UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*,	)	
Plaintiffs,	)	Civ. No. 22-3319 (CRC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY IN SUPPORT OF SECOND MOTION TO DISMISS
Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS SECOND MOTION TO DISMISS

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March 1, 2024

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INTRODUCTION

Plaintiffs' standing to challenge an alleged lack of reporting involving the long-since terminated presidential campaign of former Governor Jeb Bush has been litigated to the extreme, involving two lawsuits, oral arguments, myriad rounds of briefing, and at least three published decisions. In its most recent opinion addressing the Federal Election Commission's ("FEC" or "Commission") first motion to dismiss, the Court found that its holding in the first lawsuit that plaintiffs had not suffered an informational injury sufficient to confer standing precluded a contrary finding here. Mem. Op. and Order, *Campaign Legal Center, et al. v. FEC*, Civ. No. 22-3319 at 2 (D.D.C. Sept. 26, 2023) (Docket No. 23) (the "Opinion" or "Op."). The Court further expressed skepticism that plaintiffs could prevail on a closely related theory of organizational standing, given the Court's categorial determination in the prior lawsuit that plaintiffs lack of a legally cognizable interest in the information they seek, but declined to rule on the issue and instead invited the parties to address the Court's concerns. *Id.* As a result, the issues before the Court have been narrowed to whether plaintiffs are suffering an ongoing organizational injury stemming from an alleged lack of reporting, and whether their ability to establish such an injury is foreclosed by this Court's prior decisions.

The Federal Election Commission's Second Motion to Dismiss (Docket No. 27) ("Second Motion to Dismiss" or "Second MTD") comprehensively explained why the Court's concerns were warranted, both because the Court's prior holdings preclude plaintiffs from establishing an organizational injury and because plaintiffs' injury is not in any sense "ongoing," as required for the injunctive relief they seek. In contrast, Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss (Docket No. 28) ("Response" or "Resp.") appears to be concerned principally with establishing plaintiffs' standing in the first instance. But these

arguments come too late, and are precluded. Plaintiffs do not meaningfully contest that the Court's prior determination that plaintiffs lack a legally cognizable interest in the information they seek is preclusive here, and that determination itself precludes plaintiffs from establishing that they have suffered an organizational injury-in-fact. Nor do plaintiffs offer new evidence that could assuage the Court's concerns that any injury they might have suffered from a lack of reporting in 2015-16 is ongoing, or otherwise causing plaintiffs to divert organizational resources today. This Court's prior holdings, along with the march of time, preclude plaintiffs from establishing a live case or controversy for this Court to adjudicate. Plaintiff's Complaint should therefore be dismissed in its entirety.

ARGUMENT

I. PLAINTIFFS' ATTEMPT TO RELITIGATE THE MERITS OF THEIR ALLEGED ORGANIZATIONAL INUJRY IS IRRELEVANT TO WHETHER THESE ARGUMENTS ARE PRECLUDED AND FORECLOSED

The FEC's first motion to dismiss in this matter, (Federal Election Commission's Motion to Dismiss at 13-20 (Docket No. 12),) demonstrated why plaintiffs were precluded from establishing an informational injury sufficient to bring their claims by this Court's prior decisions. In response to that first motion, plaintiffs spent many pages, (Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss at 26-42 (Docket No. 19),) attempting to establish the factual basis for their informational injury, while devoting only a fraction of this space to addressing whether that entire argument was legally precluded. Plaintiffs most recent Response makes the same error, devoting about four pages (Resp. at 16-20) to addressing issue preclusion, while the bulk of their argument, (*id.* at 12-16, 20-29,) attempts to relitigate precisely what is foreclosed by this Court's rulings.

