UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERITAGE ACTION FOR AMERICA, Plaintiff, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 22-1422 (CJN) OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Lisa Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

/s/ *Christopher H. Bell*
Christopher H. Bell (D.C. Bar No. 1643526)
Attorney
chbell@fec.gov

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

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The Federal Election Commission ("FEC" or "Commission") opposes plaintiff Heritage Action for America's ("Heritage Action") Cross-Motion for Summary Judgment ("Motion" or "MSJ") (Docket No. 20) because plaintiff has failed to establish jurisdiction, failed to state a claim, and failed to provide evidence sufficient to justify summary judgment. As a threshold matter, plaintiff's claims should be dismissed for the reasons detailed in the FEC's Motion to Dismiss ("MTD") (Docket No. 17). They 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. In addition, plaintiff is in possession of all the information it seeks as to the FEC matter in which it is a respondent, rendering that portion of its claims moot, and plaintiff has not established standing to obtain any relief on behalf of unnamed third parties as to its broad "concealment policy" claims. And plaintiff fails even to state a claim under the Administrative Procedure Act ("APA") because the actions it challenges are committed to the FEC's discretion by law and there is no reviewable "final agency action."

Even if plaintiff's claims were reviewable, they would fall well short of justifying summary judgment under standards of APA review. The agency's long-standing practice to hold votes to terminate its administrative enforcement matters ("MURs") represents a reasonable interpretation of FECA and its regulations to which the Court should defer, as well as a quintessential exercise of agency discretion in law enforcement. Plaintiff has also failed to provide evidence of final agency action that would be sufficient at summary judgment, offering little more than speculation regarding matters it claims reflect an alleged "concealment policy," other than a statement by three FEC Commissioners which references seven other proceedings without identifying them. Plaintiff's allegations that the FEC's conduct violates the APA rest on

a single unsupported premise, that the vaguely identified MURs in question have already terminated or must be deemed to have done so, but plaintiff has not come close to offering facts to show that is the case. The plain language of FECA and the FEC regulations simply do not require the termination of a proceeding following a single vote on the merits of the complaint, nor do they require the disclosure of records in the way plaintiff would prefer. Finally, plaintiff has failed to show a failure to act in any MUR under the relevant standards. Yet plaintiff demands sweeping relief that would invade agency discretion and alter longstanding agency enforcement practices, on the basis of vague claims about a handful of matters, out of the hundreds of other MURs that the agency has closed during the relevant period.

Plaintiff's Motion should be denied.

BACKGROUND

I. THE FEC AND ITS ADMINISTRATIVE ENFORCEMENT PROCEDURES

As the FEC explained in its Motion to Dismiss (MTD at 2-5), 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 ("FECA"). *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the FEC 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 investigate 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") provides anyone alleged to have committed such a violation, referred to as a respondent, with an opportunity to respond, then prepares a report to the Commission known as a General Counsel's Report. 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* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007). But other types of votes sometimes take place in advance of votes on whether there is a reason to believe a violation occurred or to dismiss. Other closed matters provide examples of such votes. *See, e.g.,* FEC MUR 6798 (David Vitter for U.S. Senate).[1]

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

[1] Certification, FEC MUR 6798 (David Vitter for U.S. Senate, *et al*.) (Dec. 5, 2017) (4-1 vote to send letter to respondents), https://www.fec.gov/files/legal/murs/6798/19044463470.pdf; Certification, FEC MUR 6798 (March 26, 2019) (2-2 vote to find reason to believe and 4-0 vote to close the file), https://www.fec.gov/files/legal/murs/6798/19044463493.pdf.

enforcement matter at an Executive Session. *See generally* FEC, Commission Directive No. 52 (Circulation Vote Proc.) (effective Dec. 1, 2016). During such meetings, the Commissioners may, *inter alia*, 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. 52 U.S.C. § 30109(a)(2). But 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. Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546. Further administrative proceedings may involve conciliation with respondents or a *de novo* civil enforcement suit. (MTD at 4.) 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), alleging that the FEC has unlawfully dismissed or 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 declares that a dismissal or failure to act is "contrary to law," the court can order the FEC to conform to that declaration within 30 days. *Id.* § 30109(a)(8)(C). If the FEC fails to do so, the complainant may obtain a private right of action against the administrative respondent. *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

As explained in the FEC's Motion to Dismiss (MTD at 5-7), 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 18, 2022) (hereinafter "MUR 7516 Pub. Rec.") (Complaint dated Oct. 16, 2018). The FEC designated the enforcement matter as MUR 7516. *Id.* (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 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) (Docket No. 1). On March 25, 2022, after there had not been the four votes necessary for the agency to defend the

action alleging that it had failed to act on MUR 7516, 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.* (Docket 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. *CLC v. Heritage Action*, Civ. No. 22-01248 (D.D.C.) (July 8, 2022) (Docket No. 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 30 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 (Docket No. 1).

On May 13, 2022, the three FEC Commissioners who had voted against finding reason to believe in MUR 7516 placed a controlling Statement of Reasons explaining their votes in the file. MUR 7516 Pub. Rec. (Statement of Reasons dated May 13, 2022).

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) (Docket No. 20-6). On June 15, 2022, Heritage received a copy of the Statement of Reasons dated May 13, 2022. *Id.* (Docket No. 20-7).

On June 7, 2022, FEC Commissioners voted to close the administrative file for MUR 7516, and a notification was sent to Heritage Action on June 9, 2022. MUR 7516 Pub. Rec.

(Notification dated June 9, 2022). 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 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 to the public. *Id.*

B. This Judicial-Review Action

Plaintiff filed this suit principally asserting APA causes of action on May 20, 2022. (Compl.) Plaintiff claims that it has been harmed by lack of access to the vote certifications and statements of reasons in MUR 7156. (Compl. ¶¶ 3-10.) Alongside that relatively confined challenge, however, plaintiff makes the sweeping claim that it is only one victim 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.) Plaintiff alleges that this "concealment policy" has harmed a number of other respondents in other unidentified MURs, over an indeterminate period of time. (Compl. ¶¶ 3, 73-74.)[2]

In support of this theory, 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

[2] 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.

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.) Heritage Action notes that it is a defendant in such a private right of action stemming from MUR 7516.

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.

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)).) Plaintiff seeks to have the Court "hold unlawful and set aside Defendants' concealment policy[.]" (Compl. ¶ 88.)

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.) On this basis, plaintiff again seeks to have this Court "hold unlawful and set aside Defendants' concealment policy[.]" (Compl. ¶ 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 seeks an order that defendants terminate MUR 7516 and release the voting records and statements of reasons to plaintiff. (Compl. ¶¶ 88, 94, 100, 109, 115.) Plaintiff's Prayer for Relief requests 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." (*Id.*, Prayer for Relief, paragraphs b, c, d.) Plaintiff states that it is "not presently" seeking an injunction, but it seeks declaratory relief and an order to the same effect. (Motion at 38- 39 & n.5.)

ARGUMENT

Plaintiff fails to meet its burden to justify summary judgment. Its claims are precluded because FECA is the exclusive avenue for judicial review of the FEC's handling of administrative enforcement proceedings. Plaintiff's claims are also moot, because it has the information it seeks with respect to MUR 7516, and it has no standing to challenge an alleged "concealment policy" on behalf of respondents in MURs with which it has no connection. Plaintiff's vague and conclusory allegations also fail to state a claim under the APA, which requires that plaintiffs challenge a final, discrete agency action. Even if reviewable, plaintiff's claims are meritless. The Commission's longstanding approach to the termination of enforcement matters is consistent with FECA and FEC regulations, and the agency is entitled to substantial deference in the conduct of investigations. Thus, plaintiff has failed to show any agency action that is contrary to law. Nor has plaintiff shown unlawful delay, particularly in light of its glaring lack of specific evidence, which is fatal to its claims at summary judgment. And the sweeping relief plaintiff demands would constitute an unprecedented judicial intervention into the agency's enforcement proceedings. Plaintiff's claims must fail.

