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) REPLY IN SUPPORT OF MOTION TO DISMISS

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

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

Greg J. Mueller (D.C. Bar No. 462840)
Christopher H. Bell (D.C. Bar No. 1643526)
Attorneys
gmueller@fec.gov
chbell@fec.gov

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

August 12, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

Statutes and Regulations

Miscellaneous

Plaintiff Heritage Action for America ("Heritage Action") has opposed the Federal Election Commission's ("Commission" or "FEC") Motion to Dismiss (Docket No. 17, "Motion" or "Mot."), but plaintiff has failed to refute the FEC's showing that the Court lacks jurisdiction to consider its claims and that plaintiff has failed to state a claim upon which relief can be granted.

As an initial matter, this Court lacks jurisdiction to address plaintiff's claims because they are moot. Plaintiff now has all the information it sought with regard to the FEC administrative enforcement matter in which it was a respondent, and it has identified no tenable way around that mootness. Plaintiff's brief indicates that it is not a party to any other FEC enforcement proceeding, and that there is no concrete reason to suspect it will be in the future. (Plaintiff's Combined Mem. Of P. & A. in Opp'n to the FEC's Mot. to Dismiss and in Supp. of Pl.'s Cross-Mot. for Summ. J. (Docket No. 20-1, "Response" or "Resp.").)[1]

Plaintiff's "concealment policy" claims must also fail. It lacks standing to pursue them on behalf of unidentified respondents in the other FEC enforcement matters to which it refers. Further, plaintiff has failed to identify any discrete agency action, as required to bring a challenge under the Administrative Procedure Act ("APA"). And it also articulates no agency "policy" subject to APA challenge, but merely the handling of that small group of other enforcement matters, as to which it seeks to override the FEC's law enforcement discretion and overturn decades of agency practice with regard to the termination of such matters.

In any event, plaintiff's APA and mandamus claims are precluded by the judicial review provision of the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8), which is

---

[1] On August 11, 2022, the Commission filed a motion to stay briefing on plaintiff's Cross-Motion for Summary Judgment. (*See* Docket No. 22.) This filing does not address the points and authorities raised in the cross-motion combined with plaintiff's response to the Commission's Motion to Dismiss, and the Commission reserves the right to respond as necessary following the Court's ruling on the motion to stay.

the exclusive means of challenging the FEC's handling of administrative enforcement matters. Contrary to plaintiff's contentions, that well-established principle applies not only to claims by administrative complainants, but to claims by respondents like plaintiff as well.

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

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

Plaintiff's Complaint alleges that the FEC failed to provide Heritage Action with the voting records and any statement of reasons regarding Matter Under Review ("MUR") 7516, in which plaintiff was the respondent. (Pl.'s Compl. for Declaratory and Injunctive Relief ("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. (Mot. at 5-7.) Plaintiff received all this information by June 15, 2022, via its Freedom of Information ("FOIA") request, and the FEC made the entire case file publicly available 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, as it is suffering no ongoing harm, nor can this Court redress any harm.[2] This Court thus lacks jurisdiction to consider these claims. (Mot. at 12-16.)

In its Response, plaintiff does not dispute that it is currently in possession of all the information it sought with respect to MUR 7516. Instead, plaintiff attempts to shift the debate by

[2] Contrary to plaintiff's assertions, the FEC does not "conflate[]" standing and mootness. (Resp. at 13.) Plaintiff has never had standing as to its "concealment policy" allegations for matters where it is not a party. Mot. at 16-19; *infra*, Part II.A. To the extent plaintiff had

raising a series of claims that are equally unavailing and fail to articulate any ongoing and legally cognizable injury for purposes of establishing Article III standing.

First, plaintiff argues that the FEC's ongoing "concealment policy" with respect to *other* matters to which plaintiff *is not a respondent* constitutes a cognizable informational injury sufficient to confer standing, but plaintiff's vague claim of injury on that basis falls short. (Resp. at 14-16.) Plaintiff says "such information may help Heritage Action defend against [the] citizen suit [brought against it by Campaign Legal Center] by providing … further proof that the citizen suit here was the product of a larger scheme to deceive the courts."[3] (*Id.* at 15.)

However, "[n]ot every unrequited demand for information from the FEC is sufficient to establish Article III standing." *Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 342 (D.D.C. 2020). "[T]he nature of the information allegedly withheld is critical to the standing analysis." *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (per curiam). "Only if the statute grants a plaintiff a concrete interest in the information sought will he be able to assert an injury in fact." *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013); *see Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (stating that "the existence and scope of an injury for informational standing purposes is defined by Congress"). This is because a plaintiff does not have a "justiciable interest in the enforcement of the law." *Common Cause*, 108 F.3d at 418.

