UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GIFFORDS

Plaintiff,

Case no: 1:21-cv-02887-EGS

v. Hon. Emmet G. Sullivan

NATIONAL RIFLE ASSOCIATION OF AMERICAN POLITICAL VICTORY FUND, et al,

Defendants.

_____/

DEFENDANTS THE NATIONAL RIFLE ASSOCIATION OF AMERICA AND NATIONAL RIFLE ASSOCIATION OF AMERICA POLITICAL VICTORY FUND'S REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

While the NRA Affiliates vehemently deny Plaintiff's hyperbolic and unsubstantiated claims that they engaged in some sort of scheme to violate the prohibitions against coordinated communications and corporate contributions to candidates, as well as the reporting requirements under the Federal Election Campaign Act ("FECA"), the issues presently before the Court preclude Plaintiff's claims from moving even one step further. Simply put: it is Plaintiff's burden to prove by a preponderance of the evidence that this Court has subject matter jurisdiction over Plaintiff's claims, and they have failed to meet that burden.

The NRA Affiliates demonstrated in their initial brief that Plaintiff's challenge to the Commission's handling of their administrative complaints under FECA should be dismissed for lack of jurisdiction and, alternatively, in part for failure to state a claim. This Court lacks subject-matter jurisdiction because the FEC did "act" when it completed one of the four possible "actions" it may take at the reason-to-believe stage set forth in the FEC's Statement of Policy Regarding Commission in Matter at the Initial Stage in the Enforcement Process, 72 FR 12545, March 7, 2007, and Plaintiff has failed to satisfy its burden to show otherwise.

Plaintiff likewise lacks standing. Plaintiff cannot rely upon the doctrine of competitive standing where, as here, it is not a potential candidate in any future election, and its after-the-fact effort to save its Complaint by claiming informational injury is meritless because Plaintiff has not suffered a legally cognizable injury and provided no evidence whatsoever that the NRA Affiliates' campaign finance activities have not been disclosed as required by law. Alternatively, the five-year statute of limitations precludes Plaintiff's pre-November 2016 claims. Because Plaintiff has not carried its burden on any of these issues, this Court should dismiss the complaint for lack of subject matter jurisdiction, lack of standing, and alternatively dismiss Plaintiff's pre-November-2016 claims as time-barred under 28 U.S.C. § 2462.

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction over Plaintiff's Claims.

A. Plaintiff's efforts to avoid the substance of the NRA Affiliates' challenge to subject matter jurisdiction lack merit.

Rather than directly addressing this Court's lack of subject-matter jurisdiction, Plaintiff leads by claiming that "Defendants improperly attempt to relitigate this Court's ruling in *Giffords v. FEC* that the Commission failed to act on the Plaintiff's administrative complaints, and that this failure was contrary to law." ECF No. 39 at 41. According to Plaintiff, the operative precondition to this lawsuit is not whether the FEC failed to act, but whether this Court *declared* that the FEC failed to act in a manner contrary to law. *Id*. Further, Plaintiff argues that the NRA Affiliates are "collaterally attack[ing] this Court's rulings in *Giffords v. FEC* under section 30109(a)(8)," and argues generally that allowing such challenges may allow district courts outside this District to review or reverse decisions in this District made with respect to section 30109(a)(8), despite lacking jurisdiction to do so. *Id*. at 41-42. Plaintiff's arguments are decisively meritless.

As a threshold matter, Plaintiff's claim that the NRA Affiliates are attempting to relitigate this Court's *Giffords v. FEC* ruling is demonstrably false. *Id*. at 41. The issues raised in the NRA Affiliates' motion are whether the FEC had indeed "acted" on the administrative complaints in the context of section 30109(a)(8), and whether a deadlock dismissal is sufficient for the FEC to have acted on the FEC Complaints in the context of Section 30109(a)(8). ECF No. 35-1, at 24-26. In other words, this motion presents the issue of whether a right to a private suit arises where the FEC failed in a split vote to find that there was reason to believe a violation was committed, and the Commissioners who constituted a controlling group for the purposes that decision submitted to the administrative record their written statement of reasons. *Id*. By contrast, those issues were never raised in *Giffords v. FEC*, No. 1:19-cv-1192 (D.D.C.) ("*Giffords*"), which focused instead on

whether the FEC had acted reasonably and expeditiously under the *TRAC* factors. *See generally id.*, at ECF No. 88. And, as will be discussed in further detail *infra*, p. 5, the FEC did not mount a full defense in that lawsuit, and it never raised the issues that serve as the basis for the NRA Affiliates' subject matter jurisdiction challenge.