I. STANDARD OF REVIEW

A. Standard of Review on a Motion for Summary Judgment

Under the Federal Rules, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial burden of showing, by reference to the record, that there are no genuine issues of material fact to be determined at trial. *See Clark v. Coats & Clark, Inc*., 929 F.2d 604, 608 (11th Cir. 1991). The court must view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the

record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Def's. of Wildlife v. Dep't of Agric.*, 311 F. Supp. 2d 44, 53 (D.D.C. 2004) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970)).

At the summary judgment phase, a plaintiff must demonstrate with admissible evidence that it has established the elements of standing. *See Lujan v. Def's. of Wildlife*, 504 U.S. 555, 561 (1992). While "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, . . . [i]n response to a summary judgment motion, . . . the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts[.]'" *Id*. (quoting Fed. R. Civ. P. 56(e); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 115 n. 31 (1979)); *see Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (plaintiff at summary judgment stage must support each element of standing by affidavit or other evidence); *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951, 952 (D.C. Cir. 1998) ("evidence there must be" to establish the elements of standing at the summary judgment stage); *Humane Soc'y of the U.S. v. Perdue*, 935 F.3d 598, 602 (D.C. Cir. 2019) (quoting *Lujan*, 504 U.S. 561) (The plaintiffs "must prove injury in fact with 'specific facts' in the record.").

Plaintiff has moved for summary judgment as to each of its claims, and it accordingly rests on the evidence that has so far been introduced to the record in this matter. That record consists primarily of the documents the Commission has made available on its website with regards to MUR 7516. FEC, *MUR #7516: Summary*, https://www.fec.gov/data/legal/matter-under-review/7516/ (last visited Aug. 25, 2022). There is no record evidence regarding the seven additional, unidentified MUR proceedings plaintiff challenges, except for some general discussion of these documents in FEC Commissioner statements. (MSJ, Exhs. A, G.)

B. Standard of Review on APA Claims

Plaintiff alleges that the FEC's lack of dismissal of enforcement matters following a single divided (3-3) vote regarding whether to find reason-to-believe a violation occurred was "contrary to law" (Count I), "arbitrary and capricious agency action" (Counts II, III), and action "unlawfully withheld or unreasonably delayed" (Count IV). *See supra*, Background Part II.B.

Assuming APA causes were properly presented, the arbitrary and capricious standard of review as set forth in the APA is "highly deferential" and "presume[s] the validity of agency action." *Am. Horse Prot. Ass'n v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc). As the D.C. Circuit has explained, the standard for determining whether a Commission determination "was arbitrary or capricious or otherwise an abuse of discretion" is "extremely deferential" and "requires affirmance if a rational basis for the agency's decision is shown." *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986); *Van Hollen v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016) ("*State Farm* entails a very deferential scope of review that forbids a court from substitut[ing] its judgment for that of the agency.") (internal quotation marks omitted)). To meet that standard, plaintiffs must show that "the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In the context of a failure to act allegation under 52 U.S.C. § 30109(a)(8), the Court of Appeals has explained that "in using the language 'contrary to law,' Congress appears to have intended that the unreasonableness of the Commission's delay in completing its task be tested

under standards generally applicable to review of agency inaction." *In re Nat. Cong. Club*, Civ. No. 84-5701, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984). To make these determinations in section 30109(a)(8) cases, the Court of Appeals has instructed district courts to consider the four factors used in *Common Cause* — "'[1] the credibility of the allegation, [2] the nature of the threat posed, [3] the resources available to the agency, and [4] the information available to it, as well as the novelty of the issues involved,'" *id.* (quoting *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980)) — as well as the six factors discussed in *Telecommunications Research & Action Center v. Federal Communications Commission*:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d 70, 80 (D.C. Cir. 1984) (citations and internal quotation marks omitted) ("*TRAC*").

C. Agency Deference

Courts are required to analyze an agency's interpretation of a statute by following the two-step procedure set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If the court concludes that the statute is either silent or ambiguous, the second step of the court's review process is to determine whether the

interpretation proffered by the agency is "based on a permissible construction of the statute." *Id.* at 843.

Once a reviewing court reaches the second step, it must accord "considerable weight" to an agency's construction of a statutory scheme it has been "entrusted to administer[.]" *Id.* at 844. "[U]nder Chevron, courts are bound to uphold an agency interpretation as long as it is reasonable—regardless whether there may be other reasonable or, even more reasonable, views." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998). And the court must defer to an agency's reading of its own regulations unless it is "plainly erroneous or inconsistent with the regulation." *Id.* at 1320 (internal quotation marks omitted).

Under this standard, the courts have regularly deferred to the FEC's interpretation of FECA and its implementing regulations. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*DSCC*") ("To satisfy [the contrary-to-law] standard it is not necessary for [the Court] to find that the agency's construction was the only reasonable one or even the reading the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding."); *Doe 1 v. FEC*, 302 F. Supp. 3d 160 (D.D.C. 2018), *aff'd and remanded*, 920 F.3d 866 (D.C. Cir. 2019) (interpreting 52 U.S.C. §§ 30109(a)(4)(A)(ii), 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20(a)-(b)). The D.C. Circuit applied the contrary-to-law standard applicable to reviews of an agency dismissal decision in *Orloski* by engaging in "the familiar two-step framework outlined in *Chevron*." *Citizens for Resp. & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 86 (D.D.C. 2016) (*CREW I*) (citing *Orloski*, 795 F.2d at 161-62). In *In re Sealed Case*, the D.C. Circuit reiterated the propriety of *Chevron* deference after a "thorough consideration" of FECA's "'detailed statutory framework for civil enforcement . . . analogous to a formal adjudication.'" *Id.* at 85 & n.5 (quoting *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000)).

The deference that is accorded to the Commissioners' implementation choices is rooted in Congress's design of the agency to take action with care and without the appearance of partisan politics. The FEC can "initiate investigations, . . . and take other steps of comparable importance only upon the affirmative vote of four . . . members. The four-vote requirement serves to assure that enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment." H.R. 12406, H. Rep. No. 94-917, 94th Cong., 2d Sess. at 3 (1976). The Court of Appeals has repeatedly emphasized this important element of the FEC's decision-making. *E.g.*, *Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (quoting legislative history); *Pub. Citizen, Inc. v. Fed. Energy Regul. Comm'n*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) ("The [FEC's] voting and membership requirements mean that, unlike other agencies — where deadlocks are rather atypical — FEC will regularly deadlock as part of its *modus operandi*.").

Deference is particularly warranted with respect to the Commission's conduct of its administrative enforcement proceedings. Such "implementation choices, which call on the FEC's special regulatory expertise, were the types of judgments that Congress committed to the sound discretion of the agency." *CREW I*, 209 F. Supp. 3d at 87. Indeed, the Supreme Court has described the FEC as "precisely the type of agency to which deference should presumptively be afforded," since it is vested with "primary and substantial responsibility for administering and enforcing [FECA]," including the "sole discretionary power" to initiate enforcement actions. *Id.* (quoting *DSCC*, 454 U.S. at 37; *Buckley*, 424 U.S. at 109, 111 n. 153). Thus, "in determining whether the Commission's action [in dismissing a case] was 'contrary to law,' the task for the [Court is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a

reviewing court." *DSCC*, 454 U.S. at 39 (citations omitted). Unless "Congress has directly spoken to the precise question at issue," the Court must defer to a reasonable construction by the Commission. *Chevron*, 467 U.S. at 842-844.