Plaintiff makes no attempt to show that FECA or any other statute provides plaintiff with "a concrete interest in the information sought[.]" *Nader*, 725 F.3d at 229. Plaintiff provides no

---

standing to pursue its allegations with respect to MUR 7516, such claims are moot, for the reasons articulated herein.

[3] As a threshold matter, plaintiff's attempt to rebut mootness by relying on the FEC's alleged "concealment policy" fails because no such policy exists, and plaintiff is merely contesting the exercise of Commissioner discretion on a case-by-case basis, without identifying a discrete legal action as required for a challenge under the APA. *See infra* pp. 12-20.

authority or precedent for the proposition that its generalized interest in understanding "how the Commission is enforcing FECA in these matters" or gaining information that would "help Heritage Action defend against" hypothetical future legal action confers upon it a legally cognizable interest in information about other FEC enforcement proceedings. (Resp. at 13.) Plaintiff does not show that Congress intended to provide parties with information to defend against such proceedings. *Cf. Friends of Animals*, 828 F.3d at 992 ("the existence and scope of an injury for informational standing purposes is defined by Congress"). Plaintiff suggests that "the identity of the requester is irrelevant to whether disclosure is required[,]" but the quoted statement is explicitly limited to the FOIA context and insufficient to overcome the precedent above. (Resp. at 16 (citing *Stonehill v. IRS*, 558 F.3d 534, 538–39 (D.C. Cir. 2009) (FOIA)).)

Even if an interest in defending against unknown future law enforcement proceedings were cognizable, plaintiff makes no claim that such proceedings are imminent, and any "'threatened injury must be *certainly impending*' to prevent litigation of illusory claims." *Klayman v. Obama*, 142 F. Supp. 3d 172, 184 (D.D.C. 2015) (emphasis in original) (quoting *Clapper v. Amnesty Int'l,* 568 U.S. 398, 409 (2013)). The fact that the information may be useful at some future date is insufficient. *See Ascendium Educ. Sols., Inc. v. Cardona*, Civ. No. 19-03831, 2022 WL 558190, at *5 (D.D.C. Feb. 24, 2022) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992)) ("'[S]ome day' intentions—without any description of concrete plans, or indeed any specification of when some day will be—do not support a finding of the 'actual or imminent' injury that [the Supreme Court's] cases require."). Nor does plaintiff articulate how it will be harmed if it does not get information about these seven enforcement proceedings prior to the time the FEC makes the information public after closure of the administrative file in each matter, as the FEC will continue to do consistent with longstanding disclosure policies.

Because plaintiff fails to articulate a legally cognizable "information injury" in the details of ongoing third-party enforcement proceedings, there is no possibility that the alleged harm will be "redressed by a favorable decision." *Lujan,* 504 U.S. at 561.

Second, plaintiff attempts to establish a surviving "litigation injury" by arguing that "a declaratory judgment that the FEC unlawfully concealed its voting records in MUR 7516 . . . would help Heritage Action obtain dismissal of [Campaign Legal Center's ("CLC")] citizen suit." (Resp. at 16.) However, this argument relies on two premises that cannot withstand scrutiny. The first premise is that the FEC's "concealment policy is the but-for cause of CLC's citizen suit against Heritage Action[.]" (*Id.* at 17.) Even assuming such a "concealment policy" existed (it does not) and was applied in plaintiff's enforcement proceeding, plaintiff fails to establish that the court in *CLC v. FEC*, Civ. No. 1:21-cv-0406-TJK (D.D.C.), would have reached a different result had plaintiff been in possession of the information it sought as to MUR 7516 when that matter was decided. The second premise is that "a declaratory judgment would provide effective relief to Heritage Action to defend against the citizen suit." (Resp. at 13.) Plaintiff makes no effort to define the chain of causation, but presumably "effective relief" constitutes the dismissal of *CLC v. Heritage Action*, Civ. No. 22-01248 (CJN) (D.D.C.). Plaintiff fails to show that declaratory judgment in this action will affect that other action, let alone provide some form of "effective relief."[4] In fact, a declaration that the Commission acted unlawfully in failing to release MUR information would have no bearing on the modes of

[4] Plaintiff fails to analogize the collateral consequences doctrine cases it cites, which have in common the element that the relief sought would have clear and obvious "collateral consequences" on other pending legal action, a factual predicate that is not met here. *See, e.g.*, *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008) (appeal not moot when "district court's decision to dismiss the original action for want of subject matter jurisdiction has a concrete (and potentially devastating) impact on the second action").

analysis courts employ in reviewing whether the agency has failed to act in the MUR itself. *See Giffords v. FEC,* Civ. No. 19-1192 (EGS), 2021 WL 4805478, at *8 (D.D.C. Oct. 14, 2021) (finding a failure to act even though the court was aware of prior split votes on whether there was reason to believe violations of FECA occurred, based on the factors in *Common Cause v. FEC*, 489 F. Supp. 738 (D.D.C. 1980) and *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)). In any event, plaintiff's recent dispositive filings in both of the above-cited actions involving Campaign Legal Center indicate that plaintiff is in possession of the information it deems necessary to "defending ongoing legal action" without what would amount to an advisory opinion from this Court on FEC conduct.[5] (*See* Mot. at 15.)

