UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE PATRIOTS FOUNDATION
4020 121st Street
Urbandale, Iowa 50323,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION
1050 First St., NE
Washington, D.C. 20463,

Defendant,

and

HILLARY FOR AMERICA
P.O. Box 5256
New York, NY 10185-5256

CORRECT THE RECORD
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Washington, DC 20024

MEDIA MATTERS FOR AMERICA
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Defendant-Intervenors.

Civil Action No. 1:20-cv-02229

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR JUDGMENT ON THE PLEADINGS

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American Bridge 21st Century Foundation	**AB Foundation**
American Bridge 21st Century PAC	**AB PAC**
Campaign Legal Center and its Senior Director, Policy & Strategic Partnerships Catherine Hinckley Kelley (collectively)	**CLC**
Citizens for Responsibility & Ethics in Washington v. FEC, 799 F. Supp. 2d 78 (D.D.C. 2011)	**CREW 2011**
Citizens for Responsibility & Ethics in Washington v. FEC, 236 F. Supp. 3d 378 (D.D.C. 2017)	**CREW 2017**
Correct the Record	**CTR PAC**
Federal Election Commission	**FEC**
Hillary for America	**HFA**
Matter Under Review	**MUR**
Media Matters for America	**MMFA**
Political Action Committee	**PAC**
Telecommunications Research & Action Center	**TRAC**
The Federal Election Campaign Act of 1971, as amended	**FECA (or the "Act")**
The Federal Election's Office of General Counsel	**OGC**
The Patriots Foundation	**TPF**

INTRODUCTION

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, Defendant-Intervenors Hillary for America ("HFA"), Correct the Record ("CTR PAC"), Media Matters for America ("MMFA"), American Bridge 21st Century Foundation ("AB Foundation"), American Bridge 21st Century PAC ("AB PAC"), and David Brock seek judgment on the pleadings as to the Complaint filed by The Patriots Foundation ("TPF") against the Federal Election Commission ("FEC" or the "Commission"). This Court should grant Defendant-Intervenors' motion because Plaintiff TPF has failed to meet its burden of demonstrating standing and has failed to state a claim upon which relief may be granted. Furthermore, given Plaintiff's inexcusable and prejudicial delay in filing the administrative action that eventually led to the filing of this lawsuit, the relief Plaintiff seeks is barred by the equitable remedy of laches.

Plaintiff lacks standing for several reasons. First, Plaintiff alleges an informational injury, but what Plaintiff actually seeks a legal determination and to have the law enforced to its liking, rather than the disclosure of FECA-required information. Moreover, the information Plaintiff claims to seek is already publicly available. Plaintiff has failed to meet its burden of alleging by a preponderance of the evidence that relevant information exists that is not already available to Plaintiff. Furthermore, even if Plaintiff could somehow show that it would obtain new information as a result of a favorable ruling in this matter, there is real reason to doubt that the information Plaintiff seeks would be useful. The subject of Plaintiff's complaint—the 2016 election—is far in the public's rearview mirror; Secretary Clinton is neither a current public officeholder nor candidate, and there is no indication that she will run for public office in the future; and at least two of the organizations Plaintiff complains about are now dormant or defunct. Second, Plaintiff alleges an organizational injury, but the Complaint fails to show that any discrete programmatic

activity will be imminently and adversely affected by the FEC's delay on taking public action in this case.

In addition to lacking standing, Plaintiff's Complaint does not plead facts sufficient to support the allegation that the FEC's failure to take public action on its administrative complaint is contrary to law. In order to make such a showing, TPF must allege that the FEC's failure to take public action is "arbitrary and capricious," which is a standard that is highly deferential to administrative agencies like the FEC and necessarily tied to the specific facts of each case. *See Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.C.C. 1980). Here, Plaintiff never once alleges any facts demonstrating that the FEC's delay—and not its own decision to file the administrative complaint nearly four years after the alleged illegal conduct occurred—is the cause of Plaintiff's harm.

Finally, the relief sought by Plaintiff in this case is barred by the equitable doctrine of laches. Plaintiff waited nearly four years after the alleged wrongful conduct occurred to file an administrative complaint with the FEC. Now, in an ironic and blatant attempt to instruct the FEC how to prioritize its matters, Plaintiff claims that the FEC is taking too much time to act on its Complaint. For these reasons, and as further explained below, Defendant-Intervenors respectfully request that this Court grant the instant motion in their favor.

BACKGROUND

I. The Federal Election Commission

The FEC is an independent agency of the United States government with "exclusive jurisdiction" over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"). *See generally* 52 U.S.C. §§ 30106, 30107, 30108. The Commission is authorized to institute investigations of possible violations of the FECA. *Id.* at § 30109. It may also institute a civil action for relief if it is unable to correct or

prevent any violation of the Act pursuant to its administrative enforcement processes. *Id*. § 30109(a)(6)(A).

Any person who believes a violation of the Act has occurred may file a complaint with the Commission. *Id*. § 30109(a)(1). After reviewing the complaint and any response filed by the respondent, the Commission considers whether there is "reason to believe" a violation of the Act has occurred. *Id*. § 30109(a)(2). If at least four of the FEC's Commissioners vote to find such reason to believe,[1] the FEC may investigate the alleged violation or engage in pre-probable cause conciliation; otherwise, the FEC dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

FECA authorizes a complainant to challenge the Commission's treatment of an administrative complaint in only two circumstances. *First*, if at any point the Commission determines that no violation has occurred or decides to dismiss a complaint, the Act authorizes limited judicial review of the Commission's dismissal decision. *See id*. § 30109(a)(8)(A). A complainant must file a dismissal suit "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B). *Second*, and relevant here, under FECA, if the FEC has not acted on a complaint within 120 days of when it was filed, the complainant may file a petition in the United States District Court for the District of Columbia seeking a declaration that the agency's failure to act is contrary to law and ordering the agency to conform with such declaration within 30 days. *See id*. § 30109(a)(8)(A), (C). The 120-day period is not a timetable within which the Commission must resolve an administrative complaint; it is merely a jurisdictional threshold before which the complainant may not file suit. *E.g.*, *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986)

[1] Prior to the Commission's vote, the FEC's Office of General Counsel ("OGC") recommends to the Commission in a report whether there is "reason to believe" a violation has occurred. *Id*. § 30109(a)(2).

("unequivocally" rejecting the contention "that [FECA] required the Commission to act within 120 days or within an election cycle.").

A quorum is required for the FEC to conduct much of its business, including two items of direct relevance in this lawsuit. First, the FEC must have a quorum in order to be able to vote to take action to investigate and conciliate a complaint. *See id*. §§ 30109(a)(2)–(4). Second, the FEC must have a quorum in order to vote to defend the agency in legal proceedings. *See* 52 U.S.C. §§ 30106(c), 30107(a)(6)–(9).