This case, moreover, involves construction of the Commission's own regulations in addition to the statute itself, and "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). "Courts defer to an agency's interpretation of its own regulation if the regulation in question is 'genuinely ambiguous' and if the agency's reading is reasonable." *Doe v. Sec. & Exch. Comm'n*, 28 F.4th 1306, 1311 (D.C. Cir. 2022) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–16 (2019)); *see Select Specialty Hosp.-Bloomington, Inc. v. Sebelius*, 774 F. Supp. 2d 332, 341 (D.D.C. 2011) (quoting *Wy. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 52 (D.C. Cir. 1999) ("So long as an agency's interpretation of ambiguous regulatory language is reasonable, it should be given effect."). This deference is based, in part, on the court's observation that "the agency that promulgated a rule is in the 'better position [to] reconstruct' its original meaning." *Kisor*, 139 S. Ct. at 2412 (quoting *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991)). It also reflects "the awareness that resolving genuine regulatory ambiguities often 'entail[s] the exercise of judgment grounded in policy concerns.'" *Id.* at 2413 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

The agency's interpretation is entitled to deference where it is the agency's "authoritative" or "official position," "implicate[s] its substantive expertise" and reflects "fair and considered judgment[.]" *Id.* at 2416–18 (citations omitted); *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 983 F.3d 498, 507 (D.C. Cir. 2020). The court applies these "three guiding principles" to assess the extent to which deference is warranted. *Doe*, 28 F.4th at 1313. Where

these principles weigh in favor of the agency's regulation, the agency's interpretation will prevail. *See id.* at 1314-17 (Securities and Exchange Commission's interpretation of its own rule regarding whistleblower monetary awards was entitled to deference).

In sum, even assuming the regulations plaintiff relies upon are ambiguous, plaintiff's interpretation cannot prevail unless it can rebut "the presumption … that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Kisor*, 139 S. Ct. at 2412 (quoting *Martin*, 499 U.S. at 151).

II. PLAINTIFF'S FAILURE TO FILE THE REQUIRED STATEMENT OF FACTS IS AN INDEPENDENT BASIS TO DENY IT SUMMARY JUDGMENT

Plaintiff's lack of factual support for its Motion for Summary Judgment, as noted *supra*, p. 11, is underlined by its failure even to file a statement of undisputed material facts. Such a statement is required by Local Civil Rule 7(h). That requirement does not apply to cases where judicial review is based solely on an administrative record, *see* LCvR 7(h)(2), but as plaintiff notes, this is not such a case. (MSJ at 28 n.3.) "Rule 7(h) provides for the efficient filtering of information essential" to its resolution of a summary judgment motion. *Robinson v. District of Columbia*, 130 F. Supp. 3d 180, 187 (D.D.C. 2015) (quoting *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150-51 (D.C. Cir. 1996)). This failure to file the required statement of facts is an independent basis for this Court to deny plaintiff's summary judgment motion. *See Robinson*, 130 F. Supp. 3d at 187 (holding that "because plaintiff failed to file a statement of material facts along with her [summary judgment motion], the Court will deny that Motion in full as a sanction for non-compliance").

III. PLAINTIFF'S CLAIMS ARE PRECLUDED BECAUSE FECA'S JUDICIAL REVIEW PROVISION IS THE EXCLUSIVE PROCEDURE TO CHALLENGE THE FEC'S HANDLING OF ENFORCEMENT PROCEEDINGS

Plaintiff cannot bring APA or mandamus claims to challenge the Commission's handling of administrative enforcement complaints. As detailed extensively in the Commission's Motion to Dismiss (Docket No. 17 at 25-31) and the FEC's Reply in Support of its Motion to Dismiss ("Reply") (Docket No. 23 at 20-25), Congress sets the bounds of the federal courts' jurisdiction, and it may preclude judicial review by establishing an alternative statutory scheme. *See Am. Fed'n of Gov't Emps. v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019) (quoting *Bowles v. Russell*, 551 U.S. 205, 212 (2007)). At the same time, 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.

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"). 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. Congress explicitly provided that only FEC administrative complainants may seek judicial review and that they may do so only in two narrow circumstances: 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." 52 U.S.C. § 30109(a)(8)(A).

The federal courts have unanimously concluded that the judicial review provisions of FECA provide the exclusive mechanism for review of allegations that the Commission

unlawfully dismissed or failed to act on a complaint. (MTD at 28-29; Reply at 23-24.) FECA's overall structure and legislative history further confirm Congress's intent to limit the scope of judicial review of matters within the FEC's area of responsibility. (MTD at 26, 29.) Judicial determinations that FECA precludes review of APA claims as to the handling of administrative enforcement complaints extend not just to claims by administrative complainants, but also to claims by administrative *respondents* such as plaintiff. (Reply at 22-24 (citing *Stockman v. FEC*, 138 F.3d 144, 146 (5th Cir. 1998); *Fieger v. Gonzales*, Civ. No. 07-10533, 2007 WL 2351006, at *8 (E.D. Mich. Aug. 15, 2007), *aff'd sub nom*. *Fieger v. U.S. Atty. Gen.*, 542 F.3d 1111 (6th Cir. 2008); *Beam v. Gonzales*, 548 F. Supp. 2d 596, 610-12 (N.D. Ill. 2008)).)

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. *Block*, 467 U.S. at 349; *see* MTD at 26-27; Reply at 23. *See also Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).

Plaintiff's complaint challenges the Commission's handling of MUR 7516 and unidentified other MURs, specifically alleging that the agency failed to dismiss the matters following a vote to find reason to believe a violation occurred did not succeed, and then failed to provide plaintiff with related voting records. (*See* Compl. ¶¶ 10, 11.) However, no separate APA or mandamus claim exists to pursue those challenges because FECA provides an adequate and exclusive judicial review mechanism. 52 U.S.C. § 30109(a)(8) permits only claims by administrative complainants. Heritage Action is indisputably an administrative respondent with respect to MUR 7516, and it does not allege that is has any role at all in the other MURs. (Compl. ¶ 15.) Congress therefore intended to bar its claims from judicial review. *See Fieger*,

2007 WL 2351006, at *10 ("[T]he Court must assume Congress intended to deny anyone other than an administrative complainant (including administrative *respondents*, such as Plaintiffs) the right to petition for judicial review.") (citing *Block*, 467 U.S. at 349).

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. Allowing APA and mandamus review of plaintiff's claims here would undo the careful limitations Congress established with FECA. As plaintiff's Complaint relies entirely on the APA and the mandamus statutes, summary judgment should not be awarded to plaintiff.

IV. PLAINTIFF'S MUR 7516 ALLEGATIONS ARE MOOT

Plaintiff's Complaint alleges that the FEC failed to provide Heritage Action with the voting records and any statement of reasons regarding MUR 7516, in which plaintiff was the respondent. (Compl. ¶¶ 79-115.) However, the FEC has shown that the sole source of Heritage's alleged injury, the lack of information regarding MUR 7516, has been cured and there is no injury for the Court to redress. (MTD at 5-7; Reply at 2-9.) Plaintiff received all this information by June 15, 2022, via its Freedom of Information ("FOIA") request, and the FEC made the case file publicly available pursuant to its disclosure policy on July 13, 2022. (*Id.*) As a result, plaintiff is in possession of all the relief it sought with respect to MUR 7516. The information is "publicly available online" and "does not appear to be in dispute." *Citizens for Resp. & Ethics in Wash. v. FEC*, 799 F. Supp. 2d 78, 88 (D.D.C. 2011). Because plaintiff does not "allege any specific factual information [it] lack[s] that is not already publicly available[,]" it cannot show an informational injury. *Id.* at 89. Plaintiff's claims are moot, and this Court thus lacks jurisdiction to consider them. (MTD at 12-16.)

Plaintiff does not dispute that it is currently in possession of all the information it sought with respect to MUR 7516, but instead it argues that it is suffering an ongoing "informational

injury" from the FEC's alleged failure to disclose documents in *other* matters in which plaintiff *is not a respondent*. (MSJ at 14-16.) However, plaintiff makes no attempt to show that FECA or any other statute provides plaintiff with the legally required "concrete interest in the information sought[.]" *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013); *see* Reply at 3-4. Plaintiff also provides no evidence that any future legal proceedings involving plaintiff are more than complete speculation. (Reply at 4-5.) And plaintiff has not shown that any relief this Court could offer will have an impact in the separate action brought against it by the Campaign Legal Center, which in any case plaintiff has defended robustly without such relief. (Reply at 5-6.) Plaintiff's primary response to the Commission's mootness showing is its unsupported speculation that the FEC has attempted to "gin up a mootness defense in response to the Complaint" (MSJ at 13), but the Commission showed that this argument is unavailing (Reply at 6-7).