Plaintiff's claim to "litigation injury" is in part moot and in part fails to present a legally cognizable injury for standing, because plaintiff is in possession of the information it sought and fails to show that the declaratory judgment it seeks would redress the claimed injury.

Third, plaintiff appears to argue that the FEC cannot evade judicial review of its alleged "policy" by in effect waiving it or making an exception in this particular case. Notably, this argument does not allege an independent basis for standing and fails to establish a particular, non-moot injury. Instead, the argument is once again entirely contingent upon the existence of an unlawful "concealment policy." But as explained *infra* and in the FEC's Motion, plaintiff has failed to show the existence of any such policy, as opposed to the Commissioners' exercise of their discretion on a case-by-case basis. *See infra* Part II.B.1. In each of the cases cited by plaintiff, there was no dispute as to the existence of an unlawful agency policy. (Resp. at 18

[5] For example, on July 8, 2022, plaintiff filed a motion to dismiss the private enforcement action initiated against it by the Campaign Legal Center. Defendant's Mem. of P. & A. in Supp. of Mot. to Dismiss, *CLC v. Heritage Action*, (22-1248) Docket. No. 20-1. This motion attached as exhibits and made frequent reference to the MUR 7516 vote certifications and statements of reasons. *Id*. Docket Nos. 20-6, 20-7 (Exhs. E, F).

(citing *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494–95 (D.C. Cir. 1988); *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 641 (D.C. Cir. 2002)).) Because plaintiff's "concealment policy" claims fail as a matter of law, they fail to provide an independent basis on which to avoid mootness here.

Fourth, plaintiff mischaracterizes the standard by which the potential for future harm may constitute an injury in fact. It is true that the party asserting mootness bears a "heavy" burden where "[t]he *only conceivable basis* for a finding of mootness in th[e] case is [the respondent's] voluntary conduct." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (emphasis added). However, "once it is 'absolutely clear' that challenged conduct cannot 'reasonably be expected to recur,' . . . the fact that some individuals may base decisions on 'conjectural or hypothetical' speculation does not give rise to the sort of 'concrete' and 'actual' injury necessary to establish Article III standing." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 97 (2013) (citing *Friends of the Earth*, 528 U.S. at 190; *Lujan*, 504 U.S. at 560). In other words, if there is no reasonable basis to believe the challenged conduct will recur, mootness is established, even if it was the result of a defendant's voluntary conduct.

Here, the Commission has provided plaintiff with the vote certifications and statement of reasons it sought via its standard FOIA response process and the procedures which follow from the closure of the enforcement case file. Plaintiff provides no evidence to support its assertion that the documents were disclosed in response to this lawsuit, hence the Commission's "voluntary conduct" is plainly not the "only conceivable basis" for finding mootness, and the "heavy" burden plaintiff cites does not apply. *Friends of the Earth*, 528 U.S. at 189.

There is also no risk that the Commission could resume the "harmful" conduct plaintiff has alleged; plaintiff has all the documents it sought regarding MUR 7516, and the Commission

can no longer withhold these records from plaintiff even if it were inclined to do so. Even where a party must meet a heightened burden to show mootness due to its voluntary cessation of conduct, a claim is still moot where the underlying conduct could not be resumed in "this or any subsequent action[,]" because it is entirely "speculative" that any similar claim would arise in the future. *Deakins v. Monaghan*, 484 U.S. 193, 200, n. 4 (1988) (dismissing matter as moot because the challenged action, pursuing a claim in court, could not be resumed in "this or any subsequent action," as opposed to one in which a defendant is "free to return to his old ways.").

Furthermore, plaintiff's assertions as to its future litigation risk are simply "conjectural or hypothetical speculation." *Already*, 568 U.S. at 97. Plaintiff has provided the Court with no evidence or reason to suspect it will be the target of future enforcement proceedings, other than statements in attorney briefs that it is a politically engaged 501(c)(4) organization, much less that the Commission would unlawfully withhold records from it in those hypothetical proceedings. (Resp. at 19-20.) As a result, its allegations do not "give rise to the sort of 'concrete' and 'actual' injury necessary to establish Article III standing[.]" *Already*, 568 U.S. at 102 (internal citations omitted) (dismissing as moot movant's counterclaim where it was "absolutely clear" that manufacturer could not reasonably be expected to resume its enforcement efforts against competitor). *See also Paging Sys., Inc. v. FCC*, Civ. No. 10-1097, 2010 WL 5121962, at *1 (D.C. Cir. Aug. 30, 2010) (per curiam) (concluding that "[b]are allegations are insufficient . . . to establish . . . standing to seek judicial review of administrative action" and granting motion to dismiss) (citing *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)); *Cato Inst. v. Sec. & Exch. Comm'n*, 4 F.4th 91, 96 (D.C. Cir. 2021) (per curiam) (affirming dismissal for lack of standing and noting that "[w]hen assessing standing at any stage of the litigation, we do not accept inferences that are unsupported by the facts alleged in the complaint.") (citing *In re U.S.*

