UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERITAGE ACTION FOR AMERICA, *Plaintiff,* v. FEDERAL ELECTION COMMISSION, 1050 First Street, NE Washington, DC 20463 and LISA J. STEVENSON, in her official capacity as Acting General Counsel of the Federal Election Commission, 1050 First Street, NE Washington, DC 20463, *Defendants.*	Civ. No. 22-1422 (CJN) MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS

Pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, the Federal Election Commission ("FEC") hereby moves for an order dismissing all counts in plaintiff's complaint, including those that seek relief pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-706, and mandamus, 28 U.S.C. § 1361, for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The sole source of plaintiff's alleged injury is that it has been denied information concerning an FEC administrative enforcement matter, Matter Under Review ("MUR") 7516. However, plaintiff is now in possession of all the information it seeks, rendering its claims as to MUR 7516 moot. In addition, plaintiff has not established standing to obtain any relief on behalf of unnamed third parties as to its "concealment policy" claims, and in any event this alleged "policy" is not "final agency action"

that would be reviewable under the Administrative Procedure Act. Finally, plaintiff's claims are precluded because the judicial review provision of the Federal Election Campaign Act, 52 U.S.C. § 30109(a)(8), is the exclusive means of challenging the FEC's handling of administrative enforcement matters. A supporting memorandum and a proposed order accompany this motion.[1]

Respectfully submitted,

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July 22, 2022

[1] LCvR 7(n)(1), which generally requires an agency defending an administrative action to file a certified list of the contents of the administrative record contemporaneously with the filing of a dispositive motion, is not applicable here. For the reasons detailed in the FEC's Memorandum of Points and Authorities in support of this Motion to Dismiss, plaintiff fails to challenge any reviewable final agency action, and in any event its claims are moot and precluded by FECA's exclusive judicial review mechanism.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERITAGE ACTION FOR AMERICA, Plaintiff, v. FEDERAL ELECTION COMMISSION, and LISA J. STEVENSON, in her official Capacity as Acting General Counsel, Defendants.	Civ. No. 22-1422 (CJN) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

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Plaintiff Heritage Action for America ("Heritage Action") seeks voting records in an administrative enforcement matter of the Federal Election Commission ("Commission" or "FEC"), challenging what it claims is an FEC "policy" to conceal such records in violation of the Administrative Procedure Act ("APA"), but its complaint should be dismissed. The alleged source of injury throughout the complaint is the purported deprivation of information to Heritage Action. However, plaintiff's claim to information about Matter Under Review ("MUR") 7516 is moot because plaintiff has received all the information it seeks. Specifically, plaintiff now has the vote certifications in the matter and the Commissioners' statements of reasons for their votes. Further, plaintiff has been notified that the matter has been closed, and the file has been released. There is no longer any alleged injury for this Court to redress, leaving plaintiff without standing to pursue its claims, a prerequisite to the exercise of the Court's jurisdiction.

In addition to its own situation in MUR 7516, plaintiff's complaint also purports to challenge an alleged broader FEC "concealment policy" and seeks broader relief. But any such claim also fails. Plaintiff asserts that this ostensible "policy" has conveyed a false impression that the FEC has not yet taken action on certain enforcement matters, causing courts to permit private enforcement of the Federal Election Campaign Act, including with regard to respondents in several other unidentified matters. Yet plaintiff makes no serious attempt to show that it has standing to sue on behalf of others, and it does not. In any case, plaintiff fails to identify any final agency action that is reviewable under the APA — at most it points to an apparent pattern in the handling of a small number of enforcement matters — and finding that plaintiff's claim was viable would require the Court to override the discretion that the Commission has exercised in enforcement matters for decades.

Finally, plaintiff's claims are precluded because the judicial review provision of the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8), is the exclusive means of challenging the FEC's handling of administrative enforcement matters. Courts have repeatedly dismissed comparable claims because only FECA review is available for such claims.

For the foregoing reasons, plaintiff's complaint should be dismissed.

BACKGROUND

I. THE FEC AND ITS ADMINISTRATIVE ENFORCEMENT PROCEDURES

The FEC is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46. *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52 U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (per curiam). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 30109(a)(6).

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the statute. 52 U.S.C. § 30109(a)(1). Absent waiver, proceedings on such complaints are covered by confidentiality protections, 52 U.S.C. § 30109(a)(12), 11 C.F.R. § 111.21, until the Commission "terminates its proceedings," 11 C.F.R. § 111.20. Upon receipt of an administrative complaint, the Commission's Office of General Counsel ("OGC") is required to notify anyone alleged to have committed such a violation, referred to as a respondent, and to provide such persons with an opportunity to demonstrate in writing that no action should be

taken. *Id*. OGC then prepares a report to the Commission known as a General Counsel's Report. The Report analyzes the allegations in the complaint, applies the relevant law to the facts alleged, and sets forth OGC's recommendations for Commission action. The first General Counsel's Report in an enforcement MUR usually includes a recommendation that the Commission take actions regarding the alleged violations, including most commonly: (1) find reason to believe that a violation occurred and open an investigation; (2) find no reason to believe a violation occurred; (3) dismiss the matter as an exercise of prosecutorial discretion; or (4) dismiss the matter with a cautionary message to the respondent regarding its legal obligations. And FEC votes at this stage are frequently, although not always, on whether to take one or more of these courses of action. *See* FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007).

Generally, if one or more Commissioners objects to a first General Counsel's Report after it has been circulated to the Commission, or if fewer than four Commissioners vote to approve or reject the report's recommendations by the voting deadline, the Commission considers the enforcement matter at an Executive Session. *See generally* FEC, Commission Directive No. 52 (Circulation Vote Procedure) (effective Dec. 1, 2016). Executive Sessions are meetings that are closed to the public during which Commissioners consider pending enforcement matters and other items that must be kept confidential. *See* 11 C.F.R. § 2.4. During such meetings, the Commissioners may, *inter alia*, discuss OGC's recommendations and vote on potential actions like those described above, including whether there is "reason to believe" that a FECA violation has occurred. 52 U.S.C. § 30109(a)(2).

If at least four members of the Commission vote to find "reason to believe" a FECA violation has occurred, the Commission must notify the respondent of the alleged violation and its factual basis, and the agency then ordinarily investigates the allegations. *Id.* On the other hand, if at least four Commissioners determine that there is "no reason to believe" a violation occurred or that it is otherwise not appropriate to proceed with an investigation, they may vote to dismiss and to close the file in the matter. FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546.

After an investigation, OGC may recommend that the Commission find that there is "probable cause" to believe FECA has been violated. 52 U.S.C. § 30109(a)(3). Respondents are entitled to file a responsive brief, *id*., and OGC prepares a report to the Commission with further recommendations, 11 C.F.R. § 111.16. If at least four members of the Commission vote to find probable cause to believe that a violation has occurred, the Commission must first attempt to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondents. 52 U.S.C. § 30109(a)(4)(A)(i). If informal methods of conciliation fail, the Commission may, "upon an affirmative vote of 4 of its members," file a *de novo* civil enforcement suit in federal district court. *Id.* § 30109(a)(6)(A). After the termination of enforcement matters, the Commission places on the public record categories of documents integral to its decision-making process, including certifications of Commission votes. FEC, Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,703 (Aug. 2, 2016).