In sum, plaintiff has all the relief it sought in its Complaint with respect to MUR 7516, rendering its claims moot and thus not proper for summary judgment in plaintiff's favor.

V. PLAINTIFF LACKS STANDING TO PURSUE ITS BROAD "CONCEALMENT POLICY" ALLEGATIONS ON BEHALF OF UNNAMED THIRD PARTIES

Plaintiff's effort to challenge the FEC's failure to release certain vote certifications and statements of reasons with respect to seven unidentified other administrative proceedings does not rest on any legally cognizable injury that is redressable by this Court, and so plaintiff lacks standing to pursue that challenge. (*See* MTD at 17-19; Reply at 9-12.) To establish Article III standing a plaintiff must demonstrate that: "(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. Def's. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Accordingly, 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) (per curiam); *Bennett v. Spear*, 520 U.S. 154, 162 (1997)*; see also* MTD at 17-19.

Here plaintiff makes a sweeping challenge to an alleged FEC "policy," seeking an order that would end the Commission's longstanding practice of holding votes to close the administrative file in *all* its proceedings. (MSJ at 38-40.) Plaintiff's Response to the Commission's Motion to Dismiss made the apparent concession that it "is not attempting to sue on behalf of third parties," but instead "seeking the information in the other MURs to redress its own informational injuries."[3] (MSJ at 16 n. 1.) However, plaintiff continues to challenge the Commission's alleged "concealment policy" with respect to seven administrative proceedings other than MUR 7516, in which it concedes it has "no *direct* stake[.]" (MSJ at 16.) This contravenes the principle that "the 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. Fed. Commc'ns Comm'n*, 808 F.2d 84, 91 (D.C. Cir. 1987) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (other citation omitted)).

The fact that plaintiff is not a party to the seven administrative proceedings it challenges is alone sufficient to dismiss its claims for lack of standing. *Jud. Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 48 (D.D.C. 2003) (counsel to contributor "is precluded from bringing suit here

[3] Despite this concession, plaintiff has not amended the relief sought in its Complaint.

because it was not a party to the underlying administrative complaint"). In addition, plaintiff has no legally cognizable interest in these proceedings, and courts have found that parties with a significantly more direct interest in the outcome of an enforcement proceeding nonetheless did not have standing to challenge the Commission's handling of an administrative complaint. (Reply at 10-12.) Plaintiff's claims also stand in stark contrast to situations in which courts have found informational injury. *See*, *e.g.*, *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 783 (D.C. Cir. 2022); (*see also* Reply at 12.)

VI. PLAINTIFF'S APA CLAIMS FAIL AS A MATTER OF LAW, AND EVEN IF THE CLAIMS WERE REVIEWABLE, PLAINTIFF HAS FAILED TO OFFER EVIDENCE SUFFICIENT TO JUSTIFY SUMMARY JUDGMENT

At the summary judgment stage, plaintiff may not rest on its pleadings, and must, at a minimum, point to admissible evidence in support of each element of its claims. *See Lujan*, 504 U.S. at 561. Barebones assertions do not state a valid claim for relief under the APA and are insufficient at this stage of proceedings. *See, e.g.*, *United States v. Collins*, Civ. No. 14-80409, 2015 WL 12556167, at *2 (S.D. Fla. Apr. 3, 2015) (denying defendant's motion for summary judgment "[b]ecause factually unsupported claims or defenses should be disposed of"); *Jones v. Coty Inc*., 362 F. Supp. 3d 1182, 1195 (S.D. Ala. 2018) ("On summary judgment review, a court cannot simply accept counsel's *ipse dixit* for an unsupported factual statement in a brief."). As explained below, plaintiff's APA claims as to the alleged "concealment policy" and the handling of the unidentified other administrative proceedings plaintiff purports to challenge repeatedly fail to meet this threshold standard, and that alone requires that plaintiff's motion be denied.

A. The Commission's Longstanding Approach to the Termination of Its Administrative Enforcement Proceedings Reflects a Permissible Interpretation of FECA and the Agency's Regulations

Plaintiff's claims rely on a single, unsustainable premise: that the Commission must immediately terminate an administrative enforcement proceeding and publicly disclose the

relevant records following any failed reason-to-believe or probable-cause-to-believe vote. However, no such legal mandate exists, and the Commission's long-standing practice of terminating matters only through successful votes to close the file is plainly permissible under FECA and the FEC's implementing regulations.

It is not enough that plaintiff's proposed interpretation of such authorities be reasonable. *See Serono Labs*, 158 F.3d at 1321 ("[U]nder *Chevron*, courts are bound to uphold an agency interpretation as long as it is reasonable—regardless whether there may be other reasonable or, even more reasonable, views."). The court must defer to an agency's reading of any ambiguous regulations unless it is "plainly erroneous or inconsistent with the regulation." *Id.* at 1320 (internal quotation marks omitted). Indeed, "'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) (emphasis in original) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)).

Here, the mandate that plaintiff would read into the text of FECA and the FEC's regulations is simply absent from their text, providing this Court with no basis on which to compel agency action with respect to MUR 7516 or the other unidentified MURs plaintiff challenges. To the extent there is any ambiguity in the relevant provisions, the Commission is entitled to substantial deference as to its "implementing choices" which pertain to its "special regulatory expertise[.]" *CREW I*, 209 F. Supp. 3d at 87. Any ambiguity is further resolved in the Commission's favor as the conduct of law enforcement proceedings is committed to the agency's discretion by law absent a clear contrary statutory mandate. *Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 442 (D.C. Cir. 2018) (*CREW II*) ("[A]gency enforcement

decisions, to the extent they are committed to agency discretion, are not subject to judicial review for abuse of discretion.").

Plaintiff's contention that the Commission must immediately terminate an administrative enforcement proceeding following a single failed reason-to-believe or probable-cause-to-believe vote is based on a single subpart of FECA. That language reads as follows:

> If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

52 U.S.C. § 30109(a)(4)(B)(ii). This language mandates that the Commission "make public" any "conciliation agreement" reached with a respondent, and any "determination" that a person has not violated the Act. But FECA does not define "determination." The surrounding context suggests that the FEC makes a "determination" by an affirmative vote of at least four of its Commissioners. *Id.* § 30109(a)(4)(A)(i) ("[I]f the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed[.]").

A court in this district undertook an extensive analysis of the term "determination" that undermines plaintiff's claim that it encompasses every unsuccessful FEC reason-to-believe vote. *See Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001), *aff'd on other grounds*, 333 F.3d 168 (D.C. Cir. 2003). The court noted that, "although 'determination' is not defined anywhere in FECA, it is ordinarily used to describe a final outcome or decision." *Id.* at 58. It further observed that "[t]he term 'determination' has been defined as '[a] final decision by a court or administrative agency.'" *Id.* at n.14 (quoting Black's Law Dictionary 460 (7th ed. 1999)). The court held that, in the context at issue, "'determination' refers only to the probable cause determination" by the Commission, to the exclusion of the

"many discrete steps comprising the enforcement scheme of FECA" including a "reason to believe" vote. *Id.* at 59 n.16.

The FECA provision establishing the four-vote requirement for finding reason to believe a violation has occurred, the step in the administrative process that can lead to an investigation, does not suggest that a matter is automatically dismissed whenever a reason-to-believe vote fails. *See* 52 U.S.C. § 30109(a)(2). On the contrary, FECA specifically references a "vote to dismiss" an administrative complaint in the context of expedited action on a complaint, in section 30109(a)(1). In addition, FEC regulations specifically describe the "vote[] to close [the] enforcement file." *See* 11 C.F.R. § 5.4(a)(4).

