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.	)	

/

INTERVENOR-DEFENDANT RIGHT TO RISE SUPER PAC, INC.'S REPLY IN SUPPORT OF INTERVENOR-DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Miscellaneous

INTRODUCTION

Right to Rise Super PAC, Inc., was set up in January of 2015 by allies of Governor Jeb Bush to help convince the Governor to run for President by demonstrating potential financial support if he decided to run, and then to independently support Governor Bush if he did run. From Right to Rise's creation through today, the organization has always publicly reported all contributions and expenditures as the law requires. In the spring of 2015, when Right to Rise was raising funds, Governor Bush was by all accounts testing-the-waters to decide whether to run for President, as was reported by hundreds if not thousands of news sources at the time. Governor Bush personally paid for any travel or activities that qualified as "testing-the-waters" activities, and such expenses were publicly reported on the Bush for President campaign's first FEC report in accordance with the Federal Election Campaign Act ("FECA").

While Right to Rise vehemently denies Plaintiffs' hyperbolic claim that Governor Bush and Intervenor Right to Rise engaged in some sort of "unprecedented scheme to circumvent federal law," that determination is legal in nature and for the Federal Election Commission alone to make. The over $80 million of spending at question here has already been publicly reported on Right to Rise's FEC reports, and *even if* Plaintiffs succeed here, no new information will be disclosed.

Right to Rise demonstrated in its initial brief that Plaintiffs' challenge to the Commission's handling of its administrative complaints under FECA should be dismissed for lack of jurisdiction and, alternatively, in part for failure to state a claim. Plaintiffs lack standing because they have not suffered a legally cognizable injury and seek no information that would be useful in their voting, and FECA precludes Plaintiffs' Administrative Procedure Act ("APA") claim. Because Plaintiffs have not carried their burden on either of these issues, this Court should dismiss the complaint for lack of standing, and dismiss Plaintiffs' APA claim for failure to state a claim upon which relief can be granted.

ARGUMENT

I. Plaintiffs have not suffered an informational injury.

As Right to Rise explained in its Motion to Dismiss, Plaintiffs bear the burden of proving three elements to establish Article III standing: (1) injury in fact, (2) causation, and (3) redressability. *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016). Plaintiffs' claimed injury is informational. But to survive a motion to dismiss, that theory requires Plaintiffs to show: (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 helpful to the plaintiff's informed participation in the political process. In the context of FECA cases, courts have repeatedly held that "helpful" means helpful in voting. *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997); *FEC v. Akins*, 524 U.S. 11, 21 (1998); *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 46 (D.D.C. 2003). Plaintiffs have failed to satisfy either requirement of the informational-injury inquiry.

A. Despite their best efforts to rewrite the standard, Plaintiffs have not been deprived of information that must be disclosed under a statute.

Plaintiffs concede "[t]he law is settled" that a denial of access to information satisfies the injury in fact requirement only if the information sought is required to be disclosed by statute. Pl.'s Mem. in Opp'n to RTR's Mot. to Dismiss at 14 (Docket No. 13) ("Opp'n"). So Plaintiffs try to water down that standard, arguing that the inquiry is not just whether the information must be disclosed by statute, but also whether the information disclosed by Right to Rise under FECA would "look different if Plaintiffs were successful in their suit." Opp'n at 16 (cleaned up). And what Plaintiffs mean is that Right to Rise's FEC disclosures would look different *if Plaintiffs prevailed on their administrative complaints pending before the Commission*. Such an outcome requires the Commission to make a legal determination, i.e., that Governor Bush was a candidate

as defined by FECA during the relevant time, and that as a candidate he impermissible established, financed, directed, maintained, or controlled Right to Rise in violation of FECA. But the Commission has made no such legal determination. And 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). As it stands, Right to Rise and Governor Bush have made all the disclosures FECA required, and Plaintiffs' theory is legally irrelevant to the informational injury analysis.