II. The Internet Exemption

FECA provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 52 U.S.C. § 30116(a)(7)(B)(i). Expenditures made for communications are governed by 11 C.F.R. § 109.21, which establishes a three-part test to determine whether a communications expenditure constitutes a coordinated communication, and therefore, an in-kind contribution to a federal campaign or party committee. 11 C.F.R. § 109.21. The regulation provides that the "content prong" of the test will only be satisfied by (1) an "electioneering communication" or (2) a "public communication" that republishes campaign materials, contains express advocacy or its functional equivalent, or refers to federal candidates or party committees at certain times before an election. *Id*. § 109.21(c)

With regard to internet communications, Commission regulations only include within the definition of "public communications" "communications *placed for a fee on another person's Web site*." *Id*. § 100.26 (emphasis added). The definition, therefore, excludes internet communications which are not placed for a fee on another person's website, including communications posted or transmitted for free or posted on an entity's own website. This is often referred to as the "internet

exemption" to the Act. The Commission has explained that its "general exclusion of internet communications from treatment as coordinated communications (and thus as in-kind contributions) is deliberate," and was made because the Commission recognized the internet as a "unique and evolving mode of mass communication and political speech that is distinct from other media" and "warrants a restrained regulatory approach." MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*), Statement of Reasons, Vice Chairman Matthew S. Petersen & Commissioner Caroline C. Hunter at 11 (Aug. 21, 2019); Internet Communications, 71 Fed. Reg. 18589 (April 12, 2006).

Since the promulgation of the internet exemption in 2006, the Commission has consistently interpreted it to encompass expenses directly incurred to produce exempted internet communications. Statement of Reasons at 12 n.60 (citing to previous Commission decisions excluding production costs from the definition of contribution). This applies even when the direct input costs for a covered communication, such as for email lists and data licenses, direct production expenses, and staff time associated with the creation of the communication, are significant. *See Campaign Legal Ctr. v. FEC*, No. 19-2336 (JEB), 2020 WL 2996592 at *11 (D.D.C. June 4, 2020).

III. TPF's Administrative Complaint

On April 8, 2020—nearly *four years* after the conclusion of the 2016 general election—Plaintiff TPF filed its administrative complaint, which the FEC designated as Matter Under Review ("MUR") 7726, against five respondents: CTR PAC, AB PAC, AB Foundation, MMFA, and David Brock. HFA was not named as a respondent in the administrative complaint but was notified of the complaint by the FEC and granted an opportunity to respond. The allegations in Plaintiff's administrative complaint are generally related to the 2016 election and the ways in which Defendant-Intervenors interacted with each other. There were a number of FEC complaints

filed by various individuals and organizations in 2015 and 2016 related to the same or similar activity addressed in Plaintiff's complaint. *See* ECF No. 1-1, Admin. Compl. at 15 n.43 (citing MURs 6940, 7097, 7146, and 7193). Yet Plaintiff waited four years, until the statute of limitations has nearly expired, to file its own complaint. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington v. FEC*, 236 F. Supp. 3d 378, 392 (D.D.C. 2017) (*CREW 2017*) (applying five-year limitations period set forth in 28 U.S.C § 2462 to FECA enforcement actions brought by the Commission).

With the exception of HFA, the remaining Defendant-Intervenors are a collection of organizations that were founded by David Brock. HFA is the principal campaign committee of former United States Secretary of State Hillary Clinton, who was the nominee of the Democratic Party for the office of President in the 2016 election. CTR PAC is a "hybrid" or *Carey* political action committee ("PAC") that registered with the FEC in June 2015. CTR PAC was active during the 2016 election cycle, serving as a strategic research and rapid response team designed to defend Secretary Clinton from baseless political attacks. As a hybrid PAC, CTR PAC maintained one bank account that was subject to the Act's contribution limits and source restrictions and could make contributions to candidates, and a second bank account that could accept unlimited contributions from any source but could not contribute to federal candidates. *See Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). In other words, CTR PAC was half traditional PAC and half super PAC. *See id.*

CTR PAC conducted the vast majority of its activities online, using its website and social media accounts to set the record straight about Secretary Clinton's record when her opponents and media outlets made false and misleading claims about her. CTR PAC also shared similar content with the people who subscribed to its email list. It conducted a handful of other activities that were

not related to its online presence, but those activities were relatively rare and represented a minor portion of its program. CTR PAC reported every dollar it spent—for online and non-online activities— from both of its accounts as "expenditures" or "disbursements" on its regularly filed FEC reports and included a purpose description for each itemized disbursement. *See Correct the Record*, FEC, https://www.fec.gov/data/committee/C00578997/ (last visited July 20, 2021). CTR PAC has been dormant since the 2016 election. Indeed, it filed a request for termination with the FEC nearly two years ago in December 2019. ECF No. 1-1, Admin. Compl. at 1 n. 1.

The third organization, AB PAC, is an independent expenditure-only committee founded in 2010. AB PAC is a large research, video tracking, and rapid response organization, and it operates on the Democratic side of the aisle. The fourth organization, MMFA, is an incorporated tax-exempt Section 501(c)(3) organization that was established to work with members of the media to reduce occurrences of excessive bias in the media. The fifth and last organization, AB Foundation, is a tax-exempt Section 501(c)(4) organization that is "dedicated to opposing the conservative movement's extreme ideology and exposing its dishonest tactics."

Plaintiff's administrative complaint makes the following vague and unsupported allegations: (1) MMFA coordinated with HFA on media services that constituted prohibited and unreported in-kind contributions from MMFA to HFA; (2) AB Foundation shared staff, office space, and equipment with AB PAC, and although AB Foundation paid AB PAC for those costs and publicly reported those payments, those payments were inaccurate insofar as they were based on estimates rather than actual costs; (3) AB PAC and CTR PAC coordinated with HFA such that their purported independent expenditures should have been reported as in-kind contributions to HFA; and (4) AB PAC made prohibited in-kind contributions to other unnamed Democratic campaigns. Compl., *See* ECF No. 1, Compl., at ¶ 4.

On July 6, 2020, MMFA, AB Foundation, CTR PAC, AB PAC, and HFA filed a consolidated response to TPF's administrative complaint. *See* ECF No. 10-2, Admin. Response. In their response, the administrative respondents argued that each of TPF's allegations were rooted in speculation and a misreading of the law rather than in evidentiary support. Specifically, they argued that the administrative complaint did not present any facts or evidence indicating that: (1) MMFA made in-kind contributions to HFA, CTR PAC, or AB PAC; (2) AB Foundation made in-kind contributions to AB PAC or that AB PAC misreported its activity; or (3) CTR PAC and AB PAC made in-kind contributions to HFA. Finally, the response noted that the administrative complaint provided no evidence that AB PAC ever provided research services to a campaign committee for free, let alone any evidence of *which* campaign committee may have received such services. *Id*.

TPF's administrative complaint was filed in the midst of unusual circumstances. For seven months before TPF filed its administrative complaint, and a total of eight months after, the FEC lacked a quorum of members and was thus unable to take action on the complaint. Indeed, the Commission had a quorum until former Commissioner Matthew Petersen resigned in late August 2019. FEC, "Matthew Petersen to depart Federal Election Commission," (Aug. 26, 2019). Plaintiff's complaint was filed in April 2020, when the FEC lacked quorum. Two months after TPF filed its administrative complaint, quorum was restored for a brief period when Trey Trainor III was sworn in as a Commissioner effective June 5, 2020. FEC, "James E. Trainor III sworn in as Commissioner," (June 5, 2020). But that quorum was short lived, as Commissioner Caroline Hunter resigned a month later, effective July 3, 2020. FEC, "Caroline C. Hunter to depart Federal Election Commission," (June 26, 2020). It was not until December 10, 2020, that the FEC again regained quorum and restored its activities to full strength. FEC, "Statement of Commissioner

Ellen L. Weintraub On the Senate's Votes to Restore the Federal Election Commission to Full Strength," available at https://www.fec.gov/resources/cms-content/documents/2020-12-Quorum-Restoration-Statement.pdf (Dec. 9, 2020).