In the event that a statute detailing an agency's duties and responsibilities is ambiguous, as it is here, courts will defer to an agency's interpretation of its implementing statute as long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The court must accord "considerable weight" to an executive agency's construction of a statutory scheme it has been "entrusted to administer." *Id.* at 844; *see Serono Labs.*, 158 F.3d at 1321 ("[C]ourts are bound to uphold an agency interpretation as long as it is reasonable—regardless whether there may be other reasonable or, even more reasonable, views."). Plaintiff's reading of 52 U.S.C. § 30109(a)(4)(B)(ii) provides no reason to depart from the Commission's longstanding approach, and plaintiff cites no other legal authority suggesting that the required "disclosure" must follow immediately from a single failed reason-to-believe vote. Without more, plaintiff has failed to overcome the deference the Commission is owed in its interpretation of its implementing statute.

That interpretation has been consistent and long-standing. For decades the Commission has fulfilled its obligations under FECA by disclosing a "determination" in any administrative proceeding only after a successful vote to close the administrative file. Because a "deadlocked"

vote that fails to reach a four Commissioner majority is not a "determination" under FECA, this procedure allows the Commissioners to further consider a matter after a single inconclusive vote. 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.*);[4] MUR 6623 (Scalise for Congress, *et al.*);[5] MUR 5754 (MoveOn PAC, *et al.*).[6] This procedure has the added virtue of ensuring that, when a matter is closed and a record provided to the public, this decision will have the endorsement of a majority of the Commissioners and hence will be consistent with section 30109(a)(4)(B)(ii)'s use of the term "determination," to the extent that applies. This latter consideration is crucial, as the extent of disclosures following the termination of FEC proceedings has been subject to dispute. *See, e.g., Doe 1*, 302 F. Supp. 3d 160.

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[4] 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.

[5] 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.

[6] 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.

In the many years the Commission has practiced its policy of disclosure following a successful vote to close the file, the practice has been largely uncontroversial. In fact, courts have repeatedly referenced the Commission's practice of dismissing matters through the inclusion of an explicit vote to close the file. *See Citizens for Resp. & Ethics in Wash. v. FEC*, 971 F.3d 340, 346 (D.C. Cir. 2020); *Doe, 1 v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019); *CREW II*, 892 F.3d at 441 n.13; *Citizens for Resp. & Ethics in Wash. v. FEC*, 236 F. Supp. 3d 378, 388 (D.C. Cir. 2017). The D.C. Circuit has also referenced the date the FEC closes the file (rather than the date of any previous vote at the reason-to-believe stage) as "the date of the dismissal" that triggers section 30109(a)(8)(B)'s 60-day deadline for a complainant to challenge the dismissal. *CREW II*, 892 F.3d at 436; *Jordan v. FEC*, 68 F.3d 518, 519 (D.C. Cir. 1995); *Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993); *Citizens for Resp. & Ethics in Wash.*, 799 F. Supp. 2d at 83.

Plaintiff also relies on two FEC regulations, which it claims require the Commission to immediately terminate an enforcement proceeding following a single failed reason-to-believe or probable-cause-to-believe vote, but that reliance is misplaced. One regulation provides:

> If the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent.

11 C.F.R. § 111.20. The other states that, "[i]f the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter." 11 C.F.R. § 111.9(b). Both of these regulations describe what happens after an agency "terminates" a matter, but they certainly do not mandate that matters be terminated every time a reason-to-believe vote does not succeed.

The terms "finds" and "finding" as used in these regulations are undefined by FECA, but context again strongly suggests that the term refers to a decision reached by an affirmative vote of at least four Commissioners, as the Commission may "find that a person committed such a violation . . . pursuant to the procedures described in paragraphs (1) and (2)[.]" 52 U.S.C. § 30109(a)(4)(C)(i)(I). Those paragraphs describe "an affirmative vote of 4 of [the agency's] members[.]" 52 U.S.C. § 30109(a)(2). Courts have explicitly held that in the absence of a four vote majority, "the Commission did not 'make a finding of no reason to believe[.]'" *Doe 1*, 302 F. Supp. 3d at 172 (citing 11 C.F.R.§ 111.20(a)). The Commission has also exercised its authority to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), for decades by requiring that motions exercising "a duty or power" under FECA have "four votes for approval." FEC, Directive 10, (effective June 8, 1978, amended Dec. 20, 2007), https://www.fec.gov/resources/cms-content/documents/directive_10.pdf. This is consistent with FECA's purposes of fostering nonpartisan consensus, and plaintiff makes no challenge to it. The FEC directive applies in full to any "finding of no reason to believe," 11 C.F.R. § 111.20, or any motion to close the file, the customary point in matters involving at least one split vote that Commissioners agree that consensus will not be achieved.

Plaintiff argues that "[b]ecause the use of the term 'otherwise' indicates that failing to find 'reason to believe' constitutes a 'terminat[ion]' of the matter, the FEC must disclose its voting records after 'a finding of no reason to believe.'" (MSJ at 30 (alterations in original) (citing 11 C.F.R. § 111.20(a)).) But an unsuccessful vote to find reason to believe is not the same as a successful vote to find "no reason to believe," which requires four votes. In fact, courts have interpreted this language to refer to instances in which a matter was "terminated" by an affirmative vote of a majority of the Commissioners. For instance, the court in *Doe 1 v. FEC*

found that a matter had been "otherwise terminated" because the Commission voted unanimously to approve a conciliation agreement with respondents. 302 F. Supp. 3d at 173. Plaintiff makes no claim that anything similar occurred in the seven unidentified proceedings it challenges.

"Courts defer to an agency's interpretation of its own regulation if the regulation in question is 'genuinely ambiguous' and if the agency's reading is reasonable." *Doe*, 28 F.4th at 1311 (quoting *Kisor*, 139 S. Ct. at 2415–16). To the extent there is any ambiguity in the relevant regulations, it should be resolved in the Commission's favor in accordance with the Supreme Court's "guiding principles" articulated in *Kisor*. *Doe*, 28 F.4th at 1313. The Commission's uninterrupted adherence to a policy of holding a vote to close the administrative file for decades is clearly the agency's "official position." *Kisor*, 139 S. Ct. at 2416. The Commission's interpretation also "implicate[s] its substantive expertise[,]" *id.* at 2417, because the "subject matter in dispute here[,]" the consideration and dismissal of administrative complaints regarding violations of FECA, "is part and parcel of the [FEC's] statutorily assigned duties." *Doe*, 28 F.4th at 1315 (rule regarding whistleblower monetary awards implicated SEC's substantive expertise). Finally, the Commission's interpretation reflects its "fair and considered judgment[,]" *Kisor*, 139 S. Ct. at 2417, as it has consistently applied the practice of holding votes to close the file for decades. The Commission's interpretation is plainly "reasonable," and thus should be given effect. *See Wy. Outdoor Council*, 165 F.3d at 52 ("So long as an agency's interpretation of ambiguous regulatory language is reasonable, it should be given effect.").

Plaintiff has provided no reason why the Commission's interpretation of 11 C.F.R. §§ 111.9(b), 111.20(a) is unreasonable. Plaintiff cites no case or other proceeding in which they are interpreted in accordance with plaintiff's reading. This is clearly insufficient to overcome the

deference owed to the FEC in its interpretation of its own regulations. *See Wyoming Outdoor Council*, 165 F.3d at 52 (according "substantial deference" to agency's interpretation of its own regulations).

In sum, the Commission's approach to the termination of its matters is permissible.