However, pursuant to the Court's instructions, Op. at 29, the relevant question at this stage in proceedings is whether this Court has already decided an issue of fact or law that

precludes plaintiffs from establishing their purported organizational injury, regardless of whether they could establish standing if given a second bite at the apple. It is black-letter law that a court applying issue preclusion does not revisit the earlier decision. *Canonsburg Gen. Hosp. v. Sebelius*, 989 F. Supp. 2d 8, 17 (D.D.C. 2013) ("A court conducting an issue preclusion analysis does not review the merits of the determinations in the earlier litigation.") (quoting *Consol. Edison Co. of N.Y. v. Bodman*, 449 F.3d 1254, 1257 (D.C. Cir. 2006)); *Nat'l Post Off. Mail Handlers, Watchmen, Messengers, & Grp. Leaders Div. of Laborers' Int'l Union of N. Am. v. Am. Postal Workers Union*, 907 F.2d 190, 194 (D.C. Cir. 1990) ("The doctrine of issue preclusion counsels us against reaching the merits in this case, however, regardless of whether we would reject or accept our sister circuit's position."); *Yamaha Corp. of Am. v. United States*, 745 F.Supp. 734, 738 (D.D.C. 1990) (noting the D.C. Circuit's instruction "that collateral estoppel prevents a court from ever reaching the merits")). And "[a]lthough the dismissal of a complaint for lack of jurisdiction does not adjudicate the merit[s] so as to make the case *res judicata* on the substance of the asserted claim, it does adjudicate the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims." *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015) ("*Home Builders*") (alterations and emphasis in original) (quoting *GAF Corp. v. United States*, 818 F.2d 901, 912 n.72 (D.C. Cir. 1987)).

Plaintiffs' many pages detailing why they have suffered an organizational injury sufficient to confer standing to bring their claim, (Resp. at 12-16, 20-29,) do not address whether that precise argument is precluded based upon the well-established criteria for establishing issue preclusion under the law of this Circuit (*see* Second MTD at 10-20). Even assuming the Court's prior determination was "'patently erroneous,'" this "'is not alone sufficient'" to avoid its

preclusive effect. *Canonsburg*, 989 F. Supp. 2d at 19 (quoting *Otherson v. Dep't of Just., I.N.S.*, 711 F.2d 267, 277 (D.C. Cir. 1983)); *Restatement (Second) of Judgments* § 28 comment j); *see B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 157–58 (2015) ("issue preclusion prevent[s] relitigation of wrong decisions just as much as right ones.") (internal citations omitted); *Home Builders* 786 F.3d at 44 (Silberman, J., concurring) (agreeing "with the court that we are precluded by our prior opinion from acknowledging appellants' standing" but writing separately because the prior opinion "is incorrectly decided and is quite at odds with our jurisprudence"); *NOW v. Operation Rescue*, 747 F. Supp. 760, 769 (D.D.C. 1990) ("Issue preclusion . . . is designed to prevent a second court from reweighing the evidence that formed the basis for the first court's judgment."), *aff'd in part, remanded in part sub nom. Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994); *cf. City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) ("A court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect.").

II. PLAINTIFFS' ATTEMPT TO ESTABLISH AN ORGANIZATIONAL INJURY IS PRECLUDED AND FORECLOSED

A. The Court's "Categorical" Language that Plaintiffs Have no Legally Cognizable Interest in Labeling Spending Coordinated Precludes Plaintiffs From Establishing an Organizational Injury Here

In its most recent Opinion, the Court determined that its prior holding with respect to plaintiffs' organizational standing was based on facts unique to the prior delay case, and therefore did not control whether plaintiffs could establish an organizational injury as to whether the FEC acted "contrary to law" in this proceeding. Op. at 26-28. However, the Court nonetheless intuited that "the Court's categorical language that Plaintiffs have 'no legally cognizable interest in labeling spending coordinated if that spending has already been disclosed in some format' may slam shut that door to federal court." Op. at 27 (citing *Campaign Legal*

Ctr. v. FEC ("*RTR I*"), 520 F. Supp. 3d 38, 48 (D.D.C. 2021). On this basis the Court specifically called on the parties to brief "[w]hether *RTR I* and [*Campaign Legal Ctr. v. FEC* ("*RTR II*"), 578 F. Supp. 3d 1 (D.D.C. 2021)] have preclusive effect on organizational standing[.]" Op. at 29. The threshold question before this Court is thus whether plaintiffs can establish an organizational injury sufficient to confer standing even if they have "no legally cognizable interest in labeling spending coordinated[.]" Op. at 27. They cannot.