FECA provides that the administrative complainant may seek judicial review in this District, pursuant to 52 U.S.C. § 30109(a)(8)(A), in the event that the Commission dismisses or is alleged to have failed to act on a complaint. Defense of such cases may only be approved

through an affirmative vote of four members of the Commission. 52 U.S.C. §§ 30106(c), 30107(a)(6). If a court in a review action declares that a Commission dismissal or failure to act is "contrary to law," the court can order the Commission to conform to that declaration within 30 days. *Id.* § 30109(a)(8)(C). If the Commission fails to conform to the declaration within 30 days, the complainant may obtain a private right of action against the administrative respondent for the alleged violations. *Id.*; *FEC v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 488 (1985).

II. FACTUAL BACKGROUND

A. Administrative Proceedings Related to this Action

On October 16, 2018, the Campaign Legal Center ("CLC") and an individual, Margaret Christ, filed an administrative complaint with the FEC against Heritage Action. *See* FEC MUR 7516 (Heritage Action for America) , https://www.fec.gov/data/legal/matter-under-review/7516/ (last visited July 20, 2022) (hereinafter "MUR 7516 Pub. Rec.") (Complaint dated Oct. 16, 2018). The FEC acknowledged receipt of the administrative complaint and designated the enforcement matter as MUR 7516. The Commission notified Heritage Action of the complaint and obtained a response from it with regard to the allegations. (MUR 7516 Pub. Rec.) (Notification of Complaint to Heritage Action for America dated Oct. 22, 2018). After evaluating available information, OGC drafted a comprehensive First General Counsel's Report, providing that Report to the Commission on February 19, 2021. *Id.* (First General Counsel's Report dated Feb. 19, 2021).

On April 6, 2021, the Commission voted on whether there was reason to believe that Heritage Action had "violated 52 U.S.C. § 30104(c)(1) by failing to disclose donors who contributed for political purposes" and "52 U.S.C. § 30104(c)(2)(C) by failing to further identify the donors who donated for the purpose of funding an independent expenditure." MUR 7516

Pub. Rec. (Certification dated April 6, 2021). The Commissioners divided 3-3 on this vote. *Id.* That same day, the Commissioners voted on whether to close the administrative file for MUR 7516, which has long been the agency's customary method to terminate the proceedings on an administrative enforcement matter, but that vote split 3-3 and thus did not succeed. *Id.*

Meanwhile, on February 16, 2021, CLC had sued the FEC, claiming that it had failed to act on CLC's administrative complaint and that this inaction was contrary to law under 52 U.S.C. § 30109(a)(8)(A). *CLC v. FEC*, Civ. No. 21-406 (D.D.C.) (Feb. 16, 2021), (Compl. for Declaratory and Injunctive Relief (Dkt. No. 1)). On March 25, 2022, after a vote on whether to defend the agency in that case had failed to garner the required 4 votes, the court in *CLC v. FEC* (No. 21-406) entered default judgment against the FEC and ordered the agency to conform to its judgment pursuant to 52 U.S.C. § 30109(a)(8)(C). *Id.* (Order (Dkt. No. 16)).

Also on March 25, 2022, Heritage Action submitted a Freedom of Information Act ("FOIA") request to the FEC seeking any vote certifications and statements of reasons in MUR 7516. *See CLC v. Heritage Action*, Civ. No. 22-01248 (D.D.C.) (July 8, 2022) (Dkt. 20-6).

On April 7, 2022, the Commissioners divided 3-2 and 3-1 on further votes to find reason to believe that Heritage Action had violated 52 U.S.C. § 30104(c)(1) and 52 U.S.C. § 30104(c)(2)(C). MUR 7516 Pub. Rec. (Certification dated April 7, 2022). That same day, the Commissioners split 3-3 on two votes to close the file in MUR 7516. *Id.*

On May 5, 2022, after more than thirty days had elapsed since the judgment of the court in *CLC v. FEC* (Civ. No. 21-406), CLC filed a private action against Heritage Action alleging the FECA violations from MUR 7516. *CLC v. Heritage Action*, Civ. No. 22-1248 (Compl.) (Dkt. 1).

On May 13, 2022, the three FEC Commissioners who had voted against finding reason to

believe in MUR 7516 placed a Statement of Reasons explaining their votes in the file. MUR 7516 Pub. Rec. (Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor).

On June 2, 2022, pursuant to the FOIA request by Heritage Action, the Commission authorized the release to Heritage Action of the certifications of votes that had occurred in MUR 7516 prior to the date of its FOIA request. *CLC v. Heritage Action*, Civ. No. 22-01248 (D.D.C.) (July 8, 2022), (Exh. E) (Dkt. 20-6). On June 15, 2022, Heritage received a copy of the Statement of Reasons dated May 13, 2022. *Id.* (Exh. F (Dkt. 20-7)).

On June 7, 2022, FEC Commissioners voted to close the administrative file for MUR 7516. A notification of this action was sent to Heritage Action by email on June 9, 2022. MUR 7516 Pub. Rec. (Notification dated June 9, 2022). The notification explained that the file in the matter would be placed on the public record in about 30 days. *Id.* Two Commissioners who had voted to find reason to believe issued a Statement of Reasons explaining their votes on July 7, 2022. MUR 7516 Pub. Rec. (Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub dated July 7, 2022). The case file was released to the public via the FEC's website on July 13, 2022. *See id.* The file included both of the Statements of Reasons described above, as well as other documents customarily released in accord with the Commission's disclosure policy. *Id.*

B. This Judicial-Review Action

Plaintiff filed this APA suit on May 20, 2022. (*Heritage Action for Am. v. FEC*, Civ. No. 22-1422 (D.D.C.) (May 20, 2022), Pl's Compl. for Declaratory and Injunctive Relief ("Compl.") (Dkt. 1).) The core of plaintiff's complaint is that it has been harmed by lack of access to the vote certifications and statements of reasons in MUR 7156. (Compl. ¶¶ 3-10.) Plaintiff claims that this harm is the result of an alleged "policy" of the Commission to deliberately conceal the

FEC Commissioners' voting records and statements of reasons from the respective subjects in otherwise terminated enforcement proceedings in violation of the APA. (Compl. ¶¶ 1, 2.) In particular, Heritage Action contends that whenever a motion to find reason to believe that a respondent in an FEC enforcement MUR has violated FECA fails to garner the necessary four Commissioner votes for the matter to proceed, the matter is automatically terminated. (Compl. ¶¶ 29-30.) Plaintiff claims that any subsequent failure to close the MUR file, and to disclose the voting records and statement of reasons, violates the Commission's legal obligations. (*See* Compl. ¶¶ 36-38.) Plaintiff alleges that, because FECA allows complainants to sue the Commission if it "fail[s] . . . to act" on an administrative complaint and then to sue the respondent directly if the FEC still fails to act, 52 U.S.C. § 30109(a)(8)(A), (C), by failing to close the file the Commission "has left the public and courts with the false impression that it has not taken action" on the administrative complaint, "thus deliberately subjecting the Commission and Heritage Action to direct civil lawsuits on false pretenses." (Compl. ¶ 7 (alterations in original).) Heritage Action notes that it is a defendant in such a private right of action stemming from MUR 7516, and it alleges that respondents in other unidentified MURs have also been affected by this "policy." (Compl. ¶¶ 3, 73-74.)[1]

These claims form the basis of plaintiff's five-count complaint. Counts I through IV all allege violations of the APA, while Count V seeks mandamus relief.