IV. Plaintiff's Lawsuit

Pursuant to 52 § 30109(a)(8)(A), (C), Plaintiff filed this lawsuit on August 13, 2020, 127 days after filing its administrative complaint with the FEC. Plaintiff's nine-page complaint alleges one cause of action: "the FEC's failure to act on its administrative complaint is contrary to law under 52 U.S.C. § 30109(a)(8)(A)." ECF No. 1, Compl. at ¶ 40, and barely any facts to support that assertion. Plaintiff seeks a declaratory judgment and an order from this Court requiring the FEC to act on its complaint within 30 days.

Because this lawsuit was filed when the FEC lacked quorum, the agency could not obtain the votes needed to defend the suit. Accordingly, Defendant-Intervenors moved to intervene and were granted intervention by this Court on October 28, 2020. Minute Order Granting Motion to Intervene (entered Oct. 28, 2020). After waiting for years to file its administrative complaint and then filing suit in this Court nearly as quickly as the law allowed it to, Plaintiff apparently was still not ready to litigate this matter. Plaintiff repeatedly moved to stay the action, a request Defendant-Intervenors joined. ECF Nos. 14, 15. This Court granted the motions to stay, and the case was subsequently stayed for a total of 180 days. *See* Minute Orders of Nov. 30, 2020 and Mar. 30, 2021. On July 20, 2021, the Court entered default against the FEC since it has not entered an appearance or otherwise participated in this case. ECF No. 19.

Now that the stay has been lifted, and because Plaintiff's complaint is deficient in several ways, Defendant-Intervenors move for judgment on the pleadings.

STANDARD OF REVIEW

After the close of pleadings, when a complaint fails to plead facts sufficient "to state a claim for relief that is plausible on its face," it should be dismissed under Rule 12(c) of the Federal Rules of Civil Procedure. *Qi v. F.D.I.C.*, 755 F. Supp. 2d 195, 199 (D.D.C. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The analysis of a Rule 12(c) motion is essentially the same as that for a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted. *Smallwood v. United States Dep't of Just.*, 266 F. Supp. 3d 217, 219 (D.D.C. 2017); *Plain v. AT & T Corp.*, 424 F. Supp. 2d 11, 20 n. 11 (D.D.C. 2006).

When evaluating a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), courts must "assume the truth of all material factual allegations in the complaint," *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (cleaned up), but courts need not accept inferences unsupported by factual allegations or legal conclusions, *see, e.g.*, *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Federal courts are courts of limited jurisdiction, and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). To defeat a 12(b)(1) motion, a plaintiff must show "by a preponderance of the evidence that the Court has subject matter jurisdiction[.]" *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 176 (D.D.C. 2004). Additionally, the Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (citation omitted).

To withstand a motion to dismiss under Rule 12(b)(6), a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. v. Twombly*, 550 U.S. 544, 570

(2007). Facts not alleged cannot be assumed. *I*d. at 563 n.8. Allegations must amount to "more than labels and conclusions." *Id*. at 555. "[F]ormulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

Judged against these standards, Defendant-Intervenors' motion for judgment on the pleadings should be granted.

ARGUMENT

I. Plaintiff lacks standing.

Plaintiff has failed to adequately allege that the FEC's failure to take public action on its administrative complaint thus far has caused it injury. For some of its allegations, Plaintiff has not suffered a suffered a legally cognizable informational injury because it seeks a legal determination and to have the law enforced to its liking, rather than the disclosure of FECA-required information. For others, the information Plaintiff claims to lack is already available to it. But even if Plaintiff could somehow show that it would obtain new information as a result of a favorable ruling, Plaintiff has failed to show that it has suffered a concrete, tangible harm as a result of lacking such information. Plaintiff vaguely alleges that it uses information to educate the public "so that the public may fully evaluate candidates for public office," ECF No. 1, Compl. at ¶ 12, but never explains how that activity has been impaired by the information it claims to lack. Furthermore, the subject of Plaintiff's complaint—the 2016 election—is long behind us; the candidate Plaintiff seeks information is about (Secretary Clinton) is not running for public office now or in the future; and at least two of the organizations about which Plaintiff complains are now dormant or defunct. It is hard to imagine how the information Plaintiff seeks could be useful in educating the public in the present moment. And the Complaint is certainly bereft of any such facts.

Finally, Plaintiff cannot plausibly allege that its claimed informational injury has been caused by the FEC's delay. Plaintiff did not bother to file the administrative complaint until nearly

four years after the conduct it challenges occurred, right before the statute of limitations expires on its claims. ECF No. 1-1, Admin. Compl.; *see also CREW 2017*, 236 F. Supp. 3d at 392. If Plaintiff has suffered any injury—and Defendant-Intervenors contend it has not—the injury was caused by Plaintiff's own delay and not by the FEC. Plaintiff apparently did not need the information it now seeks in the four years it waited to file a complaint with the FEC; it cannot now plausibly claim that the FEC's failure to act on its proposed timeline is the cause of its injury.

A. Plaintiff is required to establish Article III standing.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). That is because federal courts may only decide "actual ongoing controversies." *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (cleaned up). *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). Indeed, while "[a]ny person" who believes that FECA was violated may file an administrative complaint with the FEC, 52 U.S.C. § 30109(a)(1), as Plaintiff has done, only those who otherwise satisfy Article III may seek judicial review of the FEC actions under § 30109(a)(8)(A). *See Common Cause v. FEC*, 108 F.3d at 419. Thus, although § 30109(a)(8)(A) confers a right to sue, it does not confer standing. *See Campaign Legal Ctr PAC. v. FEC*, No. 18-CV-0053 (TSC), 2020 WL 2735590, at *2 (D.D.C. May 26, 2020) (interpreting *Common Cause*'s recognition that § 30109 does not confer standing to cases involving challenges to the Commission's inaction); *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 48 (D.D.C. 2003) (same).

To establish standing, a plaintiff must show (1) a concrete, particularized, and actual or imminent injury in fact that is (2) fairly traceable to the Defendant's challenged action and (3) likely to be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*,

Inc., 528 U.S. 167, 180–81 (2000). The D.C. Circuit has cautioned that in cases like this one, where plaintiff's "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult" to prove. *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (quoting *Lujan*, 504 U.S. at 562). Further, a "deficiency on any one of the three prongs suffices to defeat standing." *Citizens for Responsibility & Ethics in Washington v. FEC*, 799 F. Supp. 2d 78, 85 (D.D.C. 2011) (*CREW 2011*) (quoting *U.S. Ecology, Inc. v. U.S. Dept. of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000)). To survive a motion for judgment on the pleadings, Plaintiff must plausibly allege facts showing by a preponderance of the evidence that this Court has subject matter jurisdiction. *Smallwood*, 266 F. Supp. 3d at 219. As discussed below, Plaintiff's allegations are not enough.

B. Plaintiff has not suffered a legally cognizable informational injury.

A plaintiff can only claim an informational injury sufficient for standing in limited circumstances. To assert an informational injury, a plaintiff must allege that it is "directly deprived of information that must be disclosed under a statute." *CREW v. U.S. Dep't of the Treasury, IRS*, 21 F. Supp. 3d 25, 32 (D.D.C. 2014); *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011) ("For purposes of informational standing, a plaintiff 'is injured-in-fact . . . because he did not get what the statute entitled him to receive.'") (quoting *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006)). But not just any information will do: "[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). When evaluating whether a complainant has suffered an informational injury sufficient to confer standing to seek judicial review under 52 U.S.C. § 30109(a)(8), "the nature of the information allegedly withheld is critical to the [court's] standing analysis." *Common Cause*, 108 F.3d at 417. If the information allegedly withheld is

already available to plaintiffs or is information as to whether a violation of the law has occurred, then plaintiffs have not suffered an injury in fact sufficient to confer standing. *Id.*

In this case, Plaintiff vaguely alleges that it lacks information about three issues: (1) alleged in-kind contributions made by MMFA to CTR PAC, AB PAC, HFA; (2) alleged in-kind contributions made by AB Foundation to AB PAC and alleged misreporting of AB Foundation activity; and (3) CTR PAC's and AB PAC's alleged unreported in-kind contributions to HFA. Compl. ¶ 7. Plaintiff never states what specific information or types of documents it seeks. For the reasons discussed below, none of Plaintiff's allegations meet the standard required to show informational injury.