B. Plaintiff's APA Claims Fail Because the FEC's Determination as to When to Terminate Enforcement Proceedings Is Committed to the Agency's Discretion

The APA, by its explicit terms, does not provide for judicial review "to the extent that . . . agency action is committed to the agency discretion by law." 5 U.S.C. § 701(a)(2). As a result, "agency enforcement decisions, to the extent they are committed to agency discretion, are not subject to judicial review for abuse of discretion." *CREW II*, 892 F.3d at 442. Accordingly, under § 701(a)(2), "certain categories of administrative decisions are unreviewable," among them "agency decisions not to institute enforcement proceedings." *Id.* at 439 (quoting *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006)). In addition, "§ 701(a)(2) bars judicial review when there is no 'law' to apply in judging how and when an agency should exercise its discretion[.]" *Id.* at 440 (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

In its prior briefing (MTD at 29-31; Reply at 12-17), the Commission detailed why plaintiff's APA claims challenge FEC actions that are committed to its discretion by law, and they therefore fail to state a claim for relief. In effect, plaintiff seeks a declaratory judgment and order that would prohibit the Commission's longstanding practice of holding votes to close the administrative file in its enforcement matters. (Reply at 13-14.) Such relief would deprive Commissioners of the discretion afforded the agency under FECA, which does not specify when or how a proceeding must terminate in the absence of a majority vote of the Commissioners to do so, leaving it to the Commission to establish these procedures. *See supra*, Part VI.A. It would also conflict with the well-established principle that the decisions to initiate, conduct and

terminate law enforcement proceedings are presumptively in the hands of the government and not the courts. (Reply at 14;) *see CREW II*, 892 F.3d at 439, 442. This principle as to agency discretion has resulted in the dismissal of APA claims made against the FEC by an administrative respondent. *See Beam*, 548 F. Supp. 2d at 612 (finding that "there is no discrete, non-discretionary action to compel in this case").

Plaintiff itself acknowledges that "[b]y longstanding policy and practice, the Commission has traditionally held an administrative vote to close the enforcement file." (Compl. ¶ 27.) And as noted *supra*, pp. 27-28, the Commission identified seven MURs, considered between 2004 and 2019, in which the Commission held a reason-to-believe or probable-cause-to-believe vote that did 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. These examples illustrate that an unsuccessful vote on whether to find reason to believe has not customarily been understood to terminate an FEC enforcement matter, and Commissioners remain free to reconsider their earlier votes and change their minds.

Plaintiff's contention that the agency is *required* to terminate administrative proceedings following a single deadlocked vote relies entirely (MSJ at 6, 9, 10, 14, 16 n. 1, 20, 22-24, 29, 32, 37) on a recent statement by three FEC Commissioners arguing that certain unidentified MURs should be considered closed, but that reliance is unavailing. It takes four votes to adopt an FEC policy. 52 U.S.C. §§ 30106(c), 30107(a)(8). It has traditionally taken four votes to end an FEC enforcement matter, and other FEC commissioners have disagreed with the statement on which plaintiff relies. *See*, *e.g.*, Statement of Commissioner Ellen L. Weintraub On the Opportunities Before the D.C. Circuit in the *New Models* Case To Re-Examine *En Banc* Its Precedents

Regarding "Deadlock Deference" at 2-3, 9-16 (Mar. 2, 2022)[7] ("Weintraub Statement") (contending that further Commission action remains possible in matters until there are successful motions to close the file).[8]

Plaintiff's claims fail for the additional reason that there is no "law" to apply in judging how the agency should exercise its discretion. *CREW II*, 892 F.3d at 440. As noted *supra*, Part VI.A, FECA is silent regarding when and how a matter is terminated in the absence of four Commissioner votes for dismissal. In the absence of explicit standards, there is no clear guidance for the courts, and uncertainties abound. For instance, it would not be clear if a 3-3 vote would be required, or if some lower number of votes could be sufficient to dismiss a matter. The APA prohibits judgments against agencies in the absence of such standards precisely because the agencies themselves are better equipped to navigate these issues. Where a statute is silent, it is presumptively for the agency to fill in the gaps. *See Stockman*, 138 F.3d at 152 (noting that FECA "does not create a deadline in which the FEC must act or create a private cause of action to enforce this provision."); *Fieger*, 2007 WL 2351006, at *9 ("The Court finds

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[7] https://www.fec.gov/resources/cms-content/documents/2022-03-02-ELW-New-Models-En_Banc.pdf

[8] An exchange from decades ago demonstrates a previous understanding that it would be possible for Commissioners to have a series of votes in a MUR without a successful vote to close the file. In 1995, at an American Bar Association symposium, it was noted that a "previous General Counsel of the Commission [had been] asked the question on a case that looked like it was heading for a 3-3 split." *Symposium on Campaign Finance Enforcement: A Comparative View,* 11 J. L. & Pol. 1, 12 (1995) (quoting then-FEC General Counsel Lawrence M. Noble). The previous General Counsel had been asked, "[w]hat happens if the Commissioners split 3-3, and just turn to you and say we're not going to close the file?" *Id.* The General Counsel in 1995 explained that in that eventuality he "would just send the case back up every week until something happens." *Id.* He further noted that (as of that time) "in practice what happens after a 3-3 vote is that the Commission then votes unanimously to close the file and make the matter public." *Id.*

that nothing in section [30109] or any other provision of the Act imposes any deadline for the Commission to take particular investigatory actions.").

In addition, the Commission's past practice is informed by prudential concerns that this Court should take into account. If this Court were to accept plaintiff's position and find the agency has no discretion as to file closure, the result would be hazardous to the customary functioning of the FEC's enforcement process. For one thing, it could result in dismissals of enforcement matters when that was not the will of a majority of Commissioners, and even when a motion to dismiss a matter had not passed with the vote of four Commissioners. Indeed, three Commissioners could effectively dismiss a matter at any time, even if three other Commissioners disagreed, which would be contrary to FEC policy and practice. If FEC enforcement matters automatically terminated when a Commission vote to find reason to believe did not reach the four-vote threshold, it could end the ability of Commissioners to further consider matters and inhibit commissioners' ability to develop their views and to reach consensus following deadlocked votes, as described above.

Plaintiff has failed to meet its burden to prove that the decision of when and how to terminate an administrative proceeding, in the absence of a majority vote of the Commissioners to do so, is not committed to the agency's discretion by law under 5 U.S.C. § 701(a)(2).

C. Plaintiff's APA Claims Fail Because It Has Not Challenged any Final, Discrete Agency Action

In its Motion to Dismiss, the Commission comprehensively explained that plaintiff's "concealment policy" claims also fail because an alleged "on-going program or policy is not, in itself, a 'final agency action' under the APA." (MTD at 20 (citing *Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014).) Plaintiff fails to identify any discrete agency action, let alone one that is final. The Commission previously detailed the history of its enforcement

proceedings, contrasted with the anecdotes offered by plaintiff to establish a general "concealment policy." (*See* MTD at 23-24.) The Commission showed that what plaintiff challenges is not a policy at all. Indeed, in the roughly four years since the administrative complaint against plaintiff in MUR 7516 was filed, the agency has closed at least 594 MURs.[9] Plaintiff alleges — without sufficient evidence — that seven MURs have been wrongly held open, but even assuming the truth of that claim, seven matters out of 594 is clearly insufficient to establish a general "policy" to challenge under the APA. Further, the Commission's file closures have included a number of matters that were the subject of cases alleging unlawful delay.[10]

In response to the FEC's demonstration of the full scope of its administrative enforcement activity, plaintiff appears to engage in a tactical retreat with regard to the relief it seeks as to the alleged "policy." In its Complaint, plaintiff sought "[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) (emphasis added).) However, in its Motion plaintiff seeks only "an order 'compel[ling]' the FEC to issue the required notifications to the parties in the eight enforcement matters and publicly release its voting records and any

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[9] FEC, STATUS OF ENFORCEMENT – FISCAL YEAR 2022, SECOND QUARTER (01/01/22-03/31/22) 4, https://www.fec.gov/resources/cms-content/documents/Status_of_Enforcement_Second_Quarter_2022_05-06-22_Redacted.pdf (reflecting matters closed in the agency's fiscal years 2019-21 and first two quarters of fiscal year 2022).