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[1] Plaintiff claims that the alleged "concealment policy" has also affected seven other administrative "respondents[.]" (Compl. ¶ 3.) Plaintiff presumably draws this figure from a May 13, 2022 Commissioner statement cited elsewhere in its complaint (Compl. ¶ 35), although that statement actually refers to a total of eight administrative matters or MURs, each of which can involve more than one respondent. *Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters* (May 13, 2022), https://www.fec.gov/resources/cms-content/documents/Redacted_Statement_Regarding_Concluded_Matters_13_May_2022_Redacted.pdf, at 1.

Count I alleges that defendants' "concealment policy" led the Commission to unlawfully withhold information from Heritage Action regarding MUR 7516, and therefore to act "[c]ontrary to law," in violation of 5 U.S.C. § 706(2)(A). ((Compl. ¶¶ 79-88) (citing 5 U.S.C. § 555(e); 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a)).)

Count II alleges that defendants "acted arbitrarily and capriciously by failing to comply with the FEC's regulations[,]" in violation of 5 U.S.C. § 706(2)(A), in failing to notify plaintiff of the Commission's alleged terminating action regarding MUR 7516 and failing to provide plaintiff with voting records. ((Compl. ¶¶ 89-94) (citing 11 C.F.R. §§ 111.9(b), 111.20(a)).)

Count III alleges that defendants acted arbitrarily and capriciously, and in violation of 5 U.S.C. § 706(2)(A), because they "departed from [their] longstanding policy and practice by adopting a new concealment policy" by "treating MUR 7516 differently than similarly situated enforcement matters in which Defendants administratively closed the file upon split votes failing to find reason to believe a violation occurred[.]" (Compl. ¶¶ 95-100.)

Count IV alleges that defendants have "unlawfully withheld or unreasonably delayed" notice of the Commission's alleged terminating action in MUR 7516 and release of its voting records and any statement of reasons, in violation of 5 U.S.C. §§ 555(b), 555(e), and 706(1). ((Compl. ¶¶ 101-109) (citing 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a)).)

Finally, Count V seeks an order in mandamus (28 U.S.C. § 1361) compelling the Commission to "comply with the law" by notifying Heritage Action of the alleged termination of action in MUR 7516 and by releasing the voting records and any statements of reasons in that MUR. (Compl. ¶¶ 110-115.)

In all Counts, plaintiff requests that the Court order defendants to terminate MUR 7516 and release the voting records and statements of reasons to plaintiff. (Compl. ¶¶ 88, 94, 100,

109, 115.) Counts I and III also request that the Court "set aside" the alleged concealment policy (Compl. ¶¶ 88, 100.)

Plaintiff's Prayer for Relief requests further sweeping judicial intervention. It seeks not only "[a]n order compelling Defendants to issue the required notification to Heritage Action of the Commission's terminating action in MUR 7516 and publicly release the voting records and any statement of reasons," but also an "injunction requiring Defendants to issue the required notifications to complainants and respondents and to publicly release Commission's [sic] voting records and statements of reasons in any enforcement matter after the Commission fails to garner four votes to initiate an enforcement action based on the complaint." Prayer for Relief, paragraphs b, c, d.

ARGUMENT

Plaintiff's complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted. Plaintiff challenges the Commission's actions with respect to MUR 7516, but plaintiff's claims are moot. As noted, the source of plaintiff's alleged injury throughout the complaint, as alleged in all five counts, is the purported deprivation of information regarding MUR 7516. Yet even assuming plaintiff was so injured, this injury has been cured. Plaintiff has all the information it seeks, and therefore plaintiff's complaint should be dismissed.

As noted above, plaintiff's complaint attributes the harm it alleges to itself to a broader alleged "concealment policy," and two parts of the Prayer for Relief seek injunctive relief that would extend not just to Heritage Action but to respondents in unidentified other MURs. But plaintiff fails to establish its standing to vindicate the rights of these unnamed parties, and fails to demonstrate that similar handling of unidentified other enforcement matters would constitute a

"policy" that is final agency action reviewable under the APA, rather than an ordinary exercise of the discretion of law enforcement agencies.

Finally, plaintiff's claims fail because FECA's judicial review provision, 52 U.S.C. § 30109(a)(8), is the only means to challenge the agency's handling of administrative enforcement matters.

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) allows dismissal for "lack of jurisdiction over the subject matter" of claims asserted in the Complaint. The party claiming subject matter jurisdiction bears the burden of demonstrating that jurisdiction exists. *Khadr v. United States,* 529 F.3d 1112, 1115 (D.C. Cir. 2008). When reviewing a motion to dismiss for lack of subject matter jurisdiction, each court has "'an affirmative obligation to insure that it is acting within the scope of its jurisdictional authority.'" *Jones v. Ashcroft,* 321 F. Supp. 2d 1, 5 (D.D.C. 2004) (citation omitted). In evaluating such motions, courts review the complaint liberally and grant plaintiffs the benefit of all inferences that can be derived from the facts alleged. *Barr v. Clinton,* 370 F.3d 1196, 1199 (D.C. Cir. 2004). To determine whether it has jurisdiction over a claim, the court may consider materials outside the pleadings. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005). No action of the parties can confer subject matter jurisdiction on a federal court because subject matter jurisdiction is both a statutory requirement and a constitutional requirement under Article III. *Akinseye v. District of Columbia,* 339 F.3d 970, 971 (D.C. Cir. 2003).

Dismissal of a complaint is also appropriate under Rule 12(b)(6) where, accepting the factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 129 (D.C. Cir. 2012) (citing

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft,* 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). A claim must be dismissed "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558.

II. PLAINTIFF'S MUR 7516 ALLEGATIONS ARE MOOT BECAUSE IT HAS ALL THE INFORMATION IT SEEKS

Plaintiff alleges that the FEC failed to provide Heritage Action with the required notice that MUR 7516 had "terminated" after a failed Commissioner vote to find reason to believe a violation occurred, and then failed to publicly release the corresponding voting records and any statement of reasons. (Compl. ¶¶ 79-115.) Yet the sole source of Heritage's alleged injury, the deprivation of information regarding MUR 7516, has been cured and there is no injury to plaintiff for the Court to redress. Plaintiff's claims are therefore moot, and the Court lacks jurisdiction.