What's more, an adverse Commission legal determination would not change the expenditures Right to Rise has already disclosed; such a determination would merely render those expenditures unlawful. That is what distinguishes this case from the one on which Plaintiffs rely, *CLC v. FEC*, No. 19-cv-02336-JEB, 2020 WL 2996592 (D.D.C. June 4, 2020) ("*CLC II*"). The information at issue in *CLC II* related to certain expenses paid for through the overhead account of Correct the Record, which is a hybrid, or *Carey*, political committee. *Id*. at *3. Hybrid committees maintain three bank accounts: a "soft" money independent expenditure account which can raise unlimited amounts and is not subject to federal contribution limits; a "hard" money federal account subject to federal contribution limits; and an overhead account for certain expenses such as staff salary, rent, and other overhead costs. FEC Statement on Carey v. FEC (2011 (Oct. 6, 2011), Fed. Election Comm'n, https://fec.gov/updates/fec-statement-on-carey-v-fec/; *see also Carey v. FEC*, No. 11-259 (D.D.C. Aug. 19, 2011) (Stipulated Order and Consent Judgement). The *CLC II* plaintiffs claimed they were entitled to know what payments from the overhead account would be considered a coordinated expenditure in the event the Commission determined Correct the Record and Hillary for America violated coordination regulations under FECA. *See*

Plaintiffs' Opposition to Correct the Record's and Hillary for America's Amended Motion to Dismiss, 1:19-cv-02336-JEB, (Mar. 5, 2020) at 17 ¶ 1.

In other words, the *CLC II* plaintiffs needed to know specifically which expenditures were attributable to the hard and soft money accounts. That was the basis for the court's holding that they had standing. *CLC II*, 2020 WL 2996592, at *6. In contrast here, Plaintiffs' theory is that *all* of Right to Rise's spending must be treated as coordinated, positing that Right to Rise was "established" by candidate Bush and his agents. Indeed, Plaintiffs have stated—and Right to Rise agrees—that Right to Rise was a single-candidate super PAC set up solely to independently support Governor Bush if he ran for President. Opp'n at 7. As a matter of law, then, if the Commission were to determine that Right to Rise was in fact "established" by Governor Bush and his agents, and accept Plaintiffs' underlying assumption that there is no temporal limitation to the term "candidate" as FECA defines that term,[1] then every single expenditure made by Right to Rise would be coordinated *per se* and treated as a violation of federal contribution limits. So, the information of Right to Rise's expenditures would not change an iota. It would simply be treated *per se* as an in-kind contribution to Bush's campaign committee.

To answer the same question posed in *CLC II*—"Would these disclosures look different if CLC was successful in this suit?"—the answer is no. The information publicly disclosed would be the same, it would just be reported in an additional spot—on the Bush campaign's FEC reports.

[1] As Plaintiffs acknowledge in their Response, the "soft money" prohibition in Section 30125(e)(1) applies to an entity established by one or more "candidates or individuals holding Federal office." Opp'n at 7. Plaintiffs also state that Right to Rise Super PAC was established in January of 2015, and that Governor Bush became a candidate for Federal office in June of 2015. Consequently, at the time of Right to Rise Super PAC's establishment, Governor Bush was neither a candidate nor an individual holding federal office. Plaintiff's theory requires an expansive definition of the term candidate—including the six-month period prior to triggering candidacy—that the Commission has never adopted and is the sort of required legal determination that underlies this action purporting to be about disclosure.

As a result, Plaintiffs lack no information that would help them because no additional information exists that could be disclosed. *CLC II* is of no help to Plaintiffs here. *See also Free Speech for People v. FEC*, No. 19-CV-1722 (APM), 2020 WL 999205, at *6 (D.D.C. Mar. 2, 2020) (rejecting a similar informational injury theory where "Plaintiff already knows the information FECA requires be disclosed [but] Plaintiff simply wants the same information from a different source—an FEC investigation and a finding of an election law violation. Such a desire does not support an informational injury.").

Plaintiffs also allege that Governor Bush violated testing-the-waters restrictions by failing to report certain expenditures. But there is no evidence to support this speculative legal—not factual—allegation, which the Commission has presumably reviewed and does not have a quorum to support. To be sure, there *is* a certain category of expenses that must be treated by a potential candidate for federal office as testing-the-waters expenses (e.g., fundraising, polling, travel). But Right to Rise did not pay for any of this type of expense for Governor Bush. Right to Rise paid for expenses related to Governor Bush's appearance as a special guest at its own fundraisers, as is required by FECA whether Bush was testing-the-waters *or* an announced candidate, because the benefit ran to Right to Rise.