1. Plaintiff's administrative complaint seeks legal determinations—not new factual information—about the in-kind contributions allegedly made by CTR PAC.

Courts have repeatedly held that a plaintiff does not suffer an injury in fact to establish standing if it merely seeks a legal determination based on factual information that is already publicly available. *See Wertheimer v. FEC*, 268 F.3d 1070, 1074–75 (D.C. Cir. 2001) (no informational standing to pursue a legal determination that expenditures were "coordinated" when all relevant expenditures had been publicly disclosed); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178–79 (D.D.C. 2013) (no informational standing to pursue legal determination that publicly reported expenditures exceeded applicable limitations); *CREW 2011*, 799 F. Supp. 2d at 88–89 (no informational standing to pursue legal determination that publicly reported expenditures were "in-kind contributions").

In other words, a plaintiff has no legally cognizable interest in learning solely "whether a violation of the law has occurred," *Common Cause*, 108 F.3d at 418, or in having the FEC "get the bad guys," *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013) (internal quotation marks omitted). *See also Common Cause*, 108 F.3d at 418 ("Nothing in FECA requires that information concerning

a violation of the Act as such be disclosed to the public. Indeed, even if FECA did require such disclosure, we doubt whether this requirement could create standing. To hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred would be tantamount to recognizing a justiciable interest in the enforcement of the law. This we cannot do.").

Plaintiff's Complaint makes the vague allegation that it lacks information about "Correct the Record PAC's and American Bridge 21st Century PAC's unreported in-kind contributions to Hillary for America." Compl. ¶ 7. Plaintiff's administrative complaint is slightly more specific in that it alleges that CTR PAC openly coordinated its activity with HFA, and as such, expenditures unrelated to online communications that were made by CTR PAC during the 2016 election were in-kind contributions to HFA. ECF No. 1-1 Admin. Compl. at 14.

The information Plaintiff claims to seek is very similar to the information sought by Campaign Legal Center and its Senior Director, Policy & Strategic Partnerships Catherine Hinckley Kelley (hereinafter, collectively, "CLC"), in a complaint filed against the FEC in 2019, which alleged that the FEC's dismissal of their 2016 administrative complaint was contrary to law. *See CLC v. FEC*, 507 F. Supp. 3d 79, 82 (D.D.C. 2020). In that case, CLC alleged that it knew CTR PAC and HFA coordinated their activities, but it suffered an informational injury because it lacked information about the specific amount of "input costs" (such as costs for production, staff, travel, and overhead) that were related to the creation of unpaid online communications sponsored by CTR PAC and coordinated with HFA. *Id.* at 88; *see also supra* pp. 4-5. Those "input costs," CLC contended, would not be exempt from the definition of "coordinated communication" and would instead be treated as prohibited in-kind contributions.

The district court closely examined CLC's allegations and concluded that the information allegedly sought by CLC was already publicly available in CTR PAC's disclosure reports filed with the FEC, and that what CLC really sought was a finding by the FEC that CTR PAC's expenditures were "coordinated" with HFA as a matter of law and should be treated as in-kind contributions. *Id.* at 90. Importantly, the court held that even if it adopted CLC's view of the law—that input costs for online communications should be treated as non-exempt coordinated expenditures—no new factual information would be revealed. Two changes would occur: (1) expenses that are currently reported on Line 21 of CTR PAC's FEC reports as "operating expenditures" would be moved to Line 23 and reported as "in-kind contributions"; and (2) HFA would duplicatively report these same expenses on its own reports. The D.C. Circuit has explicitly rejected legal characterizations and duplicative reporting as a basis for informational standing in *Wertheimer v. FEC*, noting that the plaintiffs "d[id] not really seek additional facts but only the legal determination that certain transactions constitute coordinated expenditures," and so would simply obtain "the same information from a different source." 268 F.3d 1070 (D.C. Cir. 2001). *See also Vroom v. FEC*, 951 F. Supp. 2d 175, 178–79 (D.D.C. 2013) (no informational standing to pursue legal determination that publicly reported expenditures exceeded applicable limitations). Accordingly, the district court granted summary judgment in favor of the intervening defendants. *Campaign Legal Ctr.*, 507 F. Supp. 3d at 91 (appeal filed on April 7, 2021, No. 21-5081).

So too here. This case is slightly different because Plaintiff does not claim informational injury based on expenditures associated with exempt online communications. Indeed, Plaintiff states in its administrative complaint that "[a]ny services that CTR PAC provided to the Clinton campaign that are *not related to exempt communications* are reportable in-kind contributions that must comply with the limits and prohibitions of the Act." ECF No. 1-1, Admin. Compl. at 15. But

just as CTR PAC and HFA explained in their responses to CLC's complaint, expenditures made by CTR PAC that were unrelated to exempt online communications were either not coordinated under FEC rules, or HFA paid CTR PAC for the fair market value of the services, *and those payments have already been publicly reported*. Correct the Record Financial Summary, *FEC*, available at https://www.fec.gov/data/committee/C00578997/ (last visited July 20, 2021). Plaintiff's Complaint does not allege any facts to the contrary. Accordingly, there is no new factual information for Plaintiff to learn, and Plaintiff does not have standing to find out whether CTR PAC and HFA coordinated their activity in violation of the law, unless such a finding would lead to additional *factual* information. *See Wertheimer*, 268 F.3d at 1075. This is fatal to Plaintiff's claim of informational injury.

At bottom, Plaintiff in this case makes similar failed allegations of informational injury that another district court in this Circuit has already roundly rejected. *Campaign Legal Ctr.*, 507 F. Supp. 3d at 84-91. The only additional factual difference is that here, Plaintiff claims to lack information about alleged in-kind contributions made by AB PAC to HFA (in addition to those allegedly made by CTR PAC). ECF No. 1, Compl. at ¶ 7. But like CTR PAC, AB PAC has reported all its contributions and expenditures, including independent expenditures, on disclosure reports that are filed with the FEC and publicly available on the FEC's website. *See* AB PAC Financial Summary, *FEC*, available at https://www.fec.gov/data/committee/C00492140/ (last visited July 20, 2021). Plaintiff seeks only a legal finding of coordination between AB PAC and HFA that would reveal no new factual information. Such a legal finding would merely result in the reclassification of certain already-disclosed independent expenditures as impermissible in-kind contributions, and carry law enforcement consequences. This is insufficient to allege an informational injury.

2. Plaintiff fails to allege any facts to support its claim that MMFA made in-kind contributions to CTR PAC, AB PAC, or HFA.