Critically, plaintiffs do not dispute that the Court's determination that plaintiffs have no "legally cognizable interest" in labeling pre-existing spending coordinated meets all the criteria for issue preclusion. (*See* Resp. at 16-20.) Instead, plaintiffs declare that "[t]he FEC does not so much assert that plaintiffs' argument for organizational standing is precluded, as just assume that it 'must fail' on its merits." (Resp. at 17 (citing Second MTD at 15).) However, this ignores the portion of the Commission's motion (Second MTD at 13-15) that listed the criteria for issue preclusion and explained why the Court's prior language meets these criteria, given that plaintiffs' "interest" in labeling spending coordinated was (1) contested by the parties in *RTR I*, (2) necessarily determined by the Court, and that (3) applying preclusion here would not work no basic unfairness on plaintiffs.

Because plaintiffs do not contest that the Court's determination that they lack a "legally cognizable interest in labeling spending coordinated" is preclusive in this matter, the only remaining question is whether that determination controls the outcome in this case. It clearly does. The only relief plaintiffs seek in this matter is the disclosure of already-public spending information regarding the Right to Rise Super PAC and the Jeb Bush Campaign, in a manner that makes clear that this spending was coordinated between the entities. (*See* Second MTD at 17-18 (explaining that the information plaintiffs seek in support of their informational and

organizational theories of injury are effectively identical, pursuant to plaintiffs' own description of their claims as adopted by this Court).) If plaintiffs lack a legally cognizable interest in labeling this spending coordinated, they have not suffered the necessary harm to their interests that organizational standing requires. *See People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*") (a plaintiff must first show "that the agency's action or omission to act injured the organization's interest," and second, the plaintiff must show that it "used its resources to counteract that harm"). As this Circuit has made clear, plaintiffs "cannot ground organizational injury on a non-existent interest." *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017) ("*EPIC*").

Moreover, plaintiffs' assertion that they have identified "new" spending that was not considered by the Court in prior proceedings, (Resp. at 18-19,) is immaterial because the Court's operative holding regarding their interest in that information was not cabined to the particular information the Court considered at that time. The relevant paragraph of the Court's opinion reads in full:

> Plaintiffs distinguish *Wertheimer* [*v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001)] on the grounds that the plaintiffs there already knew that the underlying expenditures were coordinated, whereas here, they do not know precisely what portion of Right to Rise's expenditures qualify as such. *See* Resp. 24–25. But this distinction is immaterial. ***Wertheimer*** **held that plaintiffs have no legally cognizable interest in labeling spending "coordinated" if that spending has already been disclosed in some format**, 268 F.3d at 1075, **which is precisely the case for the expenditures plaintiffs seek to uncover through this lawsuit**, *see* Resp. at 24 ("plaintiffs have reason to believe that much of Right to Rise's $118 million in total disbursements *should have been reported as in-kind contributions* to the Bush campaign") (emphasis added); *id.* at 27 ("plaintiffs are deprived of information *as to which of a super PAC's disbursements are actually in-kind contributions* to a 2016 presidential campaign) (emphasis added). Meanwhile, plaintiffs point to no additional expenditures or transactions that their requested information might bring to light. The Court thus concludes that plaintiffs lack standing to determine which of Right to Rise's disbursements were coordinated with the Bush campaign.

RTR I, 520 F. Supp. 3d at 48 (italic emphasis in original, bold emphasis added) (footnote omitted). The Court's plain language thus makes clear that plaintiffs have no legally cognizable interest in labeling *any* spending coordinated if that spending "has already been disclosed in some format . . . which is precisely the case for the expenditures plaintiffs seek to uncover through this lawsuit[.]" *Id.* The Court has held that plaintiffs lack a legally cognizable interest in this spending, and that holding is preclusive here.