To the extent Governor Bush engaged in testing-the-waters activity in the spring of 2015 as he decided whether to run, he paid for such activities pursuant to Commission regulations and reported that spending as testing-the-waters activity on his campaign's first FEC report. Jeb 2016 Inc., 2015 July Quarterly Report (Form 3x) (current version filed Jan. 31, 2016) (showing $388,720.15 of in-kind contributions from Governor Bush to Jeb 2016); *See also* Alex Leary, *Jeb Bush Gave Campaign $388,000 of His Own Money for 'Testing the Waters' Before He Was Official*, Tampa Bay Times (July 15, 2015) ("Jeb 2016's first report affirms what we have publicly

stated over the past few months that if Governor Bush engaged in any testing-the-waters activities that they would be paid for appropriately, and that if Governor Bush decided to run for office that any testing-the-waters expenses would be reported at the required time," spokeswoman Kristy Campbell said.); Alex Leary and Adam C. Smith, *Jeb Bush Exploits Non-Candidate Status to Rewrite Campaign Finance Playbook*, Tampa Bay Times (Mar. 1, 2015) ("Supporters of Gov. Bush wanted to make sure there would be resources available should he decide to move forward with a run," [spokeswoman Kristy] Campbell said. "We are taking a conservative approach to all of Gov. Bush's activities."). Governor Bush disclosed all of his spending for the purpose of testing-the-waters on his campaign's first FEC report. Consequently, there is again nothing different that would be publicly disclosed if Plaintiffs were successful in this suit. Plaintiffs have failed to show an informational injury and lack Article III standing.

B. Plaintiffs' generic claim that the information sought would be "helpful" is insufficient to obtain Article III standing.

In addition to demonstrating they were deprived of information that must be disclosed under a statute, Plaintiffs must also show that the information would be helpful in voting. While Courts have repeatedly held that "helpful" in the context of FECA means helpful in voting, *e.g.*, *Common Cause,* 108 F.3d at 418; *Akins*, 524 U.S. at 21; *Judicial Watch, Inc.*, 293 F. Supp. 2d at 46, the D.C. Circuit recently held that "[t]he helpfulness of the information does not depend on the plaintiff's status as a voter." *CREW v Am. Action Network*, 410 F. Supp. 3d 1, 13 (D.D.C. 2019) ("*AAN*"). Plaintiffs read *AAN* as eviscerating the "helps with voting requirement," and claim that they have demonstrated an injury in fact because "there is no reason to doubt that the disclosures they seek would further their efforts to defend and implement campaign finance reform." Opp'n at 28 (cleaned up). But Plaintiffs overstate the effect of *AAN*.

AAN was limited to its facts, which involved a 501(c)(4) organization which did not publicly disclose any of its donors. The plaintiff in that case—a 501(c)(3) organization—could neither vote nor participate in political activity, so the plaintiff pled that it intended to use the information sought in the lawsuit (which was not otherwise public) to "look for correlations between . . . spending on independent campaign activity that . . . benefits a candidate, and that member's subsequent congressional activities[.]" *AAN*, 410 F. Supp. 3d at 13. That sort of "helpfulness" is not possible here. Governor Bush suspended his presidential campaign more than four years ago and has not sought public office since. Plaintiffs cannot possibly seek "correlations between . . . spending on independent campaign activity" that benefited Governor Bush as a candidate and "subsequent [public office] activities" taken by Governor Bush as did the plaintiff in *AAN*. And allowing Plaintiffs to proceed merely on the grounds the information sought might help them field calls from reporters is unfounded—all the information Plaintiffs purportedly seek has already been disclosed pursuant to FECA. *See CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) (concluding that plaintiff lacked standing to seek information regarding the precise value of an alleged in-kind contribution because the "precise value—if that could be determined—would add only a trifle to the store of information about the transaction already publicly available," and because FECA did not require the disclosure of the information sought by Plaintiff). Because there is no more information Plaintiffs can acquire, much less information that satisfies the requirement of helpfulness, the Court should dismiss the Complaint in its entirety because Plaintiffs lack standing.

II. The Commission's lack of public action does not bestow Plaintiffs with standing either.

The Commission's delay does not inflict any unique or independent informational injury sufficient to grant standing to Plaintiffs for an undeniable reason: Plaintiffs have no legal right

under any statute or regulation to the information that they seek. So Plaintiffs try to create a new standing theory from whole cloth that this Court should reject.