Plaintiff also alleges that it lacks information about unreported or unlawful in-kind contributions made by MMFA to CTR PAC, AB PAC, and HFA. Compl. ¶ 7. But Plaintiff's Complaint does not provide a single fact to support the assertion that MMFA made in-kind contributions to other Defendant-Intervenors. *See* ECF No. 10-2, Admin. Response. And there are certainly no facts presented to rebut Defendant-Intervenors' assertion that any services provided by MMFA were for exempt online communications, and thus are not in-kind contributions as a matter of law. Indeed, as "proof" that MMFA coordinated its activities with HFA, Plaintiff's administrative complaint cites to a *blog post published on MMFA's own website* the day after the email was sent. Of course, unpaid online communications like that blog post are exempt from the definition of "public communication" and thus do not meet the three-part coordination test to be treated as a coordinated expenditure or in-kind contribution.

Courts have held that allegations of informational injury that are based on speculation—like those made by Plaintiff—cannot support standing. *See, e.g.*, *Friends of Animals v. Jewell*, 115 F. Supp. 3d 107, 117 (D.D.C. 2015), aff'd, 828 F.3d 989 (D.C. Cir. 2016) (rejecting an informational injury that relied on a speculative antecedent occurrence because "it would be exceedingly odd to pluck a new informational -injury rule from such a conjectural, hypothetical ground.") (cleaned up); *Wertheimer*, 268 F.3d at 1074-75 (D.C. Cir. 2001) (denying an informational injury claim when it was merely "conceivable" that the relief the plaintiffs sought "might lead to additional factual information"). This court should similarly reject Plaintiff's claim.

3. Plaintiff claims to lack information about payments made by AB Foundation to AB PAC, but that information is already publicly available.

Plaintiff's Complaint states that "insofar as the amounts paid to American Bridge 21st Century PAC by American Bridge 21st Century Foundation were estimates rather than actual costs, the amounts reported to the FEC by American Bridge 21st Century PAC were inaccurate and do not accurately disclose the financial activity or financial relationship between the two entities." ECF No. 1, Compl. at ¶ 23. Accordingly, Plaintiff alleges that it "lacks information about whether American Bridge 21st Century PAC accurately reported payments received from American Bridge 21st Century Foundation. *Id*. at ¶ 7. But Plaintiff does not provide any facts that support its allegation that the reported budget estimates did not accurately reflect actual costs. Based on nothing, Plaintiff merely speculates that the budget estimates *might not* reflect actual costs, and then vaguely alleges that it lacks information on that basis. This type of speculation is insufficient to meet the standard for alleging a specific, concrete informational injury. *See Friends of Animals*, 115 F. Supp. 3d at 117.

To the contrary, the actual facts confirm that AB Foundation has already publicly reported the information Plaintiff claims to seek. As Plaintiff itself acknowledges, at the end of each fiscal year, AB Foundation reported the payments it made to AB PAC as well as the outstanding funds that were owed to AB PAC. That information is listed on AB Foundation's Form 990 tax returns, which are publicly available on the IRS website. Audits performed by AB Foundation's accountants are also publicly available on the New York State Charities Bureau website. For example, the Foundation's 2016 annual filing includes an audit performed by AB Foundation's accountants and filed in 2018, stating, "[d]uring the year ended December 31, 2016, the Foundation transferred $720,000 to American Bridge for salary, rent and other expenses allocated

to it. As of December 31, 2016, the Foundation owed American Bridge $1,005, 603." Charities NYS Database Results for American Bridge 21st Century Foundation, New York State Attorney General, https://www.charitiesnys.com/RegistrySearch/show_details.jsp?id=%7bE9A8A6BF-A2FC-4C2C-8958-92C5FBA6A18A%7d (last visited July 21, 2021). The audit was performed after the Foundation's 2016 fiscal year ended, and it reflected actual numbers. Plaintiff is obviously free to allege that the amounts owed by AB Foundation to AB PAC constitute unreported in-kind contributions, but such an allegation would not supply Plaintiff with an informational injury because the amounts owed (and thus the value of the in-kind contributions) are already publicly available.

Courts regularly find that when, as here, the information being sought by a plaintiff is publicly available, there is no informational injury. In *Free Speech for People*, for example, the court concluded that the plaintiff suffered no informational injury when "the relevant facts [were] already available" from public sources. 442 F. Supp. 3d at 343-44 (cleaned up). That case is no anomaly. *See CREW 2011* at 89. In *Citizens for Responsibility*, the court concluded that the plaintiffs lacked a cognizable informational injury because they failed to "allege any specific factual information . . . that was not already publicly available." *Id.* (cleaned up). The same logic applies to this case. AB Foundation has already publicly reported the amounts paid and owed to AB PAC. Plaintiff has provided no reason to believe those budget estimates are inaccurate. To carry its burden of demonstrating an informational injury by a preponderance of the evidence, *Biton*, 310 F. Supp. 2d at 176, Plaintiff must do more than make bare, unsupported allegations.

4. Plaintiff has failed to show how the alleged lack of information has caused it any concrete harm.

The second prong of the informational injury test turns the Court's attention to the relationship between the Plaintiff's asserted informational injury and "type of harm Congress

sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017); *Friends of Animals*, 828 F.3d at 992. This test scrutinizes whether the plaintiff has demonstrated that the information it allegedly lacks causes the types of consequential harm that Congress sought to redress in FECA by allowing a private party to sue the FEC for unlawfully failing to act on its administrative complaint. The harm suffered must be "particularized" as well as "concrete." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citation omitted). "[P]articularized" means that "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

In this case, Plaintiff makes vague allegations about the type of work it does—filing FEC complaints and educating the public—but never once alleges with any particularity how lacking the specific information described in its Complaint has harmed those activities. Plaintiff has thus failed to meet its burden. *See Ctr. for Biological Diversity v. Bernhardt*, 442 F. Supp. 3d 97, 109-111 (D.D.C. 2020), aff'd sub nom. *Ctr. for Biological Diversity v. Haaland*, 849 F. App'x 2 (D.C. Cir. 2021) (rejecting informational injury because the complaint failed to allege facts demonstrating how the information sought would help the plaintiff).

Plaintiff has likely failed to tie its alleged injury to its activities because it has not suffered any concrete harm. Even if Plaintiff would somehow learn new factual information if it obtained a favorable ruling in this case, there are significant reasons to doubt that such information would actually help Plaintiff's activities. The D.C. Circuit has explained that plaintiffs only allege an informational injury where there is "no reason to doubt" that the statutorily required information they claim to seek would help them. *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040–41 (D.C. Cir. 2016). Here, Plaintiff appears to claim that it would use the information to help educate the public so that the public may fully evaluate candidates for public office. ECF No. 1, Compl. at

¶ 12 (Plaintiff "uses public disclosure reports that are required to be filed with the FEC to educate the public about campaign spending and the true sources and scope of the candidates' financial support *so that the public may fully evaluate candidates for public office*.") (emphasis added). But nearly all the information Plaintiff seeks relates to the 2016 presidential election and Secretary Clinton, who neither holds a public office nor has plans to run for elected office in the future. It is far from clear how the information Plaintiff claims to seek in this lawsuit would be helpful in efforts to educate the public about candidates for public office, and Plaintiff's Complaint certainly does not allege facts stating that it would. Furthermore, at least two of the organizations at issue in Plaintiff's administrative complaint are either dormant or defunct now, so there is no need to educate the public about their activities. As Plaintiff itself acknowledges, CTR PAC has been dormant since the 2016 election, and it filed a request for termination with the FEC nearly two years ago in December 2019. ECF No. 1-1, Admin. Compl. at n. 1. And HFA, Secretary Clinton's principal campaign committee for her 2016 presidential race, has long been inactive.