Office of Pers. Mgmt. Data Sec. Breach Litig., 928 F.3d 42, 54 (D.C. Cir. 2019) (per curiam)); *Belmont Abbey Coll. v. Sebelius*, Civ. No. 11-1989, 2012 WL 3861255, at *3 (D.D.C. Sept. 5, 2012) ("The threat of future litigation is inadequate to satisfy the imminent-injury component of the standing doctrine.") (citing *City of Orville v. FERC*, 147 F.3d 979, 987 (D.C. Cir. 1998)).

Because plaintiff now has the information it sought in this lawsuit, its claims are moot.

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

In addition to seeking records as to MUR 7516, plaintiff makes a sweeping challenge to what it claims is an agency "concealment policy" with regard to such records. However, plaintiff lacks standing to pursue such a claim involving respondents in FEC matters in which plaintiff is not involved. In any event, plaintiff fails to state a claim upon which relief can be granted under the APA, because it has failed to identify any "policy" that would be reviewable as discrete agency action, but instead merely complains about discretionary agency actions in a handful of unidentified FEC enforcement matters. The relief plaintiff seeks, however, would reverse decades of agency practice as to when and how FEC enforcement matters end and contravene the court's obligation to "allow [the agency] to exercise its discretion and utilize its expertise in complying with broad statutory mandates." *Cobell v. Kempthorne*, 455 F.3d at 301, 307 (D.C. Cir. 2006) (citing *Cobell v. Norton*, 240 F.3d 1081, 1099, 1106 (D.C. Cir. 2001)).

A. Plaintiff Lacks Standing to Pursue its Broad "Concealment Policy" Allegations Because It Is Not a Party to the Administrative Complaints It Challenges, and It Lacks a Cognizable Legal Interest in Those Proceedings

Plaintiff concedes that it "is not attempting to sue on behalf of third parties," but instead it claims to be "seeking the information in the other MURs to redress its own informational injuries." (Resp. at 16 n.1.) However, plaintiff's alleged "injury" as to information in unrelated third-party proceedings is an insufficient basis to establish Article III standing.

In particular, plaintiff attempts 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[.]" (Resp. at 16.) Plaintiff's sole source of knowledge as to these matters appears to be a public statement made by three FEC Commissioners. (*See* Resp. Exh. A (Docket No. 20-2).) As with its Complaint, plaintiff's Response does not (i) identify these matters, (ii) identify the respondents, or (iii) provide any details as to factual similarities of the matters with each other or with the matter in which plaintiff was a respondent. Nonetheless, plaintiff seeks "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 statements of reasons." (Resp. at 39 (alteration in original) (citing 5 U.S.C. § 706(1); 28 U.S.C. § 1361).)

In this situation, plaintiff has offered no basis to overcome the "judicially self-imposed limits on the exercise of federal jurisdiction." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). "[T]he decision to seek review must be placed in the hands of those who have a direct stake in the outcome,' … not . . . in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Am. Legal Found. v. FCC*, 808 F.2d 84, 91 (D.C. Cir. 1987) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (other citation omitted)).

This Court has 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. In *Judicial Watch, Inc. v. Federal Election Commission*, 293 F. Supp. 2d 41, 43 (D.D.C. 2003), a nonprofit legal organization that acted as counsel for an individual contributor to a United States Senate campaign, and the contributor himself, brought an action under FECA's judicial review provision alleging that the Commission

had failed to respond to or investigate an administrative complaint the contributor had filed against the campaign committee. Both plaintiffs alleged that this resulted in informational injury, as they had been deprived of information they sought when the administrative complaint was filed. *Id.* The court found that the non-profit, despite serving as counsel to the contributor, was not an administrative complainant and therefore was precluded from seeking judicial review under FECA. *Id.* at 44-45. The court also found that the contributor had "not suffered a concrete and particularized injury cognizable by this Court, and therefore lack[ed] standing[.]" *Id*. at 45. The court rejected the contributor's arguments (1) that he had been deprived of information uncovered during the FEC investigation of his administrative complaint as they pertained to his own contributions; (2) that he might become himself, in the future, a potential respondent in an FEC investigation of the recipient committee and such information would assist in his defense; and (3) that the FEC's delay constituted, in and of itself, an injury in fact. *Id*. at 45-48.