A. "Delay" cases do not confer Article III standing without an independent, concrete, injury.

The D.C. Circuit's decisions uniformly hold that § 30109(a)(8)(A) "does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause*, 108 F.3d, 419. This conforms to the unambiguous rule that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). *Accord Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing.").

In direct contradiction with this precedent, Plaintiffs propose an entirely novel interpretation of standing requirements in § 30109(a)(8)(A) actions. They say that bringing an action challenging the Commission's failure to act within 120 days *should* confer standing "because of the unique informational deficits arising in a delay suit." Opp'n at 33. In other words, delay actions should be treated differently than actions challenging the Commission's dismissal of a Complaint even though (1) the right to both actions arise under the exact same statutory subsection, 52 USC § 30109(a)(8)(A), and (2) this Court has never before made such a distinction.

Contrary to Plaintiffs' new standing theory, courts in this Circuit have expressly held in other delay suits that plaintiffs must have an independent basis for standing. In fact, another court in this District made that exact determination against Plaintiff CLC only two months ago. *CLC v. FEC*, No. 18-cv-0053-TSC, 2020 WL 2735590, at *2 (D.D.C. May 26, 2020) (disagreeing with the very argument made by CLC in this suit, holding: "§ 30109(a)(8)(A) – which governs both types of challenges – does not confer standing."); *accord Judicial Watch, Inc.*, 293 F. Supp. 2d at

48 (D.D.C. 2003) ("The [D.C. Circuit] made clear that while the FEC's failure [to] act within the 120-day period of [§ 30109(a)(8)(A)] conferred a right to sue, it did not also confer standing."). There is no legal authority supporting Plaintiffs' theory that "FEC inaction is distinct from an unlawful FEC dismissal for constitutional standing purposes." Opp'n at 32. Therefore, Plaintiffs must have suffered a separate and concrete informational injury to maintain this suit, an information injury they cannot prove.

B. The Commission's delay alone does not cause an informational injury.

The Commission's delay alone does not cause an informational injury because Plaintiffs have no legal right to the information they seek. As discussed above, to "[t]o carry its burden of demonstrating a sufficiently concrete and particularized informational injury, the plaintiff must show that . . . it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it…" *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017). Pointing to a number of statutes, regulations, and prior decisions, Plaintiffs try to: (1) broadly define the breadth of information the Commission must disclose regarding a § 30109(a)(8)(A) action, and (2) argue that the duty to disclose arises even where the Commission has not yet taken any action at all. But every disclosure requirement imposed upon the Commission, by statute or regulation, only arises when the Commission takes certain defined actions. If such action(s) have not yet taken place, the Commission has no disclosure obligation and the public has no legal right to that information. *CLC v. FEC*, 245 F.Supp.3d 119, 125 (D.D.C. 2017) ("[A] plaintiff does not suffer an injury in fact if it seeks only information that the applicable statute does not require to be disclosed.").

Importantly, the statutes and regulations requiring the Commission's disclosure are not particularly expansive. For example, under 52 U.S.C. § 30109(a)(4)(B)(ii), FECA requires the Commission to disclose certain information only if it (1) reaches a "conciliation agreement" with

the respondent; or (2) "determin[es] that a person has not violated" the law. Similarly, 11 C.F.R. § 111.20(a) requires the Commission to make public (1) "a finding of no reason to believe or no probable cause to believe" a violation has been committed; or (2) any other finding that "terminates its proceedings." Finally, FOIA compels the Commission to make public all final opinions and orders, in addition to commissioner voting records in its proceedings. 5 U.S.C. § 552(a)(2)(A), (a)(5). Plaintiffs do not identify any other applicable disclosure provisions, and each of the above-referenced statutes and regulations apply only if the requisite agreement, opinion, order, or finding has been reached—none of which has occurred as it relates to MUR 6927.

Furthermore, Plaintiffs fail to identify any precedent supporting their new theory that agency delay alone causes an informational injury. For instance, in Plaintiffs' chief legal authority—*Doe 1 v. FEC*, 920 F.3d 866, 870-71 (D.C. Cir. 2019)—the Commission accepted a conciliation agreement, closed the file, and announced it would release documents to the public. Certain parties objected to the release because those parties would be named publicly. *Id.* at 869. They argued that the Commission could *only* release the information identified at 52 U.S.C. § 30109 (a)(4)(B)(ii). *Id.* The Court disagreed, declaring that the Commission had the power to disclose more than the governing Act alone required (i.e., by enacting the broader 11 C.F.R. § 111.20). *Id.* at 870-871. The Court stated "FECA's provisions at issue here have been held to authorize public disclosure of information, as the *agency* may determine to be proper upon a balancing of the public interests involved." *Id.* at 871. (emphasis added).