To have Article III standing a plaintiff must establish: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Where a plaintiff asserts a procedural right, he must show that he has suffered a personal and particularized injury that

impairs one of his concrete interests. *Int'l Bhd. of Teamsters v. TSA*, 429 F.3d. 1130, 1135 (D.C. Cir. 2005). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right in vacuo — is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

Under the Constitution, federal courts are limited to deciding "actual, ongoing controversies." *Honig v. Doe,* 484 U.S. 305, 317 (1988). "Even where the litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Clark v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (quotation marks and citations omitted). Thus, "[w]hen the challenged harm is prospective, courts face the additional hurdle of assuring themselves that its likelihood is not too far flung, lest imminence . . . be stretched beyond its purpose to create a controversy where none exists. *Klayman v. Obama*, 142 F. Supp. 3d 172, 184 (D.D.C. 2015) (citing *Lujan*, 504 U.S. at 564 n. 2) (internal quotation marks omitted). Consequently, the "threatened injury must be *certainly impending* to prevent litigation of illusory claims." *Id.* (citing *Clapper v. Amnesty Int'l USA*, 589 U.S. 398, 409 (2013) (emphasis in original)).

A case is moot if a defendant can demonstrate that two conditions are met: (1) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation, and (2) there is no reasonable expectation that the alleged wrong will be repeated. *Doe v. Harris,* 696 F.2d 109, 111 (D.C. Cir. 1982) (citing *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)). When both conditions are satisfied, the case is moot because neither party has a legally cognizable interest in the final determination of the underlying facts and law. *Id.* While the movant has the burden of proving mootness, a plaintiff must defend a motion to dismiss brought

under Rule 12(b)(1) by proving by a preponderance of the evidence that the court has jurisdiction to hear its claims. *Khadr,* 529 F.3d at 1115.

Plaintiff cannot meet this burden here. The complaint is clear that any harm plaintiff may have suffered stemmed from its lack of the MUR 7516 voting certifications and statements of reasons that it now has. In particular, plaintiff alleges that it is "suffering informational injury as a result of Defendants' concealment policy." (Compl. ¶ 74.) "The denial of this information causes Heritage Action to suffer the type of harm the disclosure provisions are meant to prevent, because Heritage Action is denied information regarding its continued exposure to enforcement actions and civil liability." (*Id*.) Moreover, the sole relief sought by plaintiff with respect to MUR 7516 is "[a]n order compelling Defendants to issue the required notification to Heritage Action of the Commission's terminating action in MUR 7516 and publicly release the voting records and any statement of reasons[.]" (Compl. at 28 (Prayer for Relief).)

Plaintiff has those things. As explained above, in response to plaintiff's FOIA request, the FEC provided plaintiff with the vote certifications it sought on June 2, 2022, and the existing Statement of Reasons on June 15, 2022.[2] *See supra* pp. 5-7 (Administrative Proceedings Related to This Action). On June 9, 2022, the Commission notified counsel for plaintiff that the agency had closed the file in MUR 7516. *Id.* And by mid-July 2022, the entire administrative file was made publicly available. *Id*. That file contains, *inter alia*, "voting records[,]" "statement of reasons[,]" and "the required notification to Heritage Action[.]" (Compl. at 28 (Prayer for Relief).)

[2] As noted *supra* p. 7, two Commissioners wrote a separate Statement of Reasons on July 7, 2022, and this was made available to Heritage Action when the FEC made the record for MUR 7516 publicly available on July 13, 2022.

Plaintiff's recent filings in other proceedings also make clear that it is in possession of all the information necessary to "defending ongoing legal action." (Compl. ¶ 74.) For example, on July 8, 2022, plaintiff filed a motion to dismiss the private enforcement action initiated against it by the Campaign Legal Center. Compl. ¶ 3; Def's Mem. of P.& A. in Supp, of Mot. to Dismiss, *CLC v. Heritage Action*, (22-1248) (Dkt. 20-1). This motion attached as exhibits and made frequent reference to the MUR 7516 vote certifications and statements of reasons. *Id*. (Dkts. 20-6, 20-7 (exhibits E, F)).

This Court has rejected comparable claims to informational standing when plaintiffs already have the information they seek. In *Citizens for Responsibility & Ethics in Washington v. Federal Election Commission*, 799 F. Supp. 2d 78 (D.D.C. 2011) ("*CREW*"), the court dismissed plaintiffs' claims for lack of standing, noting that the precise information sought by the plaintiffs, in that case the level of spending by a political action committee, was "publicly available online" and "does not appear to be in dispute." *Id*. at 88. Because Heritage Action likewise does not "allege any specific factual information [it] lack[s] that is not already publicly available[,]" *id.* at 89, it cannot demonstrate a factual injury.

In sum, because plaintiff has the information it seeks as to MUR 7516, interim events have ended the effects of the alleged harm to plaintiff, and the first requirement for mootness is plainly met. *See Doe,* 696 F.2d at 111. There is no longer any possibility that the alleged harm will be "redressed by a favorable decision." *Lujan,* 504 U.S. at 561.

The second requirement for mootness is also met, because there is no reasonable expectation that the alleged harm to plaintiff — a lack of information about an FEC enforcement matter involving plaintiff — will be repeated. *See Doe,* 696 F.2d at 111. The complaint identifies no additional FEC enforcement proceedings involving plaintiff. Nor does plaintiff

allege that it is likely to be subject to such proceedings in the future or that it would suffer the same harm it alleges with respect to MUR 7516. Therefore, plaintiff has not met its burden to establish standing in this regard. *See, e.g., Paging Sys., Inc. v. FCC*, Civ. No. 10-1097, 2010 WL 5121962, at *1 (D.C. Cir. Aug. 30, 2010) (per curiam) (granting motion to dismiss) ("Bare allegations are insufficient ... to establish ... standing to seek judicial review of administrative action.") (citing *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)); *Cato Inst. v. Sec. & Exch. Comm'n*, 4 F.4th 91, 96 (D.C. Cir. 2021) (affirming lower court's grant of motion to dismiss for lack of standing) ("When assessing standing at any stage of the litigation, we do not accept inferences that are unsupported by the facts alleged in the complaint.") (citing *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 54 (D.C. Cir. 2019) (per curiam)). And the mere theoretical possibility of future enforcement proceedings cannot suffice, because any "threatened injury must be certainly impending." *Klayman*, 142 F. Supp. 3d at 184 (citing *Clapper*, 568 U.S. at 409); *see Belmont Abbey Coll. v. Sebelius*, Civ. No. 11-1989, 2012 WL 3861255, at *3 (D.D.C. Sept. 5, 2012) ("The threat of future litigation is inadequate to satisfy the imminent-injury component of the standing doctrine.") (*citing City of Orville v. FERC*, 147 F.3d 979, 987 (D.C. Cir. 1998)).

Because plaintiff now has the information it seeks in this lawsuit, its claims are moot and should be dismissed.

III. PLAINTIFF LACKS STANDING TO CHALLENGE THE ALLEGED "CONCEALMENT POLICY," AND IN ANY CASE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In addition to Heritage Action and MUR 7516, plaintiff also seeks broader relief on behalf of unidentified respondents in other unidentified FEC enforcement matters. Any such effort must fail for lack of standing and failure to state a claim.