Here, plaintiff does not allege that it is a complainant or respondent in any of the seven other proceedings to which it refers, and for that reason alone it lacks standing to challenge FEC actions in those proceedings. *See supra*, Part I; *Jud. Watch, Inc.*, 293 F. Supp. 2d at 48 (counsel to contributor "is precluded from bringing suit here because it was not a party to the underlying administrative complaint"). In addition, the possibility that plaintiff "may be a potential defendant in a future investigation" is insufficient because plaintiff "has put forth no evidence that an investigation of [its conduct] is ongoing; [it] merely states that one is possible. Future, speculative injury does not satisfy the test for standing as articulated by the Supreme Court in *Lujan*." *Jud. Watch, Inc.*, 293 F. Supp. 2d at 47-48. Nor would the Commission's "delay in acting on [plaintiff's] administrative complaint" constitute "an injury in fact," because there is simply "no basis in the law" to find that such a delay is sufficient. *Id.* at 48.

Plaintiff's claims of informational injury related to proceedings to which it has no connection are similar to but even weaker than unsuccessful past claims about the FEC's handling of enforcement matters. *See, e.g.*, *Free Speech for People*, 442 F. Supp. 3d at 343 (non-profit had no informational interest in obtaining evidence of illegal campaign contributions by Trump campaign); *Nader*, 725 F.3d at 229 (former presidential candidate did not have sufficiently concrete interest in information that might show various organizations violated election laws to keep him off the ballot).

Plaintiff's claims also stand in stark contrast to situations in which courts have found informational injury. FEC administrative complainants have been able to establish such standing in limited situations where they could show their allegations, if successfully pursued, would result in the disclosure of specific information that FECA required to be disclosed by administrative respondents and show that such information would be useful to the complainants in their programmatic activities. *See*, *e.g.*, *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 783 (D.C. Cir. 2022) (finding that "FECA-required factual information about the amounts of the contested coordinated, in-kind contributions … " 'would help [administrative complainants] … to evaluate candidates for public office, ... and to evaluate the role that [respondents'] financial assistance might play in a specific election.'") (quoting *FEC v. Akins*, 524 U.S. 11, 21 (1998)). Plaintiff is not an administrative complainant, and it has not attempted to make such a showing.

B. Plaintiff's Broad "Concealment Policy" Allegations Fail to State a Claim Upon Which Relief Can Be Granted

1. The FEC's Determination as to When to Terminate Enforcement Proceedings Is Not Reviewable Because It Is Committed to the Agency's Discretion by Law

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." *Citizens for Resp. & Ethics in Washington v. FEC*, 892 F.3d 434, 442 (D.C. Cir. 2018). 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)).

Here, while plaintiff is ultimately seeking "information," it appears to also challenge the failure to consider enforcement proceedings terminated following any vote that fails to find reason to believe a FECA violation occurred. Plaintiff does not challenge the FEC's practice of holding votes to close the administrative file. Indeed, plaintiff acknowledges that "[b]y longstanding policy and practice, the Commission has traditionally held an administrative vote to close the enforcement file." (Compl. ¶ 27.) What plaintiff objects to is the way in which certain Commissioners have voted (*i.e.*, exercised their discretion) in this regard in a small number of matters. (Compl. ¶ 32) ("Commissioners Walther, Broussard, and Weintraub have refused to vote to administratively close the files in eight enforcement matters before the Commission[.]").

While acknowledging that the vote to close the file constitutes "longstanding policy and practice" at the FEC, plaintiff simultaneously argues that it is a "purely ministerial and legally insignificant act[.]" (Compl. ¶ 30.) But in its Response, plaintiff completely fails to engage with the detailed history of the agency's enforcement process provided in the Commission's Motion, which belies plaintiff's claim that such immediate dismissals are automatic or required. (Mot. at 24-25.) In its Motion 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. (*Id.*) Plaintiff attempts (Resp. at 33-34 n.4) to distinguish those MURs, but the fact remains that they illustrate that an unsuccessful vote on whether to find reason to believe has not customarily been considered to terminate an FEC enforcement matter.

The unrebutted evidence in the Commission's Motion shows that votes on whether to close the administrative file are a textbook exercise of an agency's discretion in enforcement proceedings. *See Citizens for Resp. & Ethics in Washington*, 892 F.3d at 441 (citing § 701(a)(2)). Indeed, the very fact that the action is subject to a vote is evidence of the discretion inherent in the decision. Thus, whether to continue or conclude enforcement proceedings falls squarely within the "areas traditionally committed to agency discretion." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019); *see Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) ("[I]n cases that involve agency decisions not to take enforcement action, we begin with the presumption that the agency's action is unreviewable."); *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007) ("Excluded from this court's review, however, are agency actions that are 'committed to agency discretion by law.'"); *id*. (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)) ("Enforcement actions" generally fall within this reviewability exclusion because "'a court would have no meaningful standard against which to judge the agency's exercise of discretion' in deciding how to enforce the statutory provisions"); *Fieger v. Gonzales*, Civ. No. 07-10533, 2007 WL 2351006, at *10 (E.D. Mich. Aug. 15, 2007), *aff'd sub nom*. *Fieger v. U.S. Atty. Gen.*, 542 F.3d 1111 (6th Cir. 2008) ("It is well settled that the question of whether and when prosecution is to be instituted is within the discretion" of the authorized government officials) (quoting *Peek v. Mitchell*, 419 F.2d 575, 577 (6th Cir. 1970)).