In other words, the Commission in *Doe 1* came to a final agreement, its obligation to disclose was triggered, and it explicitly weighed the balance of interests to determine whether disclosure was appropriate. In contrast here, the Commission has, to Right to Rise's knowledge, reached no final decision or agreement and, as a result, no obligation to disclose information has

been triggered under any applicable statute or regulation. That renders *Doe 1* inapposite. *Doe I* states only that when the Commission *does* reach a determination, it may disclose more information than what is expressly provided for under FECA.

Similarly, *Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020), also shows that delay alone is not enough—an informational injury requires an actual statutory violation. There, the Court ruled that the plaintiffs, two animal rights entities, had standing to bring suit under the APA because the United States Department of Agriculture's ("USDA") failure to promulgate standards for the humane treatment of birds caused the plaintiffs a concrete informational injury. *Id.* But Congress had specifically mandated that the USDA issue standards for birds when it had amended the Animal Welfare Act eighteen years prior. *Id.* at 616-617. As a result, the USDA's *failure to comply with the statutory amendment* caused a direct, injurious impact on the two animal rights agencies dedicated to bird welfare because they were deprived of *congressionally required* information. *Id.* at 619.

Here, the Commission has not triggered the mandatory disclosure of information under any legal authority. The Commission and Intervenor have not entered into a conciliation agreement. 52 U.S.C. § 30109(a)(4)(B)(ii). The Commission has not yet communicated a determination that Intervenor did not violate the law. *Id.* It apparently has not yet made "a finding of no reason to believe or no probable cause to believe." 11 C.F.R. § 111.20(a). It has not reached any final opinion or final order, nor has it otherwise terminated the proceedings. *Id.;* 5 U.S.C. § 552(a)(2)(A), (a)(5). Absent the occurrence of these triggering events, Plaintiffs have no legal right to the information they seek and cannot have suffered an informational injury. Their new standing theory fails.

C. The Commission has no obligation to take action on Plaintiffs' Complaints.

The law does not require the Commission to take action on Plaintiffs' administrative complaints. While FECA does create a cause of action for complainants after 120 days of inaction,

FECA explicitly *does not* require that the Commission follow any mandatory action or disclosure timelines. Filing a delay action under § 30109(a)(8)(A) does not impose any statutory obligation on the Commission to promptly respond or take action. While it is literally true that "nothing in FECA or the FEC's longstanding enforcement rules and policies permits the Commission to simply hold a matter open in perpetuity," nothing in those same rules or policies *prevents* them from doing so, either. Opp'n at 37. As the Fifth Circuit stated in *Stockman v. FEC*, the Commission has the power "to conduct investigations and hearings expeditiously," but FECA "does not create a deadline in which the FEC must act." 138 F.3d 144, 152 (5th Cir.1998) (cited approvingly by *Judicial Watch, Inc.*, 293 F.Supp.2d at 48). Plaintiffs cannot create from thin air statutory obligations for Commission action or disclosure of information.[2]

Plaintiffs' theory that delay alone causes a unique informational injury also lacks any factual support. When deciding whether there exists reason to believe that a respondent violated FECA, the Office of General Counsel looks only at the available record to determine whether an investigation is warranted. *See* First General Counsel's Report at 3, MUR 7314 (*National Rifle Association, et al.*) ("In consideration of the *Complaint and the available record*, there is insufficient information in the record before the Commission to support a reasonable inference that [Respondents] may have violated [FECA].") (emphasis added); Statement of Reasons of Vice Chairman Matthew S. Petersen and Caroline C. Hunter at 12, Note 79, MUR 6928 (*Richard John*

[2] Plaintiffs also argue, erroneously, that the five-year statute of limitations in 28 U.S.C. § 2462 applies only to criminal FECA violations. Opp'n at 33 n. 10. But § 2462's plain text indicates that it applies to *all* FECA enforcement proceedings. 28 U.S.C. § 2462 (limitations period applicable to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise"). *Accord* First General Counsel's Report at 8, MUR 7494 (*John Culberson, et al.*) (relying on 28 U.S.C. § 2462 to find that some allegations in the complaint against the Respondent were outside the statute of limitations); FEC Directive No. 68 (explaining the Commission's Office of General Counsel's procedures for matters approaching the five year statute of limitations).