As explained above (*supra* pp. 7-10), plaintiff claims that the alleged harm it has suffered regarding MUR 7516 stems from an FEC "concealment policy" to convey a "false impression" that the FEC has not yet taken action on administrative complaints in its enforcement matters and to manipulate the courts into permitting private enforcement of FECA against respondents, a "policy" that plaintiff claims has also affected respondents in unidentified other administrative matters. (Compl. ¶ 3.) Although plaintiff points to no written expression of this supposed FEC "policy," and provides no specific information as to these other proceedings, it seeks "[a]n order setting aside Defendants' new concealment policy," and "[a]n injunction requiring Defendants to issue the required notifications to complainants and respondents and to publicly release Commission's voting records and statements of reasons in any enforcement matter after the Commission fails to garner four votes to initiate an enforcement action based on the complaint[.]" (Compl. at 28 (Prayer for Relief).) This unjustified relief should be denied.

A. Plaintiff Lacks Standing to Pursue its Broad "Concealment Policy" Allegations on Behalf of Unnamed Third Parties

Like all plaintiffs, Heritage Action must demonstrate Article III standing to pursue relief for its claims. *See supra* pp. 12-14. Plaintiff has not even attempted, however, to show how any broader "concealment policy" as applied in unnamed matters to unnamed parties not before this Court has caused plaintiff any cognizable injury-in-fact that an order of this Court could redress. "[T]he decision to seek review must be placed in the hands of those who have a direct stake in the outcome . . . , not . . . in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Am. Legal Found. v. FCC*, 808 F.2d 84, 91 (D.C. Cir. 1987) (internal quotation marks omitted) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (other citation omitted)). Plaintiff lacks that direct stake as to other enforcement proceedings and therefore cannot meet its burden to demonstrate standing under Article III.

The federal courts generally prohibit a party from raising the rights or interests of third persons in challenging allegedly illegal governmental action. *See Warth v. Seldin*, 422 U.S. 490, 499-500 (1975); *Rumber v. District of Columbia,* 595 F.3d 1298, 1301 (D.C. Cir. 2010). This prohibition is a "judicially self-imposed limit[ ] on the exercise of federal jurisdiction." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). And in this case, the broad relief plaintiff seeks as to its "concealment policy" claim appears to rest on the interests of such third parties who are not before the Court —subjects of FEC enforcement proceedings from whom the Commission would allegedly withhold voting records.

There are limited exceptions to the prudential rule against third-party standing, but Heritage Action cannot meet them. A party seeking third-party standing must demonstrate both a "close" relationship with the person whose interests or rights are at issue and a "hindrance" to that person's ability to protect his or her own interests. *See, e.g., Kowalski v. Tesmer,* 543 U.S. 125, 129-30 (2004). Heritage Action does not qualify for these exceptions. It has not alleged a "close" relationship with other subjects of other FEC enforcement proceedings, nor could it do so, without even naming these individuals or organizations. By contrast, for example, trade associations and other membership organizations have been allowed, in certain circumstances, to protect the rights of their members. *See, e.g., NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958) (membership organization could assert members' constitutional right of association); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (doctors accused of being accessories to the crime of contraceptive use by their patients could raise their patients' constitutional right to contraception). Plaintiff also fails to provide any basis to conclude that it has a greater ability to litigate the alleged rights of other FEC enforcement subjects than those subjects themselves. *See Singleton v. Wulff,* 428 U.S. 106, 114 (1976) (plurality opinion of Blackmun, J.) ("third parties

themselves usually will be the best proponents of their own rights."). In the absence of any relationship — let alone a "close" one — plaintiff cannot establish third-party standing.[3]

B. Plaintiff's Broad "Concealment Policy" Allegations Do Not Challenge Final Agency Action and Therefore Fail to State a Claim Upon Which Relief Can Be Granted

Plaintiff has identified no "policy" that can be considered final agency action subject to APA review, but merely the handling of a handful of a vaguely defined small group of unidentified FEC enforcement matters. To be reviewable, a challenged agency action must "either (1) reflect 'final agency action,' 5 U.S.C. § 704, or (2) 'constitute a de facto rule or binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by § 553 of the APA.'"[4] *Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 806 (D.C. Cir. 2006). An agency action is final if it is both "the consummation of the agency's decisionmaking process" and a decision by which "rights or obligations have been determined" or from which "legal consequences will flow[.]" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Therefore, the APA authorizes challenges to "discrete" federal agency action; it does not contemplate entangling the courts in managing the day-to-day business of the agencies. *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 64 (2004); *see also Lujan v. Nat'l Wildlife Fed'n,* 497 U.S.

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[3] Moreover, plaintiff does not allege that it is a membership organization seeking standing to vindicate the rights of its members. To bring such a claim, Heritage would need to demonstrate that "(a) its members would otherwise have 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." *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977).

[4] Plaintiff does not challenge the alleged "concealment policy" as a *de facto* regulation issued in violation of APA's notice-and-comment requirements, and in any event such a challenge would be meritless. *See Citizens for Resp. & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113, 118 (D.D.C. 2015) (finding that even if a repeated interpretation by several FEC Commissioners in MURs were assumed to have become a broad policy of the agency, new principles announced through adjudication are not treated as regulations for purposes of judicial review).

871, 891 (1990) (stating that, under the APA, a plaintiff "must direct its attack against some particular 'agency action' that causes it harm").

Plaintiff cannot meet these standards. It clearly objects to what it perceives to be a practice in the handling of certain FEC enforcement matters, but the court's jurisdiction "does not extend to reviewing generalized complaints about agency behavior." *Bark v. United States Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014) (citing *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006) (rejecting challenge to "a generalized, unwritten administrative 'policy'"). This is because even "an on-going program or policy is not, in itself, a 'final agency action' under the APA." *Id.* (quoting *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001)). As a result, the APA requires plaintiffs to challenge a "discrete agency action" rather than launching "a broad programmatic attack" on an agency's compliance with a statutory scheme. *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 387 F. Supp. 3d 33, 49 (D.D.C. 2019) (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)). *See also Del Monte Fresh Produce N.A., Inc. v. United States,* 706 F. Supp. 2d 116, 119 (D.D.C. 2010) (granting motion to dismiss where importer's claim that FDA "pattern and practice" of delay in produce inspections was not justiciable under the APA); *Inst. for Wildlife Prot. v. Norton,* 337 F. Supp. 2d 1223, 1226-27 (W.D. Wash. 2004) (dismissing plaintiffs' claims that an agency engaged in a pattern and practice of delay in responding to citizen petitions under the Endangered Species Act, in violation of the APA).

Courts have rejected claims similar to plaintiff's claim here. For example, in *Bark v. United States Forest Service*, plaintiffs challenged the U.S. Forest Service's issuance of several special use permits, along with its overall "policy and practice" of issuing such permits, on the grounds that the permits allowed concessioners to charge unlawful fees without proper review.

37 F. Supp. 3d at 49. The court granted summary judgment to the Forest Service, finding that the plaintiffs had failed to articulate a justiciable final agency action. *Id*. at 50. Plaintiffs had pointed to "no written rules, orders, or even guidance documents of the Forest Service that set forth the supposed policies challenged," and they could not attach a "'policy' label to their own amorphous description" of the agency's practices. *Id*. Rather, "the Forest Service's alleged 'policy' … is found in no authoritative text, and is instead a 'generalized complaint about agency behavior' that gives rise to no cause of action." *Id*. at 51 (citing *Cobell v. Kempthorne*, 455 F.3d at 307). Like the *Bark* plaintiffs, plaintiffs here have pointed to "no written rules, orders, or even guidance documents" articulating an agency policy, and rather "appear to have attached a 'policy' label to their own amorphous description of the [Commission's] practices." *Id*. at 50.