Accordingly, the Court's Opinion made clear that plaintiffs cannot establish an organizational injury in this case by pointing to information that was previously disclosed and plaintiffs merely failed to identify, and instead called on plaintiffs to "identify testing-the-waters expenditures *that neither the Bush campaign nor Right to Rise disclosed in any form*[.]" Op. at 29 (emphasis added). By their own admission, plaintiffs have not done so. Plaintiffs direct the Court's attention to "seven 'new' [testing-the-waters] events" that it had already raised in response to the Commission's first motion to dismiss in this case, but candidly admit that "[t]his Court ruled that plaintiffs were precluded from raising these events because plaintiffs 'fail[ed] to explain why they were unable to identify these alleged testing-the-waters events in the delay case' given that footage of such events may have been in the public domain." (Resp. at 18 (citing Op. at 24-25).) Plaintiffs' most recent Response does not explain this omission, and once again "fail[s] to explain why they were unable to identify these alleged testing-the-waters events in the delay case when the Court afforded them ample opportunities to do so[.]" Op. at 24.

Plaintiffs further attempt to salvage their argument by reasoning that issue preclusion does not, as a general matter, extend to matters that *could have been raised*[.]" (Resp. at 19 (emphasis added in plaintiff's brief) (citing *GAF Corp. v. United States*, 818 F.2d 901, 913 (D.C. Cir. 1987); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).) But as explained *supra*, pp. 5-7, the

Court's prior holding in *RTR I* made clear that plaintiffs lack a legally cognizable interest in *all* reporting that had previously been disclosed in some form. This holding was not qualified so as to apply only to plaintiffs' informational injury, or to the particular evidence the Court had before it at that time. Plaintiffs' interest in obtaining this information was both contested and necessarily determined in the delay case, and plaintiffs do not seriously contend otherwise.

As this Court has itself noted, issue preclusion exists to incentivize parties to fully litigate issues of fact and law in the first instance, and plaintiffs have not explained their failure to do so in this case. "That is no reason to excuse Plaintiffs from issue preclusion; it is the reason issue preclusion exists." Op. at 25.

B. Plaintiffs do not Contest That Their Organizational Theory of Injury is Factually Indistinguishable from Their Informational Theory, and These Theories Rise and Fall Together

In its Second Motion to Dismiss, the Commission explained that even in cases where issue preclusion does not *per se* preclude the courts from considering whether plaintiffs have suffered organizational harm this Circuit has found that where an alleged organizational injury is "part and parcel of [an] alleged informational injury" the court has rejected, the organizational theory must "fail with it." (Second MTD at 15 (citing *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray* ("*Wray*"), 848 F. App'x 428, 431 (D.C. Cir.) (in turn citing *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 424 F. Supp. 3d 26, 33 (D.D.C. 2020)).) In response, plaintiffs attempt to distinguish this controlling precedent by arguing that in these cases "the plaintiffs there had pled an injury consisting of only the deprivation of the sought after information itself[,]" and did not "articulate[] further concrete impact or harm to their activities by reason of this deprivation." (Resp. at 17.) Plaintiffs misread this precedent which does in fact require dismissal in this case.

In fact, in both of the cases relied upon by the Commission, the D.C. Circuit found that the substantial overlap between plaintiffs' purported organizational theory of injury and their