"Rick" Santorum, et. al.) ("On several occasions, we have explained our concern with augmenting the record with outside information *not provided in the complaint or response*. This practice is unfair to respondents, and risks threatening the legitimacy of the Commission's conclusions") (citing *Westar Energy Inc. v. Fed. Energy Reg. Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007)) (emphasis added). In other words, Plaintiffs are wrong when they say they have been deprived of "investigatory information" due to the Commission's delay.

Finally, Plaintiffs' Response fails to acknowledge a simple fact that undermines any supposed informational injury due to delay: Plaintiffs *will* eventually gain the right to view certain information under FECA. As Plaintiffs aptly note, the Commission has a "carefully balanced enforcement regime" intended to "prescribe transparency in connection with *closed enforcement matters* to foster openness and accountability, and to enable judicial review." Opp'n at 37-38. (emphasis added). While the Commission's procedure in this action has stretched longer than the typical matter, and has already pushed past two election cycles (2016 and 2018), any disclosure at this point is too late to impact the 2020 election cycle, and the Commission will eventually close this matter. At that moment, the very same information will become available to Plaintiffs that they would have received if the Commission had promptly dismissed this action four years ago, or at some point in the intervening years. Therefore, Plaintiffs' insistence that delay actions cause unique informational injuries is wrong. An informational injury does not arise solely because a Plaintiff wants information sooner than the law requires. Plaintiffs' complaint should be dismissed.

III. Plaintiffs have not suffered a distinct organizational injury sufficient to confer standing.

As organizations, Plaintiffs must prove that the entities themselves have suffered an injury to satisfy organizational standing. *See Equal Rights Ctr. v. Post Props, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). There are two requirements for organizational standing: (1) the agency action or

omission must injure the organization's interest, and (2) the organization must have used its resources to counteract that harm. *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015). In other words, "[t]he organization must allege that discrete programmatic concerns are being directly and adversely affected by the defendant's actions." *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987).

Plaintiffs' basis for organizational standing fails because the Commission's delay has not caused any concrete injury. An organization wishing to prove standing in its own right "must allege a 'concrete and demonstrable injury to the organization's activities' that is 'more than simply a setback to the organization's abstract social interests.'" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This 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. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). 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)). Most critically, a plaintiff "cannot ground organizational injury on a non-existent interest." *Elec. Privacy Info. Ctr.*, 878 F.3d at 379; *see also ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011) ("[A]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III."). Therefore, an organizational plaintiff alleging only an informational injury must demonstrate a legally recognized interest in that information. *Id.*

Here, there is no question that Plaintiffs allege an exclusively informational injury for the purposes of organizational standing. *See* Opp'n at 39 ("The Commission's failure to act on the

allegations here has forced plaintiffs to divert resources from other planned organizational needs to research and fill in *the missing disclosure information* they seek in the complaints") (emphasis added); *Id.* ("This *informational deprivation* has harmed plaintiffs' public education efforts and strained several other key programmatic activities central to their mission.") (emphasis added); *Id.* at 40 ("Moreover, the FEC's inaction has also directly harmed plaintiffs' watchdog activities by *depriving plaintiffs of information* they need to conduct their regulatory practice before the FEC and other agencies.").

As explained in Section II, *supra*, Plaintiffs cannot have suffered an informational injury because they have no legal right to the information they seek. So *Elec. Privacy Info. Ctr.* is controlling. There, the plaintiff organization alleged it suffered a concrete organizational injury where the defendant failed to produce a privacy impact assessment pursuant to Section 208 of the E-Government Act before taking certain actions. 878 F.3d at 378-79. The Court determined that the plaintiff could not have suffered a concrete injury for the purposes of organizational standing because the plaintiff did not have any legal right to the information it sought. *Id.* ("EPIC's sole theory of organizational injury is that the defendant's failure to produce a privacy impact assessment injures its interest in using the information contained in the assessment. . . . As we have discussed, however, section 208 … does not confer any such informational interest on EPIC."). Likewise, Plaintiffs lack a legal right to any information under FECA until a triggering event takes place.