Finally, to the extent that Plaintiff complains that lack of disclosure thwarts its ability to use FEC reports to file FEC complaints requesting that enforcement actions be taken against individuals and organizations that violate federal campaign finance laws, *id.* at ¶ 13, it has already filed an FEC complaint in this case. Plaintiff cannot plausibly contend that the alleged failure to disclose certain information in this case has hampered its ability to file an FEC complaint; indeed, the exact opposite is true.

C. Plaintiff's alleged injury was not caused by the FEC's delay.

The second prong of the standing inquiry requires the plaintiff to show that its alleged injury is "fairly traceable to the Defendant's challenged action." *Friends of the Earth*, 528 U.S. at 180–81. In this case, Plaintiff challenges the FEC's delay in taking public action on its complaint.

However, as discussed in detail *infra* Section II-A, Plaintiff's injury was caused by its own delay, not the FEC's. Plaintiff waited nearly four years to even file an administrative complaint with the FEC. If the information Plaintiff claims to lack was important to the mission and activities of the organization, then presumably Plaintiff would have prioritized filing an FEC complaint earlier. Plaintiff cannot now complain that delay on the part of the FEC, a resource-strapped agency that has gained and lost quorum since Plaintiff filed its complaint, is the cause of Plaintiff's injury.

D. Plaintiff lacks organizational standing because no discrete programmatic activity will be imminently and adversely affected by the FEC's delay.

TPF's attempt to plead an organizational injury fares no better. Standing requirements apply with no less force to organizational plaintiffs. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). An organizational plaintiff may have standing to sue on its own behalf "to vindicate whatever rights and immunities the association itself may enjoy" or, under proper conditions, to sue on behalf of its members asserting the members' individual rights. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

In cases where an organization is suing on its own behalf, such as here, the organization must point to a discrete programmatic concern and plausibly demonstrate how the challenged conduct will imminently and adversely affect it. Organizational standing requires "concrete and demonstrable injury," to "discrete programmatic concerns," accompanied by a "consequent drain on the organization's resources." *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir.1995) (cleaned up). A simple "setback to the organization's abstract social interests" will not suffice. *Id.* The implicated interest must be concrete. *See id.* at 1431, 1433 (finding the plaintiff's interest in "its substantial practical efforts to assist taxpayers and to promote sound, lawful, and fair revenue practices by the United States government" to be "the type of abstract concern that does not impart standing"). And the adverse effect must be tangible. *See id.*

(finding an allegation that the challenged conduct "frustrated" an organization's objectives insufficient to establish standing). The adverse effect must also be at least imminent. *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996). TPF fails to satisfy organizational standing in three ways: (1) it fails to point to a discrete programmatic interest; (2) it fails to show a tangible adverse effect on that interest; and (3) it cannot plausibly allege that any adverse effect on its programmatic interest is imminent.

First, TPF's programmatic activities are not directly or adversely affected by the FEC's failure to take public action in this case thus far. TPF describes itself as a "watchdog" organization that "educate[s] the public about campaign spending and the true sources and scope of candidates' financial support." ECF No. 1, Compl. at ¶ 11–12. It also files complaints with the FEC "requesting that enforcement actions be taken against individuals and organizations that violate federal campaign finance law." *Id.* ¶ 13. TPF further alleges that due to the FEC's delay in acting on the administrative complaint, it "is being deprived of full disclosure" about "the activities undertaken by," and "the nature of the ongoing relationships among," Defendant-Intervenors. *Id.* ¶ 43. But TPF fails to plausibly allege that the FEC's delay in acting on the administrative complaint has impeded its ability to engage in any of those activities. In fact, TPF has not described *in any way* how its day-to-day activities over the past four years have been obstructed, let alone how they are being obstructed today. And to the extent Plaintiff claims the FEC's delay has deprived the public of information, the Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74.

Second, TPF's diversion-of-resources allegation does not amount to an injury sufficient to confer standing. TPF asserts that when "incomplete, inadequate, or inaccurate" public disclosure reports are filed with the FEC, it "must divert resources and funds from other organizational operations" in order "to file an administrative complaint in the hopes of rectifying the situation." ECF No. 1, Compl.at ¶ 14. But TPF also alleges that as part of its general activities, it "files FEC complaints requesting that enforcement actions be taken against individuals and organizations that violate federal campaign finance law"—including by violating FECA's public disclosure and reporting requirements. *Id.* ¶¶ 3, 13. Thus, TPF can hardly claim it has "diverted" its resources by filing the administrative complaint; rather, it has merely dedicated resources to an activity in which it is typically engaged. This is not an injury in fact sufficient to confer standing. *See National Taxpayers Union, Inc., v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (explaining that an organization "cannot convert its ordinary program costs into an injury in fact"); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 286 (3d Cir. 2014) (denying standing where additional expenditures were "consistent with [the organization's] typical activities"); *See Envtl. Working Grp. v. U.S. Food & Drug Admin*., 301 F. Supp. 3d 165, 171 (D.D.C. 2018) ("[A]n organization does not suffer an injury in fact where it 'expend[s] resources to educate its members and others' unless doing so subjects the organization to 'operational costs beyond those normally expended.'") (internal citation omitted). The activities to which Plaintiff could claim to have diverted resources are actually part and parcel of its mission and routine activities. If anything, the FEC's decision to delay has provided Plaintiff with an avenue to perform its routine work.[2]

[2] Similarly, TPF is not injured because it has expended resources bringing this litigation. *See, e.g.*, *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.").

Third, TPF's delay in filing the administrative complaint thwarts any plausible allegation of imminent organizational injury. TPF waited nearly four years to file its administrative complaint against Defendant-Intervenors. The factual allegations underlying TPF's claims occurred largely in 2016 and 2017. *See* ECF No. 1-1, Admin. Compl., at 3–8. But TPF waited to file an administrative complaint until April 8, 2020. *See* ECF No. 1, Compl. at ¶ 3. It is implausible that additional delay by the FEC will imminently "obstruct[] TPF's ability to carry out" the activities Plaintiff describes in the administrative complaint. *Id.* ¶ 14; *Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). Were it otherwise, Plaintiff would have filed the administrative complaint sooner. Because Plaintiff waited several years to file its administrative complaint, it cannot now plausibly allege that further delay by the agency has caused an injury in fact to its organizational activities, let alone an imminent one. Plaintiff lacks organizational standing to bring this case.

II. TPF has not pled facts sufficient to allege that the FEC's delay is contrary to law.

TPF's Complaint does not plead facts sufficient to support the allegation that the FEC's failure to publicly act on its administrative complaint is contrary to law. In order to make such a showing, TPF must allege facts sufficient to show that the failure to take public action is "arbitrary and capricious," which is a standard that is highly deferential to administrative agencies like the FEC and necessarily tied to the specific facts of each case. *See Common Cause*, 489 F. Supp. at 744. Here, the Complaint provides no specific facts; instead, it contains a single conclusory statement which amounts to no more than a "[t]hreadbare recital[] of the elements of a cause of action," *Iqbal*, 556 U.S. at 678: "[t]he FEC's failure to act on TPF's administrative complaint is contrary to law under 52 U.S.C. § 30109(a)(8)(A)." ECF No. 1, Compl. at ¶ 40. Plaintiff never once alleges any facts demonstrating that the FEC's delay—and not its own decision to file the

administrative complaint four years after the alleged illegal conduct occurred—is the cause of Plaintiff's harm.