failed informational theory of injury was a separate and sufficient reason to reject the organizational theory, even if there were additional reasons for doing so. Plaintiffs correctly note that in *Lawyers' Commission for 9/11 Inquiry v. Wray* the court found that plaintiffs' organizational theories impermissibly "rest[ed] on layers of speculation[,]" including speculation as to "independent actions of some third party not before th[at] court." (Resp. at 18 (quoting *Wray*, 848 F. App'x at 431).) But this observation was distinct from, and did not rely upon, that court's earlier observation that plaintiffs "theories of organizational standing" were "'part and parcel of the alleged informational injury' and thus fail with it." *Id.* at 430-31 (citing *Lawyers' Comm. for 9/11*, 424 F. Supp. 3d at 33). Furthermore, the *Wray* court specifically noted that the organizational theories it considered "allege a range of efforts [plaintiffs] have made and costs incurred to advance their missions that came to naught[,]" such as "resources [spent] on their State Department reward application, on a petition urging the U.S. Attorney for the Southern District of New York to present their additional evidence to a grand jury, and on an engineering study on the causes of the collapse of the World Trade Center towers[.]" *Id.* at 430. Plaintiffs' assertion that the *Wray* plaintiffs' theories failed because they "articulated no further concrete impact or harm to their activities by reason of th[e] deprivation" of information, (Resp. at 17,) is therefore incorrect.

Plaintiffs' arguments are similarly misguided with respect to the D.C. Circuit's decision in *EPIC*, 878 F.3d 371. Contrary to plaintiffs' suggestions, plaintiffs in that case articulated "concrete impact or harm to their activities by reason of th[e] deprivation" of information they sought. (Resp. at 17.) In fact, that court explicitly referenced "EPIC's evidence of expenditures," but found these expenditures did not constitute a cognizable legal injury and were instead "a self-inflicted budgetary choice that cannot qualify as an injury in fact." *EPIC*, 878

F.3d at 379 (quoting *Feld*, 659 F.3d at 25). This observation followed from the court's holding that "section 208 of the E-Government Act does not confer any [] informational interest on EPIC[,]" and therefore "EPIC cannot ground organizational injury on a non-existent interest." *Id.* (quoting *Feld*, 659 F.3d at 24-25). That is precisely the case here. The Court has held that plaintiffs lack a legally cognizable interest in the information they seek, and that holding is preclusive here, *see supra*, pp. 4-8, particularly where plaintiffs "identif[y] no organizational harm unrelated to [their] alleged informational injury." *EPIC*, 878 F.3d at 377-78.

Critically, plaintiffs do not dispute that both their informational and organizational theories to establish their injury-in-fact rely entirely on their lack of access to the same set of information: allegedly coordinated spending by the RTR Super PAC and the Jeb Bush Campaign. (*See* Second MTD at 17-18; Resp. at 25-26 ("the somewhat different bases for injury-in-fact both rely on a theory of informational deprivation").) That fact places this case squarely within the precedent set by the D.C. Circuit in both *EPIC* and *Wray* for all relevant purposes. This Court's prior decisions dictate both that plaintiffs have not suffered an informational injury and that they lack a legally cognizable interest in seeing previously disclosed spending by administrative respondents reported in a different format. Because plaintiffs' organizational theory of injury is materially indistinguishable from their informational theory of injury, these closely related arguments both fail.

III. EVEN IF THE COURT'S PRIOR HOLDINGS ARE NOT PRECLUSIVE, PLAINTIFFS CANNOT ALLEGE A PLAUSIBLE AND ONGOING INJURY TO THEIR ORGANIZATIONS STEMMING FROM THIS LONG-CONCLUDED PRESIDENTIAL CAMPAIGN

In its Opinion the Court correctly observed that plaintiffs must "prove an *ongoing* injury that the Court can remedy with the injunctive relief sought." Op. at 28-29 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)) (emphasis added). Building on the Court's

observation, the Commission's Second Motion to Dismiss explained that the D.C. Circuit has drawn a clear distinction between an organization's lack of access to discrete, one-off pieces of information (insufficient), and access to a stream of information for use in a specific, regular way as part of an organization established activities (sufficient). (Second MTD at 20) (quoting *Doc Soc'y v. Blinken*, Civ. No. 19-3632, 2023 WL 5174304, at *6 (D.D.C. Aug. 11, 2023) ("Recent caselaw in this Circuit suggests that an informational injury is sufficiently concrete if an organization wishes to use a stream of information in a specific, regular way as part of its established activities[;]" while at the same time "[t]he Circuit has [] consistently rejected allegations of informational injury based solely on an organization's lack of access to discrete, one-off pieces of information[.]") (listing and describing cases).)