Similarly, in *Lillemoe v. United States Department of Agriculture, Foreign Agriculture Service*, plaintiffs claimed that the Foreign Agricultural Service ("FAS") violated the APA by selectively applying its program regulations and policies. Civ. No. 15-2047, 2020 WL 1984256, at *1 (D.D.C. Apr. 27, 2020). However, "[r]ather than challenging any one decision by FAS, the plaintiffs … [challenged] FAS's alleged *de facto* policy as a whole." *Id*. *7. The plaintiffs put forward evidence of four actions by FAS against plaintiffs that allegedly proved that "FAS maintained a 'policy' of singling them out[.]" *Id*. The court found this evidence insufficient, noting that, "[a]part from these four, discrete adverse actions, the plaintiffs [were] unable to identify, and the record [did] not contain, any evidence that FAS had an overarching policy" and that "plaintiffs [had] failed to establish the existence of a *de facto* policy of arbitrary treatment towards them." *Id*. As a result, "there [was] no final agency action for the Court to review." *Id.* n.4 (citing 5 U.S.C. § 704; *Bennett*, 520 U.S. at 177–78). Here again, Heritage Action has made

allegations about the handling of a number of other matters to which it objects, but offered no evidence of an "overarching policy" subject to APA review.

And in *Citizens for Responsibility & Ethics in Washington v. United States Department of Homeland Security*, the plaintiffs alleged that the Department of Homeland Security (DHS) had violated the Federal Records Act ("FRA") by maintaining a deficient records management program. 387 F. Supp. 3d at 42. The court found that plaintiffs did not challenge a final agency action and granted the government's motion to dismiss. *Id.* at 44. The court first distinguished between an agency's blanket refusal to comply with a statutory mandate and discrete instances of non-compliance, finding plaintiffs' claims fit in the latter category and were therefore not justiciable. *Id.* at 53. The court then rejected the plaintiffs' claim that the agency had a policy of refusing to memorialize its decision-making process, finding that the claim "supported by two examples of purported bad conduct by a subcomponent agency [was] too vague and conclusory to plausibly assert a ... claim[.]" *Id.* at 55 (internal citations omitted).

Here, plaintiff's challenge to the Commission's alleged "concealment policy" is particularly meritless because the votes or other actions of *three* Commissioners do not — and by statute cannot — establish any enforcement policy on behalf of the Commission. Because FECA requires that any affirmative Commission action to investigate or formally advance enforcement against alleged violations be approved by a vote of at least four Commissioners, 52 U.S.C. §§ 30106(c), 30107(a), a group of three Commissioners is "controlling" only for purposes of judicial review of a decision not to pursue such investigative or enforcement actions. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). But three Commissioners cannot establish any policy or regulation on behalf of the agency. 52 U.S.C. § 30106(c) ("All decisions of the Commission with respect to the exercise of its duties and

powers under the provisions of this Act shall be made by a majority vote of the members of the Commission."). Tellingly, plaintiff provides very few details on how the alleged policy was implemented by the three Commissioners, arguing only that they "have forced the Commission to follow a new policy and practice of refusing to administratively close an enforcement matter file after the Commissioners failed to find reason to believe a violation occurred" in eight enforcement proceedings, only one of which (MUR 7516) is identified. (Compl. ¶¶ 32, 34.) By failing to identify any legal basis by which these Commissioners could have imposed such a "policy" upon the agency, plaintiff's complaint fails to state a plausible and coherent claim for relief.

Even assuming three Commissioners could establish such a policy, plaintiff's sweeping but vague "concealment policy" allegations fail to provide sufficient evidence of the challenged "policy" and thus do not state a claim upon which relief can be granted. While plaintiff references eight enforcement matters (Compl. ¶¶ 32, 40), plaintiff identifies only one specific instance of the Commission carrying out its alleged "policy": MUR 7516. Courts have repeatedly found that substantially more detailed evidence of agency practices nevertheless failed to articulate a "final agency action" as opposed to "generalized complaints about agency behavior." *See, e.g., Lillemoe*, 2020 WL 1984256, at *6 (four actions against plaintiffs); *Bark*, 37 F. Supp. 3d at 50 (issuing five permits to defendant-intervenors); *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 387 F. Supp. 3d at 55 (two examples of purported bad conduct by a subcomponent agency was "too vague and conclusory" and failed to plausibly assert an "overall agency culture of resist[ance]"). Indeed, the facts of MUR 7516 itself belie the existence of any "concealment policy," as in this case the Commission has terminated the MUR and released the record to both plaintiff and the public.

Plaintiff claims that the alleged "concealment policy" "depart[s] from [the FEC's] longstanding policy and practice" (Compl. ¶ 31), citing instances where the Commission did vote to close the administrative file following a failed vote to find reason to believe a violation of FECA occurred. (Compl. ¶ 29.) However, the history of the agency's enforcement process belies plaintiff's claim that such immediate dismissals are automatic or required. In fact, the Commission has often held one reason-to-believe or probable-cause-to-believe vote that does not pass, only to determine in a later vote that there was in fact reason to believe or probable cause to believe on the same claim. *See, e.g.*, FEC MURs 7350, 7351, 7357, and 7382 (Cambridge Analytica LLC, *et al.*);[5] MUR 6623 (Scalise for Congress, *et al.*);[6] MUR 5754 (MoveOn PAC, *et al.*).[7] In short, plaintiff provides this Court with only anecdotes directly contradicted by a more complete review of FEC enforcement practices, and it has thus failed to "state a claim to relief that is plausible on its face." *Ashcroft,* 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570).

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[5] Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (Apr. 12, 2019) (failing, 2-0, to find reason to believe on a series of claims), https://www.fec.gov/files/legal/murs/7350/7350_27.pdf. *See* Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (July 30, 2019) (voting 4-0 to find reason to believe on several of the same claims), https://www.fec.gov/files/legal/murs/7350/7350_29.pdf; Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (Aug. 22, 2019) (same), https://www.fec.gov/files/legal/murs/7350/7350_37.pdf.

[6] Amended Certification, MUR 6623 (Scalise for Congress, *et al.*) (July 31, 2012) (voting 3-3 on whether there was reason to believe one respondent violated FECA and then later voting 5-1 to find reason to believe regarding that respondent), https://eqs.fec.gov/eqsdocsMUR/13044330654.pdf.

[7] Certification, MUR 5754 (MoveOn PAC, *et al.*) (Sept. 14, 2004) (voting 3-2 on whether there was reason to believe), https://www.fec.gov/files/legal/murs/5754/0000590C.pdf; Certification, MUR 5754 (MoveOn PAC, *et al.*) (Sept. 28, 2004) (voting 5-1 to find reason to believe), https://www.fec.gov/files/legal/murs/5754/0000590D.pdf.