Plaintiffs' reliance on *PETA* is misplaced. Unlike the situation here or in *Elec. Privacy Info. Ctr.*, the plaintiff in *PETA* had an express statutory right to the information it sought. *PETA*, 797 F.3d 1087, 1090. Congress expressly mandated that the USDA promulgate standards for the humane treatment of birds. *Id.* In fact, "the USDA had repeatedly set, missed, and then rescheduled

deadlines for the publication of proposed bird-specific regulations." *Id.* at 1091. Conversely, the Commission has no statutory or congressional obligation to take action on Plaintiffs' underlying Complaints whatsoever, let alone pursuant to any timelines or deadlines.

Considering the above, Plaintiffs cannot have organizational standing based on an informational injury because they have no legal right to the information they seek.

IV. Plaintiffs concede their APA claim, which is otherwise precluded by FECA.

Plaintiffs fail to meaningfully respond to Right to Rise's argument that FECA precludes Plaintiffs' APA claim. "[W]here a party fails to respond to arguments in opposition papers, the Court may treat those specific arguments as conceded." *Dinkel v. MedStar Health, Inc.*, 880 F.Supp.2d 49, 58 (D.D.C. 2012); *see also Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F.Supp.2d 15, 25 (D.D.C.2003), *aff'd*, 98 Fed.Appx. 8 (D.C.Cir.2004); *Lewis v. District of Columbia*, No. 10–5275, 2011 WL 321711, at *1 (D.C. Cir. Feb. 2, 2011) (per curiam). "Furthermore, '[i]t is not enough to mention a possible argument in the most skeletal way, leaving the [C]ourt to do counsel's work, create the ossature for the argument, and put flesh on its bones. . . .[A] litigant has the obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.'" *Dinkel*, 880 F.Supp.2d at 58 (citing *Schneider v. Kissinger*, 412 F.3d 190, 200 n. 1 (D.C. Cir. 2005)). Yet Plaintiffs rely on a single footnote at the end of their Brief to address Right to Rise's contention that the APA cannot apply. Opp'n at 43 n 11. This barebones response embodies the tenuous support for Plaintiffs' argument, and the Court should consider it conceded.

In any event, courts in this Circuit consistently hold that "52 U.S.C. § 30109(a)(8)(A) provides the *exclusive* mechanism for judicial review." *CLC*, 2020 WL 2735590, at *2 (emphasis added). The APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *see* 5 U.S.C. § 704; *CREW v. DOJ*, 846 F.3d 1235, 1244–45 (D.C. Cir. 2017). This

Circuit has noted that § 30109(a)(8)(A) contains "as specific a mandate as one can imagine." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996), and at least three courts in this District have held that § 30109(a)(8)(A) precludes an APA claim that challenges the dismissal of a complaint. *See CLC*, 2020 WL 2735590, at *2; *CREW v. FEC*, 243 F. Supp. 3d 91, 104 (D.D.C. 2017) (FECA provides an adequate remedy so there is no parallel claim for relief under the APA); *CREW v. FEC*, 164 F. Supp. 3d 113, 120–121 (D.D.C. 2015) ("This [§ 30109(a)(8) judicial review mechanism] precludes review of FEC enforcement decisions under the APA.").

Plaintiffs' single footnote citation actually supports Right to Rise's position. In *CLC II*, 2020 WL 2996592 at *14, the Court recognized the broad preclusive effect of FECA but noted that CLC was specifically challenging the *implementation of a regulation*. *Id.* at *15. Because "FECA has no provisions governing judicial review of regulations, . . . an action challenging its implementing regulations should be brought under the judicial review provisions of the [APA]" *Id.* (citing *Perot*, 97 F.3d at 560). In contrast here, Plaintiffs are challenging the Commission's delay regarding a § 30109(a)(8)(A) action, not the implementation of any specific regulation. So the *CLC II* exception for litigation involving regulations does not apply, and *CLC II*'s holding regarding FECA's preclusive effect remains. Plaintiffs' APA claim should 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 due to an absence of Article III standing under well-established D.C. Circuit precedent regarding claims of informational injury. In addition, the Court should dismiss Count II, the APA claim, for failure to state a claim.

Dated: July 24, 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, Bar ID #MI0083
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 July 24, 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/ Robert L. Avers
Robert L. Avers, Bar ID #MI0083
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com