This principle as to agency discretion has resulted in the dismissal of APA claims made against the FEC by an administrative respondent. *See Beam v. Gonzales*, 548 F. Supp. 2d 596, 612 (N.D. Ill. 2008). Rejecting those claims, the court explained that it "agree[d] that there is no discrete, non-discretionary action to compel in this case." *Id.*

In arguing that the vote to close the file is ministerial, plaintiff relies heavily (Resp. 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)[6] ("Weintraub Statement") (contending that further Commission action remains possible in matters until there are successful motions to close the file).[7]

---

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

[7] 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.*

Plaintiff's claims fail for the additional reason that there is no "law" to apply in judging how the agency should exercise its discretion. *Citizens for Resp. & Ethics in Wash.*, 892 F.3d at 440. Plaintiff points to certain statutory requirements that constrain the FEC's discretion, including 52 U.S.C. § 30109(a)(4)(B)(ii), which requires the FEC to "make public" a "determination" that "a person has not violated [the] Act[.]" (Resp. at 27.) However, no statute plaintiff cites states that such actions must occur prior to closure of an enforcement file, nor that an enforcement matter must be considered closed following a single failed reason-to-believe vote. Indeed, such an interpretation is contradicted by years of agency practice. Courts have rejected other, similar attempts to read deadlines and mandates into FECA. *See Stockman v. FEC*, 138 F.3d 144, 152 (5th Cir. 1998) (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.").

Finally, prudential concerns caution against plaintiff's reading. 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.

2. Plaintiff Has Failed to Challenge a Discrete Agency Action

In its Motion, 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."[8] (Mot. at 20 (citing *Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014).) In particular, the Commission detailed the history of its enforcement proceedings, contrasted with the anecdotes offered by plaintiff to establish a general "concealment policy." (*See* Mot. 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 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]

---

[8] Contrary to plaintiff's assertion, (Resp. at 25 n. 2,) the Commission did argue in its Motion that there was no "final agency action." (Mot. at 1, 19, 20-23.) The Commission further argued that plaintiff failed to challenge a discrete agency action, an antecedent to an action being final. The Commission has not waived a challenge to finality.

[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)).

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 Response 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 statements of reasons." (Resp. at 39 (citing 5 U.S.C. § 706(1); 28 U.S.C. § 1361).) This change is reflected in plaintiff's discussion of the 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.*) But plaintiff's own lack of facts regarding the seven proceedings inevitably hinders its ability to show that it has challenged discrete agency actions.[11]

To the extent it addresses the merits of the Commission's Motion, plaintiff emphasizes that it has "'point[ed] to a precise section of' federal law 'that clearly reins in the agency's discretion' by directing the FEC to timely disclose its voting records and statements of reasons following a dismissal, *Xie*, 780 F.3d at 408; Compl. ¶¶ 82–83 (citing 5 U.S.C. § 555(e); 52

[11] Plaintiff's footnote discussing the lack of a need for an administrative record in this matter also appears to belie its "concealment policy" allegations, as it fails to identify any documents that reflect the enactment of a "policy," and instead refers to only a portion of its case, stating that "the FEC has released the file in MUR 7516 … which would be the administrative record." (Resp. at 28 n.3.)

U.S.C. § 301109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a))." (Resp. at 22.) But as the FEC has shown, dismissal has not customarily occurred until a MUR file is closed by a vote, and when to do that is within the discretion of the agency. *See supra* Part III.B.1.

In addition, plaintiff's heavy reliance on *Xie v. Kerry*, 780 F.3d 405, 407 (D.C. Cir. 2015), is misplaced. As plaintiff states, the court in that matter found that the plaintiff had properly identified discrete agency action that the Department of State was required to take, namely "a specific principle of temporal priority[.]" *Id.* at 408. The provision at issue was straightforward, mandating a simple rule for the agency to follow. *See id.* at 406 ("Immigrant visas . . . shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed") (citing 8 U.S.C. § 1153(e)(1)).