Finally, even assuming plaintiff was challenging a justiciable Commission policy, the relief plaintiff seeks is untenable. Plaintiff would have the Court "set[] aside Defendants' new concealment policy" and issue an injunction "requiring Defendants to issue the required notifications to complainants and respondents and to publicly release Commission's voting records and statements of reasons in *any enforcement matter* after the Commission fails to garner four votes to initiate an enforcement action based on the complaint[.]" (Compl. at 28 (Prayer for Relief) (emphasis added).) However, the Court may not "require the agency to follow a detailed plan of action" and "may not prescribe specific tasks for [the agency] to complete[.]" *Cobell v. Kempthorne*, 455 F.3d at 307. Rather, "it must allow [the agency] to exercise its discretion and utilize its expertise in complying with broad statutory mandates." *Id.* (citing *Cobell v. Norton*, 240 F.3d 1081, 1099, 1106 (D.C. Cir. 2001)). Plaintiff here would have the Court supersede the discretion Commissioners have exercised for decades to dismiss matters, irrespective of the facts in any particular proceeding, and even though in some matters, like those cited above, the agency could hold a later vote to go forward with the matter following further deliberation. This would inevitably result in just the sort of "entanglement" in the "management of the agency's business that the Supreme Court has instructed is inappropriate" for the federal judiciary to undertake. *Del Monte,* 706 F. Supp. 2d at 119. Thus, plaintiff's "concealment policy" claims should be dismissed.

IV. PLAINTIFF'S CLAIMS ARE PRECLUDED BECAUSE FECA'S JUDICIAL REVIEW PROVISION IS THE EXCLUSIVE PROCEDURE FOR CHALLENGING THE FEC'S HANDLING OF ENFORCEMENT PROCEEDINGS

Plaintiff's complaint challenges the Commission's handling of MUR 7516, specifically alleging that the agency failed to dismiss the matter following a failed vote to find reason to believe a violation occurred and failed to provide plaintiff with related voting records. *See supra*

pp. 7-10. However, no separate APA or mandamus claim exists to pursue those challenges because FECA provides an adequate and exclusive judicial review mechanism. Even in cases such as this one, where FECA itself does not permit review of plaintiff's claims because the suit is not authorized by FECA's judicial review provision, FECA still precludes plaintiffs' APA and mandamus claims, which should therefore be dismissed pursuant to Rule 12(b)(6).[8]

Congress explicitly provided that only FEC administrative complainants may seek judicial review and that they may do so only in two narrow circumstances. FECA states that when a complainant is "aggrieved by an order of the Commission dismissing a complaint . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed [the complainant] may file a petition with the United States District Court for the District of Columbia." 52 U.S.C. § 30109(a)(8)(A). As noted, this review is available only as to "a complaint filed by such party," *i.e.* the administrative complainant. *Id.* Here, Heritage Action is indisputably a respondent with respect to MUR 7516. (Compl. ¶ 15 ("Heritage Action is the administrative respondent in FEC Matter Under Review (MUR) 7516.").) Plaintiff is therefore precluded from judicial review of MUR 7516 pursuant to section 30109(a)(8).

FECA provides the exclusive mechanism for judicial review of any FEC dismissal of an administrative complaint and any claimed failure to act on such a complaint. Judicial review of agency action under the APA is available only where "made reviewable by statute" and where there is "no other adequate remedy" for final agency action. 5 U.S.C. § 704. "Congress did not

[8] Plaintiff's APA claim could alternatively be dismissed for a lack of subject matter jurisdiction pursuant to Rule 12(b)(1) rather than Rule 12(b)(6) on this ground, as courts have "not always been consistent in maintaining the[] distinctions" between the two rules. *Sierra Club v. Jackson*, 648 F.3d 848, 853 (D.C. Cir. 2011) (internal quotation marks omitted).

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). Thus, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Id*. (internal quotation marks omitted); *see Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 846 F.3d 1235, 1244-45 (D.C. Cir. 2017) (same). To determine the proper basis for judicial review, courts examine the relevant statute's language, structure, and legislative history. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) (explaining that a "detailed mechanism for judicial consideration of particular issues at the behest of particular persons" may demonstrate that other forms of judicial review are "impliedly precluded"); *Klayman v. Obama*, 957 F. Supp. 2d 1, 20 (D.D.C. 2013) (concluding that the Foreign Intelligence Surveillance Act precluded plaintiffs' claim for judicial review pursuant to the APA).

In section 30109(a)(8), Congress delineated the scope of judicial review available in an action challenging alleged FEC impropriety in handling an administrative complaint. The statute specifies that (a) the statutory cause of action is available only to a complainant (b) whose complaint was dismissed or who alleges a failure to act; (c) any petition for judicial review must be filed in the United States District Court for the District of Columbia; (d) the available relief is a judicial declaration that the failure to act or dismissal of the complaint is contrary to law and an order "direct[ing] the Commission to conform with such declaration"; and (e) the safety valve in the event the agency fails to conform with such an order is a private right of action by the complainant. 52 U.S.C. § 30109(a)(8)(C). Because FECA contains this explicit and detailed review provision, there is clearly an "adequate remedy" as described in the APA, 5 U.S.C. § 704. FECA's "detailed mechanism for judicial consideration of particular issues at the behest of

particular persons" precludes other forms of judicial review, including review under the APA. *See Block*, 467 U.S. at 349. Where, as here, 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," the Court of Appeals has found that "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); *see Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009).

Every court that has considered the nature of the judicial-review procedures in section 30109(a)(8) has found that those FECA procedures are exclusive. In fact, the D.C. Circuit has confirmed that section 30109(a)(8) is "as specific a mandate as one can imagine" and accordingly concluded that "the procedures it sets forth — procedures purposely designed to ensure fairness not only to complainants but also to respondents — must be followed before a court may intervene." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam). The Fifth Circuit similarly found "substantial evidence that Congress set forth the exclusive means for judicial review under [FECA]" in section 30109(a)(8). *Stockman v. FEC*, 138 F.3d 144, 156 (5th Cir. 1998). More recently, this District Court has repeatedly held that the review procedure in section 30109(a)(8) precludes an APA claim for dismissal of an administrative complaint. *Citizens for Responsibility & Ethics in Wash. 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); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) ("*CREW* 2015") ("This [section 30109(a)(8) judicial review mechanism] precludes review of FEC enforcement decisions under the APA."); *Citizens for Resp. & Ethics in Wash. v. FEC*, 363 F. Supp. 3d 33, 44 (D.D.C. 2018) ("for the same reasons that judicial review of the challenged

enforcement actions is precluded by FECA, it is precluded under APA: because the statute expressly limits review to the two circumstances identified in 52 U.S.C. § 30109(a)(8)(A)").