In response "Plaintiffs do not deny that they must demonstrate an ongoing injury," (Resp. at 24,) but nonetheless fail to articulate how they are still incurring costs or otherwise diverting resources in response to the Commission's alleged failure to require their sought-after disclosure. Plaintiffs argue that their "injuries are ongoing in that they still have not received all the information they are due," (*id.*,) but do not link the deprivation of information to particular costs incurred or resources diverted. Indeed, plaintiffs concede that "it is fair to say that fewer 'reporters [are] still dialing CLC's line' in connection to plaintiffs' administrative complaints," but suggest that this is immaterial because "the abuses alleged therein remain acutely relevant to this election cycle, where current candidates appear to be closely following Bush's playbook." (Resp. at 26 (citing Op. at 28).) However, "it is well-established that a plaintiff has no legally cognizable interest in a legal conclusion that carries certain law enforcement consequences nor in forcing the FEC to get the bad guys." Op. at 5 (quoting *RTR I*, 520 F. Supp. 3d at 47).

In lieu of evidence that they are suffering an ongoing injury, plaintiffs advance a prudential argument, suggesting that their theory of organizational injury *must* be valid, the passage of time notwithstanding, because otherwise the Commission could too easily avoid being held to account for purportedly failing to enforce the law. (Resp. at 24-26.) This line of argument in effect sidesteps the Court's concerns with respect to controlling law. Plaintiffs begin with the undisputed point that "the mere passage of time cannot moot plaintiffs' injury[,]" arguing that the alternative "would reward FEC delay by effectively immunizing belated dismissals from meaningful judicial review under 52 U.S.C. § 30109(a)(8)[.]" (*Id.* at 24.) Plaintiffs state that "according to the FEC's theory,[1] many courts to have considered whether the FEC's dismissal of an administrative complaint was contrary to law . . . may have actually lacked jurisdiction to reach that question[,]" relying principally on *FEC v. Akins*, 524 U.S. 11 (1998). (Resp. at 25-26.)

This argument fails to address the standards by which courts assess the existence (or lack) of an ongoing injury where plaintiffs seek injunctive relief, and whether those standards have been met in this case. Plaintiffs' argument is also misguided because requiring plaintiffs to demonstrate an ongoing injury in this case does not imply that courts lacked jurisdiction to decide prior FECA cases or that courts will lack jurisdiction in future proceedings. While plaintiffs are correct that *Akins* focused on conduct between 1983 and 1988, and that the Supreme Court nonetheless asserted jurisdiction over the matter in 1998, the *Akins* plaintiffs' injury differed from plaintiffs' here in material ways. Factually, *Akins* centered on whether the American Israel Public Affairs Committee (AIPAC) was a "political committee" as defined by

[1] While plaintiffs claim to be rebutting "the FEC's theory," they are also disputing the theory the Court itself articulated. Op. at 25.

FECA. *Akins*, 524 U.S. at 13-15. As the Court surely recognized at the time, the answer to that question would impact how the Commission viewed AIPAC's expenditures in elections subsequent to 1988, and thus how that information would be reported by AIPAC in the future. Indeed, the organization is an active participant in the national policy debate to this day.[2] In stark contrast, Jeb Bush suspended his campaign for president in early 2016, and has not sought public office since.

Furthermore, plaintiffs themselves note that the *Akins* plaintiffs relied on an informational theory to establish standing, and acknowledge "the somewhat different bases for injury-in-fact" between an informational and organizational theories. (Resp. at 25-26.) This distinction is significant since, as the Court observed, the former requires demonstrating a "legal *right*" to the disclosure of coordinated expenditures, whereas the later requires demonstrating, inter alia, "a weighty *interest*" in those disclosures. Op. at 27. Thus, if the Court finds that plaintiffs lack an ongoing injury-in-fact sufficient to confer organizational standing in this case, this need not dictate whether plaintiffs in future proceedings against the Commission will be able to establish an informational injury based on an alleged deprivation of information.