[10] *See*, *e.g.*, MUR 7207, https://www.fec.gov/data/legal/matter-under-review/7207/ (handling of matter challenged in *Free Speech for People, et al. v. FEC*, Civ. No. 21-3206 (D.D.C.); MUR 7422, https://www.fec.gov/data/legal/matter-under-review/7422/ (handling of matter challenged in *CREW v. FEC*, Civ. No. 19-2753 (D.D.C)).

statements of reasons." (MSJ at 39 (citing 5 U.S.C. § 706(1); 28 U.S.C. § 1361).) This change is reflected in plaintiff's discussion of the APA's discreteness requirement, where it now claims that it "challenges the FEC's discrete failure to act in 'eight enforcement matters,' including MUR 7516." (*Id.* at 22 (citing Statement Regarding Concluded Enforcement Matters 2, 5; Compl. ¶¶ 3, 7, 32).) Plaintiff again provides no details as to these matters, and plainly relies entirely on the three-Commissioner statement. (*Id.*)

The party moving for summary judgment bears the burden of proof, and the court must view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Def's. of Wildlife*, 311 F. Supp. 2d at 53. Here the Commission has provided evidence demonstrating that it has considered and closed hundreds of MURs in the time since MUR 7516 was filed. Plaintiff has not even alleged that the Commission has adopted a formal or written policy to withhold records, but even if it had, such unsupported assertions are insufficient to carry plaintiff's burden at this stage. Plaintiff has vaguely identified a handful of matters, out of hundreds, and claimed that its speculation about their handling constitutes a reviewable agency policy.

Finally, as the Commission has explained (MTD at 25), plaintiff seeks relief that it is beyond the power of the judiciary to provide. Based on its speculative allegations of a "concealment policy," plaintiff would have the Court issue 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[.]" (Compl. at 28 (Prayer for Relief).) The imprecision of the phrase "fails to garner"

illustrates well why a 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 301, 307 (D.C. Cir. 2006). 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)). The requirement that challenges to agency "policy" identify a discrete and formally adopted plan exists so that courts are not required to engage in the "management of the agency's business[,]" *Del Monte v. U.S.*, 706 F. Supp. 2d 116, 119 (D.D.C. 2010), which here would require the court to substitute its judgment for that of the Commissioners and the agency to dismiss matters when it deems appropriate.

Plaintiff failed to identify, let alone prove with record evidence, a final, discrete agency action adopting a "concealment policy."

D. Plaintiff Has Not Proven that the Commission Acted Contrary To Law, Nor That Its Actions Were Arbitrary And Capricious Under the APA

Even if reviewable, plaintiff's claims that the Commission acted "contrary to law" (Count I) and "arbitrarily and capriciously" (Counts II and III) with regard to its disclosure of the administrative enforcement materials at issue must fail. These claims rely entirely on plaintiff's unproven assertion that FECA and the FEC's regulations *require* the dismissal of administrative proceedings following a single failed reason-to-believe vote. *See Orlov*, 523 F. Supp. 2d at 37 (quoting *Norton*, 542 U.S. at 64) ("'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*.'"). Lacking a developed factual record in this proceeding, plaintiff argues in effect that the Commission's failure to publicly disclose the records in seven "terminated" proceedings constitutes a *per se* violation of the APA, irrespective of the facts in those matters.

However, as detailed *supra*, Part VI.A, plaintiff's interpretation is simply not required by the text of FECA, and it is contradicted by the Commission's own reasonable interpretation of the law. And as explained above, the FEC's interpretation of FECA and its regulations is entitled to considerable deference, particularly in light of the Commission's longstanding practice that has been implicitly confirmed by the federal courts. *Id.*

In its Motion for Summary Judgment, plaintiff provides the Court with no basis to overcome the "presum[ptive] validity of agency action." *Yeutter*, 917 F.2d at 596. Plaintiff argues that a four-vote threshold to terminate a proceeding is an "extra-statutory requirement[,]" (MSJ at 30), but the Commission has shown that its accepted practice is fully consistent with the statutory framework. And in the absence of a clear statutory mandate, the agency's interpretation of its implementing laws and regulations is entitled to deference, particularly where its decisions concern when and how to initiate or terminate law enforcement proceedings. *See supra*, Part VI.B. It is plaintiff who attempts to read into FECA an extra-statutory requirement regarding termination, as FECA is silent as to when a matter is dismissed absent the affirmative votes of four Commissioners.

Plaintiff also makes the conclusory and unsupported allegation that "the FEC's failure to garner four votes to enforce an administrative complaint represents final agency action[.]" (MSJ at 30 (citing *Bennett*, 520 U.S. at 177–78.) This assertion ignores the Commission's showing that an unsuccessful vote to find reason to believe may be followed by a successful one. Indeed, one court has noted that a deadlocked reason-to-believe vote "did not 'make a finding of no reason to believe,'" but instead "all the Commission did with respect to plaintiffs was *decline to make a finding* that there was reason to believe[.]" *Doe 1*, 302 F. Supp. 3d at 165 (emphasis added). Nor is the issuance of a statement of reasons by less than four Commissioners in an

administrative proceeding a dispositive indication of final agency action. As the Commission has explained, a group of three Commissioners is "controlling" only for purposes of judicial review of a final decision not to pursue investigative or enforcement actions. *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). 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), and three Commissioners may not establish Commission policy.

In addition, contrary to its claim, plaintiff has not identified any "settled D.C. Circuit precedent" requiring the dismissal of an administrative proceeding following a split vote to find reason to believe a violation occurred. (MSJ at 31.) Not one of the cases plaintiff cites actually supports plaintiff's interpretation of FECA: that a deadlocked vote requires the automatic and immediate termination of an administrative proceeding. Plaintiff instead relies on out of context interpretations of general observations about FEC proceedings, for instance that "[i]f at least four Commissioners vote yes, the Commission will investigate; otherwise, the complaint is dismissed." (MSJ at 31 (citing *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 785 (D.C. Cir. 2022)).) The Commission does not dispute that without four affirmative votes the Commission cannot proceed with an investigation, and that matters often are dismissed after unsuccessful votes to proceed. However, none of these citations support the notion that an FEC matter must be automatically terminated after a single deadlocked vote at the reason-to-believe stage, nor that the failure to publicly disclose the proceeding records following such a vote constitutes a *per se* violation of the APA. The amount of time that is appropriate for the agency to consider a particular matter depends on the facts of each case, *see infra*, pp. 42-44, facts that are not present here with respect to the seven proceedings plaintiff challenges.

Plaintiff's citations to the positions the Commission has taken in court in unrelated matters are likewise unpersuasive. As with the courts, the Commission has also made the uncontroversial observation that, for instance, "[i]f at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint." (MSJ at 32 (citing FEC's Motion to Dismiss at 11, *CREW v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015) (No. 14-cv-1419), Dkt. No. 5).) This does not constitute an "admission," tacit or otherwise, that matters are terminated following a single deadlocked vote at any stage. And remarkably, while making this very argument, plaintiff asserts that an "agency's 'past practice' informs statutory interpretation" (MSJ at 32 (citing *Nat'l Ass'n for Better Broad. v. Fed. Commc'ns Comm'n*, 830 F.2d 270, 277 (D.C. Cir. 1987)), while failing to acknowledge the Commission's actual practice of over forty years of holding votes to close the administrative file, or the instances in which the Commissioners have deadlocked on a merits vote 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 supra*, pp. 27-28.

Nor does the Commission's longstanding practice with regard to closure of MUR files "thwart[] FECA's judicial-review process." (MSJ at 32.) As the Commission has explained, the fact that the Commissioners may take multiple votes on the merits of an administrative proceeding at the reason-to-believe stage does not mean that the matter is left open "indefinitely[.]" (*Id.* at 33.) The courts have repeatedly observed that FECA imposes no precise deadline for the agency to conclude its administrative proceedings. *See infra* pp. 42-44. Of course, this does not mean that any delay in file closure would be justified, but it does mean that parties alleging unlawful delay must present more than the threadbare and conclusory allegations plaintiff is armed with here, particularly when requesting an order that would alter established

agency procedures for handling matters. Plaintiff's further suggestion that the Commissioners "deliberately created" this "misconception" to avoid judicial review is meritless, as "[a]n administrative official is presumed to be objective [and] mere proof that [he or] she has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption." *United Steelworkers v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980). Indeed, in one matter in which a court had issued multiple orders finding agency dismissals contrary to law and for which there have been no subsequent public notification that the agency's MUR file had been closed, a Commissioner explicitly explained more than four years ago that she was exercising her discretion to enable a private plaintiff rather than the Commission to pursue enforcement. Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network*, Apr. 19, 2018.[11] That is far from an improper concealment, as plaintiff alleges has occurred in certain matters. And plaintiff fails to establish that the Commissioner's reasoning to enable a specific provision of FECA, the private right of action fail safe, is somehow contrary to FECA.

