provision for judicial review" of certain agency action or failure to take action and has "limit[ed] the time to raise such a challenge," "it is 'fairly discernible' that Congress intended that particular review provision to be exclusive." *Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 664 (D.C. Cir. 2014); *accord Garcia*, 563 F.3d at 523.

FECA's structure and legislative history further substantiate the congressional intent to limit the avenues of judicial review of those matters within the Commission's jurisdiction. For example, Congress expressly vested the Commission with "exclusive jurisdiction with respect to the civil enforcement" of FECA, 52 U.S.C. § 30106(b)(1), and established a procedure of judicial review that "funnels all challenges to the FEC's handling of complaints through" this Court. *CREW/AAN*, 164 F. Supp. 3d at 119 (citing 52 U.S.C. § 30109(a)(8)(A)). Likewise, FECA's legislative history "confirms that '[t]he delicately balanced scheme of procedures and remedies set out in [FECA] is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.'" *Stockman v. FEC*, 138 F.3d 144, 154 (5th Cir. 1998) (alteration in original) (quoting 120 Cong. Rec. 35,314 (1974) (remarks of Rep. Hayes, Conference Committee Chairman)).

Consistent with this analysis, this Court consistently dismisses parallel APA claims in situations like this one because such claims are precluded by FECA's exclusive judicial review procedures in § 30109(a)(8). *CREW 2018*, 363 F. Supp. 3d at 44 ("Undertaking judicial review under the APA would enable administrative complainants to make an end run around the scheme

established by Congress . . . ."); *CREW/Crossroads GPS*, 243 F. Supp. 3d at 104 (rejecting parallel claims for relief under the APA because FECA provides an adequate remedy); *CREW/AAN*, 164 F. Supp. 3d at 120 ("This [section 30109(a)(8) judicial review mechanism] precludes review of FEC enforcement decisions under the APA."). In fact, this Court recently dismissed such an APA claim in a case filed by one of the Plaintiffs in this case—the Campaign Legal Center—against the Commission. *Campaign Legal Ctr. v. FEC*, No. 18-CV-0053 (TSC), 2020 WL 2735590 (D.D.C. May 26, 2020). There, Campaign Legal Center did not even oppose dismissal of its APA claim. *Id*. at *2 ("CLC did not respond to [the Commission's argument that § 30109(a)(8)(A) precludes an APA claim] in its opposition; it instead states in a footnote that '[t]o the extent the Court concludes section 30109(a)(8)(A) provides an adequate mechanism for judicial review of the FEC's failure to act, CLC does not object to the dismissal of its separate APA claim.'"). Plaintiffs' APA claim should be dismissed here, just as it was there.

In sum, § 30109(a)(8) provides the exclusive judicial review mechanism for challenging Commission enforcement decisions such as the delay alleged in this case. Accordingly, Plaintiffs' APA claim is precluded as a matter of law and must be dismissed with prejudice.

CONCLUSION

Right to Rise respectfully requests that the Court grant its motion and dismiss Plaintiffs' complaint with prejudice in its entirety for lack of subject matter jurisdiction. Alternatively, the Court should dismiss Count I, the APA claim, for failure to state a claim.

Dated: June 5, 2020

Respectfully Submitted,

DICKINSON WRIGHT PLLC

/s/ Charles R. Spies
Charles R. Spies, Bar ID: 989020
Jessica G. Brouckaert*
1825 Eye Street, N.W., Suite 900

Washington, D.C. 20006
Telephone: (202) 466-5964
Facsimile: (844) 670-6009
cspies@dickinsonwright.com
jbrouckaert@dickinsonwright.com

Robert L. Avers*
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com

John J. Bursch*
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Attorneys for Proposed Defendant-Intervenor

**Pending Admission*

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 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.

/s/ Charles R. Spies
Charles R. Spies (Bar ID: 989020)