Plaintiff can point to no similar statutory mandate that applies here. The only statutory language it cites as requiring the disclosure of FEC MUR records provides that "[i]f 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). But the agency has for years conducted its proceedings in a way that construes this language and other relevant provisions to require the disclosure of certain records only after a matter has ended through a close-the-file vote. *See supra*, Part III.B.1; Mot. at 23-25. This approach avoids the problems that would arise if every reason-to-believe vote had to be made public when it was taken, or if the first failed reason-to-believe vote ended a matter, preventing Commissioners from later reaching a different result. (Mot. at 24.) Furthermore, the agency's practice is entitled to substantial deference, as it goes to the heart of the authority to manage and terminate its law enforcement proceedings. *Dep't of Com.*, 139 S. Ct. at 2568; *Sierra Club*, 648 F.3d at 855; *Fieger*, 2007 WL 2351006, at *10. Similar attempts to read

temporal deadlines into the language of FECA have been repeatedly rejected. *See Stockman*, 138 F.3d at 152 (declining to order an investigation concluded and noting that FECA "provides a strong basis for scrupulously respecting the grant by Congress of 'exclusive jurisdiction' to the FEC"); *Fieger*, 2007 WL 2351006, at *9 (concluding that the statute "provides no time limit for completing any investigative action"). Plaintiff fails to show that section 30109(a)(4)(B)(ii) *must* be interpreted in a manner that is contrary to longstanding agency practice. *See Orlov v. Howard*, 523 F. Supp. 2d 30, 37 (D.D.C. 2007) ("'[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*.'") (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)).

Because plaintiff has failed to identify a discrete agency action, and rather seeks court supervision of proceedings "committed to agency discretion by law[,]" plaintiff "has failed to state a claim under the APA, and therefore [its complaint] should be dismissed under Rule 12(b)(6)[.]" *Sierra Club*, 648 F.3d at 854.

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

As the FEC explained (Mot. at 25-31), plaintiff cannot bring APA or mandamus claims to challenge the FEC's handling of administrative enforcement complaints. "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *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)). "District courts have jurisdiction over civil actions arising under the Constitution and federal laws, 28 U.S.C § 1331, but Congress may preclude that jurisdiction by establishing an alternative statutory scheme for administrative and judicial review." *Id. See also City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979) ("If … there exists a special

statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.").[12]

To decide if a statutory review procedure is exclusive, courts "use the two-step framework set forth in *Thunder Basin Coal Company v. Reich*, 510 U.S. 200 [] (1994)." *Nat'l Veterans Affs. Council v. Fed. Serv. Impasses Panel*, Civ. No. 20-00837, 2021 WL 5936407, at *5 (D.D.C. Feb. 10, 2021). Under that case, "Congress intended that a litigant proceed exclusively through a statutory scheme ... when (i) such intent is 'fairly discernible in the statutory scheme,' and (ii) the litigant's claims are 'of the type Congress intended to be reviewed within [the] statutory structure.'" *Id.* (quoting *Jarkesy v. S.E.C.*, 803 F.3d 9, 15 (D.C. Cir. 2015)).

As the Commission showed in its Motion, FECA provides the exclusive mechanism for judicial review of any FEC dismissal of an administrative complaint and any claimed failure to act on such a complaint, precluding each of plaintiff's claims pursuant to the APA and the mandamus statute. (Mot. at 25-31.) This is evidenced by the text of FECA, and the fact that every court that has considered the nature of the judicial-review procedures in 52 U.S.C. § 30109(a)(8) has found that those FECA procedures are exclusive. (*Id.*)

In response, plaintiff offers a reductive misreading of this argument. Plaintiff wrongly asserts that "the FEC makes the baffling claim that APA review is unavailable here because Heritage Action also cannot obtain review of the concealment policy under FECA." (Resp. at 25.) This claim misses the mark. Congress explicitly provided that only FEC administrative complainants may seek judicial review, and that they may do so only in two narrow

[12] As the FEC noted, this preclusion could be considered to result in a lack of subject matter jurisdiction or a failure to state a claim upon which relief can be granted. (Mot. at 26 n.8.)

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 [a] 120-day period[.]" 52 U.S.C. § 30109(a)(8)(A). Federal courts have uniformly concluded that this judicial review mechanism is the exclusive one for challenges to the FEC's handling of administrative complaints. (Mot. at 27-29.) Plaintiff's APA and mandamus claims are thus precluded not "because" Heritage Action cannot obtain review under FECA (Resp. at 25), but because this was the intent of Congress, regardless of whether review would be available to plaintiff under FECA or not. *See Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (per curiam) (noting that section 30109(a)(8) is "as specific a mandate as one can imagine" and concluding that "the procedures it sets forth — procedures purposely designed to ensure fairness not only to complainants but also to respondents — must be followed before a court may intervene.").