To state a plausible claim for relief, the Complaint must allege facts demonstrating that the FEC's failure to act rises to the level of arbitrary and capricious conduct that it is contrary to law. *Common Cause*, 489 F. Supp. at 744. When determining whether agency inaction is contrary to law, courts may consider the following factors: (1) the resources and information available to the agency; (2) the credibility of the allegations made in the administrative complaint, (3) the nature of the threat posed, and (4) the novelty of the issues involved. *See*, *e.g.*, *id.*; *see also In re Nat. Cong. Club*, No. 84-5701, 1984 WL 148396, at *1 (D.C. Cir. Oct. 24, 1984) (approving the factors considered in *Common Cause*). District courts in the District of Columbia also consider the six principles enumerated by the D.C. Circuit in *Telecommunications Research & Action Center ("TRAC") v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984), which are: (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. *Id.*

The Complaint fails to allege that any of these factors are satisfied. As discussed in greater detail below, the *Common Cause* factors and the *TRAC* principles simply do not support Plaintiff's

allegation of arbitrary and capricious delay by the FEC. It is thus hardly surprising that the Plaintiff has failed to state a claim under FECA.

A. TPF has not been prejudiced by the FEC's delay when it waited four years before filing the administrative complaint (the fifth *TRAC* principle).

In deciding whether an agency's failure to take public action is arbitrary and capricious, courts consider the fifth *TRAC* principle, which is "the nature and extent of the interests prejudiced by delay…" *Pub. Citizen Health Rsch. Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 35 (D.C. Cir. 1984). To wit, courts consider whether a plaintiff has provided "real evidence of any injury resulting from the delay." *Stockman v. FEC*, 944 F. Supp. 518, 524 (E.D. Tex. 1996), *aff'd as modified*, 138 F.3d 144 (5th Cir. 1998). As part of the calculus, courts consider whether the plaintiff's conduct has contributed to the agency delay. In *Common Cause*, for example, the court noted that the plaintiff waited two years before seeking judicial review, specifically stating that the FEC was not "solely responsible for the time consumed by its investigation," and that the plaintiff did not promptly put the case in a posture for the court to resolve it. 489 F. Supp. at 744. With those facts in mind, despite the credibility of the allegations made in the plaintiff's administrative complaint, and the FEC's "exceedingly slow pace" in investigating them, the court concluded that the FEC's inaction was not contrary to law. *Id.* at 745. Likewise, in *Stockman v. FEC*, the court considered the plaintiff's actions within the scope of the administrative and court proceedings—which included repeatedly asking for extensions of time in which to file documents—and found that such conduct undermined the plaintiff's claim of prejudice. 138 F.3d at 523.

In this case, TPF has failed to plead that the FEC's delay has prejudiced its interests in any way. *See* ECF No. 1, Compl. The Complaint merely states that "[m]ore than 120 days have passed since Plaintiff filed its administrative complaint, and the FEC has taken no action on the complaint." ECF No. 1, Compl. at ¶ 6. Plaintiff's lack of basis for its claim is again not surprising

because there is no argument that the FEC's delay is the cause of any prejudice to Plaintiff. As stated, TPF waited to file an administrative complaint until *four years* after the allegedly illegal conduct took place. And then, after filing this lawsuit to challenge the FEC's delay in adjudicating its administrative complaint a mere 127 days after filing with the agency, TPF requested (and Defendant-Intervenors agreed to join their request) that the Court stay this case for an additional 180 days. *See* ECF Nos. 14, 15. Neither TPF's allegations—nor its conduct when filing the administrative complaint or after filing this lawsuit—demonstrate any concern for the swift resolution of its claims. Plaintiff has failed to allege any prejudice to its interests that would rise to level of arbitrary and capricious inaction by the FEC. Plaintiff's Complaint should be dismissed.

B. The FEC lacked a quorum for the majority of the time the administrative complaint has been pending, and since regaining quorum, it has appropriately prioritized more recent matters (the first *Common Cause* factor and the *fourth* TRAC principle).

Another factor courts consider when weighing whether an agency's delay is arbitrary or capricious is what resources the agency has available to it to adjudicate the complaint at issue. *Common Cause*, 489 F. Supp. at 744. At the same time, courts consider the effect of expediting delayed action on agency activities of a higher or competing priority, and they afford agencies deference when prioritizing their docket. *TRAC*, 750 F.2d at 80. Courts recognize that "[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance[sic] directing where limited agency resources will be devoted." *Rose*, 806 F.2d at 1091 ("We are not here to run the agencies."). Because the FEC is "primarily and substantially responsible for administering and enforcing FECA," it is "precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (cleaned up).

The FEC has had little to no resources available to adjudicate TPF's complaint for most of the time it has been pending. This fact is conveniently absent from TPF's complaint, and yet, it weighs significantly in favor of dismissal. Indeed, courts have also recognized that periods when the FEC lacks a quorum impact the agency's ability to address administrative complaints in the normal course, and for that reason, have previously declined to interfere with the FEC's process when it lacked quorum. *See Democratic Nat. Comm. v. FEC*, 552 F. Supp. 2d 20, 23 (D.D.C. May 14, 2008).

TPF filed its administrative complaint on April 8, 2020, four years after the allegedly illegal conduct had occurred, and in the middle of the highly contentious 2020 presidential election. ECF No. 1-1, Admin. Compl. As TPF well knew when it filed its complaint, the FEC lacked a quorum, and had been without a quorum for nearly a year, since August 2019.[3] Without a quorum, the FEC's hands were tied and it could not act on TPF's administrative complaint. *See* 52 U.S.C. § 30109(a)(2) (requiring an affirmative vote of four of more Commissioners to initiate an investigation). The FEC regained quorum briefly on June 25, 2020 only to lose it again a week later on July 3, 2020.[4] The FEC did not regain quorum again until the Senate voted to confirm three new commissioners, Sean Cooksey, Allen Dickerson, and Shana Broussard, on December

[3] *See* FEC, "Matthew Petersen to depart Federal Election Commission," available at https://www.fec.gov/updates/matthew-petersen-depart-federal-election-commission/ (Aug. 26, 2019) (noting that former Commissioner Matthew Petersen resigned in late August 2019).

[4] *See* FEC, "James E. Trainor III sworn in as Commissioner," available at https://www.fec.gov/updates/james-e-trainor-iii-sworn-commissioner/ (June 5, 2020) (noting that Quorum was restored when Trey Trainor III was sworn in as a Commissioner effective June 5, 2020); FEC, "Caroline C. Hunter to depart Federal Election Commission," available at https://www.fec.gov/updates/caroline-c-hunter-depart-federal-election-commission/ (June 26, 2020) (Commissioner Caroline Hunter resigned effective July 3, 2020).

10, 2020.[5] Since TPF filed its administrative complaint, the FEC has only had quorum for seven and a half months—less than half the time TPF's administrative complaint has been pending.

Since the FEC regained quorum, it has been investigating and resolving administrative complaints again. But the FEC does not have unlimited resources even when it does have a quorum, and it is inappropriate for Plaintiffs to use this lawsuit to divest scarce FEC resources from matters of higher priority. The FEC's decision to prioritize resolution of complaints that were filed before Plaintiff's complaint, or concerning conduct that occurred more recently than TPF's four-year-old claims, is not contrary to law.