Plaintiffs' final argument is that "[t]he FEC's failure to enforce the law in this area of activity . . . has encouraged an upsurge in schemes to game the timing of candidacy announcements in order to evade disclosure and circumvent FECA's contribution limits." (Resp. at 26). In support, they cite three administrative complaints filed by the Campaign Legal Center with the Federal Election Commission in 2019, 2022 and 2023 alleging FECA violations by, *inter alia*, the presidential campaigns of Governor Ron DeSantis, former President Trump, and

[2] *Homepage*, American Israel Public Affairs Committee (Last visited on Feb. 29, 2024), https://www.aipac.org/.

former New York mayor Bill De Blasio. (Resp. at 27-29.) These are presented as evidence that "[t]he FEC's enforcement vacuum has generated an increasing volume of watchdog work for plaintiffs, requiring plaintiffs to devote additional resources to policing these potential violations." (*Id.* at 27.)

This line of reasoning fails several times over. *First*, it is difficult to imagine what evidence plaintiffs might present to demonstrate that the FEC's alleged failure to enforce the law in this case in fact *caused* the alleged "upsurge in schemes" plaintiffs highlight, and indeed plaintiffs present no such evidence here. *See California Ass'n of Physically Handicapped, Inc. v. F.C.C.*, 778 F.2d 823, 825 (D.C. Cir. 1985) ("The 'standing' requirement is that the challenged action *cause* the injury."). *Second*, plaintiffs must demonstrate that the alleged "upsurge in schemes" harmed them directly, not that it merely represented a setback to their social interests. *EPIC*, 878 F.3d at 378 ("an organization may establish Article III standing if it can show that the defendant's actions cause a 'concrete and demonstrable injury to the organization's activities' that is 'more than simply a setback to the organization's abstract social interests.'") (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)); *see Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1141 (2013) ("respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending"). Even assuming the highly speculative chain of causation that the Commission's alleged failure to require the disclosure plaintiffs seek in *this* case caused the allegedly improper campaign reporting plaintiffs articulate,[3] this is no more than a setback to plaintiffs' abstract social

[3] Of the several examples of "an upsurge in schemes to game the timing of candidacy announcements in order to evade disclosure and circumvent FECA's contribution limits" articulated by plaintiffs, (Resp. at 26-29,) only one has so far resulted in the imposition of a penalty, in the form of fines agreed to by respondents in a conciliation agreement involving the De Blasio campaign, Fairness PAC, and NY Fairness PAC.

interests, which is insufficient to confer standing. *Third*, further assuming that "[t]he FEC's enforcement vacuum has generated an increasing volume of watchdog work for plaintiffs, requiring plaintiffs to devote additional resources to policing these potential violations[,]" (Resp. at 27,) these costs were voluntarily incurred. *See Am. Soc. for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) ("an organization's diversion of resources to litigation or to investigation in anticipation of litigation is considered a 'self-inflicted' budgetary choice that cannot qualify as an injury in fact for purposes of standing.") (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1139-40 (D.C. Cir. 2011)).

In short, plaintiffs' Response fails to provide evidence that the Commission's purported failure to require reporting involving the long-concluded campaign of former Governor Jeb Bush is impacting plaintiffs today, and thus does little to assuage the Court's "doubts . . . that the injury is ongoing[.]" Op. at 29. And even assuming plaintiffs' prudential concerns were a valid basis on which to assess their purported injury-in-fact, they fail to raise a plausible inference that a decision in the Commission's favor here will undermine FECA enforcement in the future. Even assuming their purported organizational injury is not precluded, it is certainly not ongoing, and therefore fails.

CONCLUSION

For the foregoing reasons, plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted,

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March 1, 2024

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2024, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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