Plaintiff's other central response is that the precedent cited by the FEC is inapposite because, according to plaintiff, the cases on which the FEC relies address only claims by administrative complainants. (*Id.* at 26.) But one of the appellate opinions in the Commission's Motion was brought by an administrative respondent. (Mot. at 28-29 (citing *Stockman*, 138 F.3d 144).) In *Stockman*, a congressman sued to enjoin the FEC from further investigation of his campaign, alleging that the FEC unduly delayed in its investigation in violation of FECA and the APA. 138 F.3d at 146. After the district court dismissed the matter on the merits, the congressman appealed, and the Fifth Circuit held that FECA precluded judicial review of the delay claim. *Id.* at 152. The court observed that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Id.* at 154 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984)). The court

determined that "[p]rudential considerations and the nature of FEC investigations also support[ed] [its] holding" as "allowing the person under investigation to bring suit in district court any time he felt aggrieved by the investigation could compromise the ability of the agency to investigate and enforce the Act." *Id.* at 154-55 (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 242–43 (1980)) ("Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes.").

Other courts have found that FECA precluded challenges not just by administrative complainants, but by administrative respondents as well. In one, the plaintiffs alleged, *inter alia*, that the FEC had failed to conduct an investigation of plaintiffs as required by FECA and therefore in violation of the APA and the mandamus statute. *Fieger*, 2007 WL 2351006, at *8.[13] The court rejected these claims, concluding that "Congress generally has deprived federal courts of jurisdiction to review the Commission's handling of its administrative complaints[,]" citing *Stockman*, 138 F.3d at 153, and *Perot*, 97 F.3d at 559. *Id.* at *10. After noting that FECA's "two narrow exceptions" did not apply to the respondent's claims, the court concluded that it "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." *Id.* (citing *Block*, 467 U.S. at 349) (emphasis in original). The judge in a third case brought by a respondent reached the same conclusion. *Beam*, 548 F. Supp. 2d at 610-12.

Plaintiff offers no reason why its claims in this case should be exempt from the unanimous judgment of the courts, in this Circuit and elsewhere, that FECA provides the exclusive avenue for judicial review of the Commission's enforcement proceedings with regard

[13] Plaintiff there sought to dismiss a related investigation by the U.S. Department of Justice.

to administrative complainants and respondents alike. *See Stockman*, 138 F.3d at 152; *Fieger*, 2007 WL 2351006, at *8. Plaintiff's APA and mandamus claims are precluded.

Furthermore, while Congress is entitled to bar categories of claimants and claims from judicial review, it is not true that a respondent like plaintiff has "no other adequate remedy." (Resp. at 25.) As the court noted in *Stockman*, "[h]ad [respondent] truly wanted to prod the FEC into completing its investigation more expeditiously, he could have filed a complaint with the FEC." 138 F.3d at 156 (citing what is now 52 U.S.C. § 30109(a)(1)). "Consistent with the structure and intent of the FEC's 'exclusive jurisdiction,' this would have given the FEC the first opportunity to resolve Stockman's claims before he sought judicial interference." *Id.* (citing what is now 52 U.S.C. § 30107). "Then, if the FEC dismissed the administrative complaint or failed to act upon it, and Stockman was 'aggrieved' by the FEC's failure to act, he could file a petition in the federal court for the District of Columbia." *Id.* (citing what is now 52 U.S.C. § 30109(a)(8)). Moreover, plaintiff could have sought to raise its concerns as an intervening defendant in the section 30109(a)(8) delay case that the administrative complainant filed, but it failed to do so in a timely manner. Order at 2, *CLC v. FEC*, Civ. No. 21-0406 (TJK) (D.D.C.) (Docket No. 34) ("because Heritage Action's motion [to intervene] is not timely, the Court will deny it"). And to any extent that plaintiff's concerns about the FEC administrative process could affect the private suit that has been filed, plaintiff has already raised them there. Def's Mem. of P. & A. in Supp. of Mot. to Dismiss, *CLC v. Heritage Action*, Civ. No. 22-1248 (Dkt. 20-1). Administrative respondents have multiple avenues available to vindicate their interests.

Because Congress established FECA as the exclusive avenue for judicial review of FEC enforcement proceedings, plaintiff's claims pursuant to other statutes should be dismissed.

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

Plaintiff offers a brief argument in support of its mandamus claim (Response at 37-38), but once again it fails to respond in a meaningful way to the Commission's arguments.

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." (Mot. at 31; Resp. 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." (Mot. at 32-33.) In response, plaintiff repeats its assertion that the "sources of federal law" it cites "contain mandatory, non-discretionary duties" (Resp. 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 II.B.1. Far from waiving the argument, as plaintiff alleges (Resp. at 38), the FEC went on to note that "[d]isagreements between Commissioners about the termination of certain administrative proceedings demonstrate the disputability of the issues plaintiff raises." (Mot. at 33.) Plaintiff discounts that point, but plaintiff itself relies heavily on Commissioner statements (*e.g.*, Resp. 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 complaint should be dismissed in its entirety.

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

Greg J. Mueller (D.C. Bar No. 462840)
Attorney
gmueller@fec.gov

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

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

August 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 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