Because TPF filed the administrative complaint when the FEC lacked quorum and during an election year, the 120-day clock began running at a time when the FEC could do nothing but accumulate a significant backlog of cases. Now, the agency appears to be diligently working through that backlog, and for the most part, prioritizing matters concerning more recent conduct first.[6] Compelling the FEC to prioritize claims related to the 2016 election would undercut the very deference that FECA—and the courts—afford to the agency. *See, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 450-51 (D.C. Cir. 1988) ("In 1988, an election year, the Commission has far more pressing matters to address than to formulate an *ex post facto* statement of reasons explaining a 1980 dismissal."). Even more detrimentally, it would grant political organizations carte blanche to

[5] *See* FEC, "Statement of Commissioner Ellen L. Weintraub On the Senate's Votes to Restore the Federal Election Commission to Full Strength," available at https://www.fec.gov/resources/cms-content/documents/2020-12-Quorum-Restoration-Statement.pdf (December 9, 2020).

[6] *See, e.g.*, FEC, "Weekly Digest, Week of June 21-25, 2021," available at https://www.fec.gov/updates/week-of-june-21-25-2021/ (June 25, 2021) (describing the agency's progress on multiple advisory opinions regarding on-going conduct, the agency's resolution of 20 matters related to conduct from the 2018 and 2020 elections); FEC, "Weekly Digest, Week of June 28-July 2, 2021," available at https://www.fec.gov/updates/week-of-june-28-july-2-2021/ (July 2, 2020) (same); FEC, "Weekly Digest, Week of July 5-9, 2021," available at https://www.fec.gov/updates/week-of-july-5-9-2021/ (July 9, 2021).

redirect the FEC's attention from imminently pressing matters to stale, baseless investigations of the organization's ideological opponents. The Complaint provides no basis to conclude that the FEC's delay in resolving TPF's administrative complaint is "a product of anything other than excessive demands on a strapped federal agency." *Stockman* 944 F. Supp. at 524.

C. The allegations in the administrative complaint are novel, speculative, unsupported by any evidence of a violation, and there is no urgent threat of recurrence (the second, third, and fourth *Common Cause* factors).

When determining whether FEC delay is contrary to law, courts also consider the novelty of the issues involved, the credibility of the allegations made in the administrative complaint, and the nature of the threat posed. *Common Cause*, 489 F. Supp. at 744. In this case, the administrative complaint provides the FEC no reason to prioritize it over more recent and important matters. As stated in Defendant-Intervenors response to the administrative complaint, Plaintiff's allegations are completely unsupported and suffer from a lack of factual evidence. ECF No. 10-2, Admin. Response. For example, as discussed above, Plaintiff complains that the payments made by AB Foundation to AB PAC for shared costs may be inaccurate without any reason to believe that is the case. ECF No. 1-1, Admin. Compl. at 5. Similarly, the administrative complaint alleges that AB PAC made prohibited in-kind contributions to other unnamed Democratic campaigns, but never so much as names which campaigns were the supposed recipients. *Id.* at 4. In sum, the administrative complaint makes barebones, conclusory allegations that are unsupported by facts. FEC regulations require that a valid complaint contain "a clear and concise recitation of . . . facts which describe a violation of a statute or regulation over which the Commission has jurisdiction. 11 C.F.R. § 114.3(d)(3). In interpreting this provision, the Commission has held that it "may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true,

would constitute a violation of the [Act]."[7] Moreover, "unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true." *Id*. Plaintiff's allegations fall woefully short of this standard. There is no urgent threat of reoccurrence because many of the organizations about which Plaintiff complains, including CTR PAC and HFA, are no longer active. There is no reason for the FEC to prioritize this matter over more recent, pressing matters.

D. The Complaint does not allege that any of the other *TRAC* principles are satisfied.

The Complaint fails to allege that any of the other *TRAC* principles are satisfied in this case, and any application of those principles makes it clear that they are not. *See Stockman* 944 F. Supp. at 523-24. *First*, an FEC complaint that has been pending with the agency for just over 15 months following eight months of agency inaction due to lack of quorum is not violative of reason. *See, e.g.*, *Common Cause*, 489 F. Supp. at 745 (finding a two-year delay was not contrary to law); *Stockman v. FEC*, 944 F. Supp. at 523 (noting that "an FEC investigation lasting approximately one year and ten months does not strike the Court as violative of rules of reason" and that resolution of similar matters "take[s] 3.3 to 4.6 years to complete"). In resolving MUR 7146—the administrative complaint filed by CLC and Catherine Hinckley Kelley advancing similar allegations—the FEC took 32 months, all while maintaining quorum, to issue a disposition declining to investigate the allegations.[8] Plaintiff has not pled any reason why this particular matter, which was initiated when the FEC lacked a quorum, is nonetheless unreasonably delayed. *Second*, Congress did not provide a timetable within which the FEC must act and does not require

[7] MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, et al.), Statement of Reasons, Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

[8] *See* Summary of MUR 7146, available at https://www.fec.gov/data/legal/matter-under-review/7146/ (last visited July 20, 2021).

for the FEC to act within a single election cycle. *See Rose*, 806 F.2d at 1092. *Third*, while this case affects some political actors, it is about activity that occurred several elections ago. This is not a case in which agency delay is intolerable, such as cases where human health and welfare are at risk. *See Rose*, 806 F.2d at 1091–92 n. 17. The Plaintiffs do not meet their burden of showing that this FEC investigation is of such a nature, that anything less than a quick resolution will be intolerable.

III. The equitable doctrine of laches bars Plaintiff's claim for relief.

The equitable doctrine of laches provides an independent reason to grant Defendant-Intervenors' motion for judgment on the pleadings. To invoke the defense of laches to bar a claim, a defendant "must show that the plaintiff has unreasonably delayed in asserting a claim and that there was 'undue prejudice' to the defendant as a result of the delay." *Jeanblanc v. Oliver Carr Co.*, No. 94–7118, 1995 WL 418667, at *4 (D.C. Cir. June 21, 1995); *see also Pro–Football, Inc. v. Harjo*, 415 F.3d 44, 47 (D.C. Cir.2005) (stating that laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense") (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121–22, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)).

This case is unique because while Plaintiff did not delay in filing the instant litigation, it did delay in filing its administrative complaint, and it could not file suit in this Court until at least 120 days after the administrative complaint had been filed. 52 U.S.C. § 30109(a)(8)(A), (C). The allegations in Plaintiff's administrative complaint revolve around Secretary Clinton's 2016 presidential campaign and the alleged interconnectedness of the Defendant-Intervenor organizations that Plaintiff contends supported her campaign. Because the administrative complaint centers on activity surrounding the 2016 election, Plaintiff could have filed it in 2016

or 2017 at the latest. Indeed, there were a number of other complaints filed in that time that alleged similar wrongdoing by Defendant-Intervenors. *See, e.g.*, *Campaign Legal Ctr.*, 507 F. Supp. 3d at 82. Yet, Plaintiff waited to file until spring 2020, in the middle of the next general election, and less than two years before the statute of limitations on Plaintiff's claims will expire. Now, apparently aware that the statute of limitations is nearing on its claims, Plaintiff is rushing the FEC to take public action. Plaintiff's inexplicable failure to immediately file an administrative complaint prejudices the FEC. If this Court provides the relief Plaintiff's seek—ordering the FEC to act on Plaintiff's complaint within 30 days—the FEC will be forced to reorder its administrative priorities, upending the deference traditionally afforded administrative agencies. Plaintiff's claim is barred by the equitable doctrine of laches.

CONCLUSION

For the reasons stated above, Defendant-Intervenors respectfully request that the Court grant their Motion for Judgment on the Pleadings.

Dated: July 20, 2021

Respectfully submitted,

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By: */s/ Aria Branch*

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2021, that I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

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