FECA's overall structure and legislative history confirm Congress's intent to limit the scope of judicial review of matters within the FEC's area of responsibility. FECA grants the Commission "exclusive jurisdiction with respect to the civil enforcement" of the Act, 52 U.S.C. § 30106(b)(1), and it establishes a specific system of judicial review that "funnels all challenges to the FEC's handling of complaints through the U.S. District Court for the District of Columbia," *CREW* 2015, 164 F. Supp. 3d at 119 (citing 52 U.S.C. § 30109(a)(8)(A)). "The legislative history of [FECA] confirms that '[t]he delicately balanced scheme of procedures and remedies set out in the Act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein.'" *Stockman*, 138 F.3d at 154 (alteration in original) (quoting 120 Cong. Rec. 35,314 (1974) (remarks of Rep. Hayes, Conference Committee Chairman)). The specificity of section 30109(a)(8), which carves out two narrow areas of limited review, is consistent with courts' repeated refusals to review agency enforcement decisions using APA review.

Plaintiff's current challenges to the Commission's handling of MUR 7516, including its alleged failure to provide notice that the MUR had terminated and to disclose voting records, are not permitted under the APA even though they also cannot be pursued under FECA's judicial review provision. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Excluded from this court's review, however, are agency actions that are 'committed to agency discretion by law.'" *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007). "Enforcement actions"

generally fall within this reviewability exclusion because "'a court would have no meaningful standard against which to judge the agency's exercise of discretion' in deciding how to enforce the statutory provisions." *Id*. (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). In fact, "'a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.'" *Orlov v. Howard*, 523 F. Supp. 2d 30, 37 (D.D.C. 2007) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)). "[A] complaint seeking review of agency action 'committed to agency discretion by law' has failed to state a claim under the APA, and therefore should be dismissed under Rule 12(b)(6)." *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (internal citation omitted); *id.* at 855 ("[I]n cases that involve agency decisions not to take enforcement action, we begin with the presumption that the agency's action is unreviewable."); *see also Oryszak v. Sullivan*, 576 F.3d 522, 526 (D.C. Cir. 2009) (holding that the APA provides no cause of action to review an agency's revocation of an employee's security clearance where that decision is "committed to agency discretion by law").

At issue here are the agency's earlier lack of notice to Heritage Action that MUR 7516 had allegedly terminated and the earlier lack of a release to plaintiff of its vote certifications and statements of reasons. Plaintiff does not dispute that any Commission obligation to disclose the record in an enforcement proceeding follows only when the Commission "terminates its proceedings[.]" (Compl. ¶ 26 (citing 11 C.F.R. §§ 111.9(b); 111.20(a)).) While plaintiff clearly disagrees with the Commission's failure to close the MUR 7516 file at a particular time, the challenged handling of the administrative matter falls squarely within the agency's discretion. Determining when proceedings on an administrative complaint have been terminated is committed to the agency's discretion. *Cf. Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988)

("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources." (citing *Heckler*, 470 U.S. at 831-32)). Allowing APA review of such decisions would undo the careful limitations Congress established in section 30109(a)(8).

In sum, section 30109(a)(8) provides the exclusive mechanism for challenging the Commission's handling of administrative complaints and limits the scope of relief available to plaintiff in this action. Because plaintiff's complaint relies entirely on the APA and mandamus, beyond what is permitted in section 30109(a)(8), plaintiff's complaint fails to state a claim and should be dismissed.

V. PLAINTIFF'S MANDAMUS CLAIM SHOULD BE DISMISSED BECAUSE PLAINTIFF CANNOT ESTABLISH A CLEAR AND INDISPUTABLE RIGHT TO THAT DRASTIC RELIEF

Plaintiff's Count V seeks "an order compelling Defendants to comply with the law by notifying Heritage Action of the Commission's terminating action in MUR 7516 and releasing its voting records and any statement of reasons." (Compl. ¶ 115.) Heritage Action seeks a writ pursuant to 28 U.S.C. § 1361, which grants the district courts jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff." Clearly there is no basis for such relief here.

The "remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (citing *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)) (internal quotation marks omitted). To show entitlement to mandamus, a plaintiff must demonstrate (1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists. *United States v. Monzel*, 641 F.3d 528, 534 (D.C. Cir. 2011). These three threshold requirements are jurisdictional; unless all are met, a court must dismiss the claim

for lack of jurisdiction. *See Burwell*, 812 F.3d at 189 (citing *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005)). As with any cause of action, an action for mandamus requires the plaintiff to demonstrate standing as a predicate to the federal court's exercise of its jurisdiction. *See Nyambal v. Mnuchin*, 245 F. Supp. 3d 217, 222 (D.D.C. 2017). "Where the relief the plaintiff is seeking is identical under either the APA or the mandamus statute, proceeding under one as opposed to the other is insignificant." *Id.* at 223 n.5 (*quoting Ctr. for Biological Diversity v. Brennan*, 571 F.Supp.2d 1105, 1124 (N.D. Cal. 2007)).

As with its claims pursuant to the APA, plaintiff's claim for mandamus relief fails because its allegations are moot, and therefore the alleged harm cannot be redressed by a favorable decision. The sole relief requested by plaintiff in its mandamus claim is that defendants "comply with the law by notifying Heritage Action of the Commission's terminating action in MUR 7516 and releasing its voting records and any statement of reasons." (Compl. ¶ 115.) Yet as discussed above, plaintiff already has all of the relief it seeks. *See supra* pp. 12-16. Plaintiff's mandamus claim is therefore moot, cannot be redressed by a favorable decision, and must be dismissed. *See Nyambal*, 245 F. Supp. 3d at 223-24 (granting motion to dismiss claims pursuant to APA and the mandamus statute for lack of standing); *see also Lozansky v. Obama*, 841 F. Supp. 2d 124, 132–33 (D.D.C. 2012) (holding that "[p]laintiffs ... lack standing because the Court cannot issue the requested writ of mandamus, and thus cannot redress the [alleged] injury").

Moreover, even if plaintiff's claims were not moot, they would fail as a matter of law. "The party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable." *Burwell*, 812 F.3d at 189 (citing *Power*, 292 F.3d at 784) (internal quotation marks omitted). Here plaintiff has no entitlement to mandamus relief because any

right to further relief is far from "clear and indisputable." *Monzel*, 641 F.3d at 534. Disagreements between Commissioners about the termination of certain administrative proceedings demonstrate the disputability of the issues plaintiff raises. And plaintiff fails to establish that the Office of General Counsel or any other agency officials have a "clear duty to act" in these disputed areas. *Id.* Indeed, an order that such an individual official provide the broad relief plaintiff seeks would be an unprecedented intrusion into FEC affairs.

Accordingly, plaintiff's Count V should be dismissed.

CONCLUSION

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

Respectfully submitted,

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July 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2022, 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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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERITAGE ACTION FOR AMERICA, Plaintiff, v. FEDERAL ELECTION COMMISSION, and LISA J. STEVENSON, in her official Capacity as Acting General Counsel Defendants.	Civ. No. 22-1422 (CJN) [PROPOSED] ORDER

[PROPOSED] ORDER

Upon consideration of the defendant Federal Election Commission's Motion to Dismiss, any opposition filed by plaintiff Heritage Action for America, and the Commission's reply, it is hereby

ORDERED that the Federal Election Commission's Motion to Dismiss is GRANTED, and it is further

ORDERED that plaintiff's Complaint is DISMISSED.

Dated: _____, 2022

_____
Hon. Carl J. Nichols
United States District Judge