Finally, plaintiff asserts that the Commission has acted arbitrarily and capriciously by "depart[ing] from longstanding agency precedent" and failing to "administratively clos[e] the file of an enforcement matter when fewer than four Commissioners vote to find reason to believe a violation of FECA occurred based on a complaint and there are no further enforcement questions presented." (MSJ at 33.) However, as the Commission has repeatedly explained, it is simply incorrect to say that the agency has always voted to close the file immediately following a single deadlocked vote. In fact, the Commissioners have deadlocked on a merits vote only to determine

[11] https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf.

in a later vote that there was in fact reason to believe or probable cause to believe on the same claim. *See supra*, pp. 27-28. The fact that the Commissioners have on other occasions voted to close the file after a deadlocked vote merely underscores that they evaluate each matter on its own merits, exercising the discretion that committed to them by law. *See supra*, Part VI.B.

E. Plaintiff Has Not Proven that the Commission Unlawfully Withheld or Unreasonably Delayed in the Disclosure of Records

Plaintiff's "unreasonable delay" claim (Count IV) fails. Plaintiff provides no baseline by which the Court might judge how long any of the matters plaintiff describes have been delayed, except to claim that seven proceedings were voted on more than one year ago and have not yet been terminated. (MSJ at 36.) However, plaintiff does not identify (1) the matters, (2) the respondents, (3) the underlying facts, or (4) any procedural history. Plaintiff has not sought from the Commission nor offered this Court any further information on these proceedings, and instead has moved for summary judgment without anything resembling the evidence required to support that relief. *See supra* p. 11. Without more, the Court has no basis to rule in plaintiff's favor.

Even if the Court were to take at face value plaintiff's assertion that these seven proceedings have been pending for more than one year following Commissioner votes on the merits, there is no *per se* rule as to when a matter has been unreasonably delayed under FECA. The Court of Appeals has made clear that FECA does not impose some particular time period within which FEC administrative enforcement matters must be fully resolved. *See, e.g.*, *FEC v. Rose*, 806 F.2d 1081, 1091-92 & n.17 (D.C. Cir. 1986) (citing the Court of Appeals's "unequivocal[] reject[ion]" of the argument that FECA required the FEC to act on an administrative complaint within 120 days and embracing the FEC's "entirely correct" view that "the Commission's handling of a complaint should be judged under the deferential standards of review prescribed in the APA"); *In re Nat'l Cong. Club*, 1984 WL 148396, at *1 (rejecting

presumption that the Commission has acted contrary to law whenever it fails to resolve a complaint within the two-year period between elections); *accord Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (explaining the Congressional understanding that some complaints would not be investigated or reviewed by the judiciary until after the election at issue); *Stockman*, 138 F.3d at 152 (noting that FECA "does not create a deadline in which the FEC must act or create a private cause of action to enforce this provision."); *Fieger*, 2007 WL 2351006, at *9 ("The Court finds that nothing in section [30109] or any other provision of the Act imposes any deadline for the Commission to take particular investigatory actions.").

Lacking any facts which might support its unreasonable delay claim, plaintiff's evaluation of the factors courts use to evaluate such claims is deficient, and in any event is derivative of its misreading of FECA, and does not provide an independent basis for this Court to rule in its favor. First, plaintiff simply fails to address the factors identified in *Common Cause*, 489 F. Supp. at 744, that are used to evaluate such claims.

Plaintiff does address the *TRAC* factors, *see* 750 F.2d at 80, but its arguments are unavailing. Plaintiff's argument regarding the first two *TRAC* factors is that the Commission's failure to publicly release the records in the seven other matters it has identified within 30 days "is in plain violation of the timetable required by regulation." (MSJ at 36.) As explained *supra*, Part VI.A, however, plaintiff has failed to demonstrate that these matters are in fact terminated. With regard to the second *TRAC* factor, Congress has in fact provided no timetable for the agency to conclude enforcement proceedings, weighing strongly against any finding of unreasonable delay in this case. *See Fieger*, 2007 WL 2351006, at *9 ("[N]othing in section [30109] or any other provision of the Act imposes any deadline for the Commission to take particular investigatory actions."). With regard to the fifth factor, plaintiff simply asserts that the

"interests prejudiced by delay" include its "First Amendment rights" (MSJ at 36), but it does not explain how any delay as to unidentified respondents in other matters could have that effect.

The third *TRAC* factor calls on the Court to consider whether the regulation at issue is more akin to "economic regulation[,]" where delay is more reasonable, versus situations where "human health and welfare are at stake[.]" 750 F.2d at 80. Plaintiff asserts that "[t]he Commission's actions do not relate to any 'economic regulation'" (MSJ at 36), but in fact, courts have concluded that cases involving FEC enforcement proceedings are not cases in which "human health and welfare are at stake[.]" *Rose*, 806 F.2d at 1091 n.17.

Plaintiff's argument with regard to the fourth factor is that the release of records in terminated proceedings "will not have any impact on the Commission's priorities" (MSJ at 37), but again, there is no evidence these matters are closed, and in any case, the setting of agency priorities and use of agency resources in this law enforcement context is committed to the agency's discretion. "[R]espect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities." *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) (citing *In re Monroe Communications Corp.*, 840 F.2d 942, 946 (D.C.Cir.1988)).

Because the record in this case falls far short of the particular facts needed to establish an unreasonable delay claim, plaintiff's Count IV fails as a matter of law.

VII. PLAINTIFF'S MANDAMUS CLAIM FAILS AS A MATTER OF LAW BECAUSE PLAINTIFF CANNOT ESTABLISH A CLEAR AND INDISPUTABLE RIGHT TO THAT DRASTIC RELIEF

Plaintiff offers a brief argument in support of its mandamus claim (MSJ at 37-38), but it fails to show that such extraordinary relief is warranted. (*See* MTD at 31-33; Reply at 25.) The parties agree that "[t]o show entitlement to mandamus, plaintiffs 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." (MTD at 31; MSJ at 37.) The FEC showed that plaintiff's mandamus claim is moot with respect to MUR 7516, and that an order providing broad relief as to its "concealment policy" claim would be unjustified, with no showing of a "clear and indisputable" right to relief or that the agency is violating a "clear duty to act." (MTD at 32-33.) In response, plaintiff repeats its assertion that the "sources of federal law" it cites "contain mandatory, non-discretionary duties" (MSJ at 37), but as explained above, no such duties apply in situations where FEC enforcement files have not been closed in the customary way. *See supra*, Part VI.A. As previously explained, "[d]isagreements between Commissioners about the termination of certain administrative proceedings demonstrate the disputability of the issues plaintiff raises." (MTD at 33.) Plaintiff discounts that point, but plaintiff itself relies heavily on Commissioner statements (*e.g.*, MSJ at 6, 9, 10, 14, 20, 22-24, 29, 32, 37), and what is really "indisputable" here is that Commissioners' views on this aspect of FECA implementation differ.

CONCLUSION

For the foregoing reasons, plaintiff's Motion for Summary Judgment should be denied.

Respectfully submitted,

Lisa Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

/s/ *Christopher H. Bell*
Christopher H. Bell (D.C. Bar No. 1643526)
Attorney
chbell@fec.gov

COUNSEL FOR DEFENDANTS
FEDERAL ELECTION COMMISSION ET AL.
1050 First Street NE
Washington, DC 20463
(202) 694-1650

August 26, 2022

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 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.

/s/ Christopher H. Bell
Christopher H. Bell (D.C. Bar No. 1643526)
Attorney
chbell@fec.gov