More fundamentally, Plaintiff misconstrues the continuing requirement of subject-matter jurisdiction. "Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256 (2013). Indeed, federal courts are "forbidden . . . from acting beyond [their] authority," and "no action of the parties can confer subject-matter jurisdiction upon a federal court." *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 120 (D.C.Cir.2008). Rather, "[a] federal court must presume that a cause of action lies outside its limited jurisdiction, with the burden of establishing the contrary resting upon the plaintiff." *Schindler Elevator Corp. v. Washington Metro. Area Transit Auth.*, 514 F. Supp. 3d 197, 202 (D.D.C. 2020), *aff'd*, 16 F.4th 294 (D.C. Cir. 2021). "Absent subject-matter jurisdiction over a case, the court must dismiss it…" *Coon v. Wood*, 160 F. Supp. 3d 246, 249 (D.D.C. 2016).

Thus, a federal court has an independent obligation to confirm subject matter jurisdiction in each case, and even as the case moves through the litigation process. *See, e.g.*, *James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C.Cir.1996) (federal courts have "an affirmative obligation to consider whether the constitutional and statutory authority exist for [them] to hear *each* dispute" (quotations omitted) (emphasis added)); *H. Lee Moffitt Cancer Ctr. & Rsch. Inst. Hosp., Inc. v. Azar*, 324 F. Supp. 3d 1, 10 (D.D.C. 2018) ("[C]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party. Thus, district courts must dismiss any claim over which they lack subject matter jurisdiction, regardless of when the challenge to subject matter jurisdiction arises."

(quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)); *Teva Pharms. USA, Inc. v. Azar*, 369 F. Supp. 3d 183, 195 (D.D.C. 2019) (noting a court's obligation to evaluate jurisdiction at each successive stage of the proceeding); *see also RES-GA Cobblestone, LLC v. Blake Const. & Dev., LLC*, 718 F.3d 1308, 1313 (11th Cir. 2013) ("Federal courts operate under a continuing obligation to inquire into the existence of subject matter jurisdiction whenever it may be lacking. That obligation continues through every stage of a case, even if no party raises the issue."). Indeed, "[i]f the court determines **at any time** that it lacks subject-matter jurisdiction, the court **must** dismiss the action." FRCP 12(h)(3) (emphases added). This is particularly the case here, where this Court has already recognized that Plaintiff's lawsuit may be premature and has recognized that it would be appropriate for defense counsel to raise this issue. *See infra*, p. 5; *cf. generally, e.g.*, *Edwards v. D.C.*, 616 F. Supp. 2d 112, 117 (D.D.C. 2009) (explaining, in the context of the FTCA, that failure to exhaust administrative remedies prior to filing suit is a jurisdictional defect that cannot be cured by amending the complaint).

Nor can Plaintiff argue that subject-matter jurisdiction in this case was somehow waived or agreed upon in *Giffords*. *Cf. Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014) ("Subject matter jurisdiction cannot be waived and federal courts have an independent obligation to assure [them]selves of jurisdiction, even where the parties fail to challenge it." (Quotations omitted)); *Coon*, 160 F. Supp. 3d at 249 (explaining that "a challenge to federal subject-matter jurisdiction is not waivable and may be raised at any point in the proceedings"). Accordingly, despite Plaintiff's attempts to argue otherwise, ECF No. 39 at 41, a declaration in a prior case does not vitiate the Court's responsibility—or the Plaintiff's burden—to confirm subject matter jurisdiction here.

Plaintiff's attempt to characterize the challenge to this Court's subject matter jurisdiction as a collateral attack is similarly unavailing. *Id.* at 42. Indeed, this Court has recognized that it is

appropriate for the NRA Affiliates to raise this argument in this lawsuit. Specifically, the *Giffords* suit left open the question of whether the conditions precedent to the filing of a private action have been met here, as demonstrated by the following interaction between this Court and FEC counsel:

> THE COURT: When do you anticipate closure? And the second part of that question is, Is it the government's position that closure is the condition preceding to the filing of a private action?
>
> MR. DEELEY: I don't have any information, Your Honor, on when the file may be closed. Exactly what constitutes the –
>
> THE COURT: Let me get you off the hot seat. Maybe that should be an issue to be litigated on the public record.
>
> In other words, based on what the Court's heard, if the Court hypothetically today were to say to the plaintiff, Proceed with your private action, **then that would be a legitimate issue to be raised by defense counsel, that it was premature at that point**. I don't want to put you in an awkward position and I don't want to rule on any substantive affidavits.

(*Giffords*, No. 1:19-cv-1192-EGS, November 1, 2021, Transcript at 8-9) (emphasis added).

Thus, this Court has opined that the issue raised by the NRA Affiliates is "a legitimate issue to be raised by defense counsel" in this case. *Id*. Indeed, the FEC did *not* mount a full defense in the prior lawsuit, nor did it raise the corresponding factual challenges raised here, including, for example, that the FEC *did* sufficiently act when, after conducting reason-to-believe votes, the FEC determined in a split vote that there was no reason to believe a violation was committed, and also that the FEC *did* comply with the Court's 30-day order when the controlling commissioners submitted their statement of reasons to the administrative record.

Further, the only case cited by Plaintiff for the proposition that the NRA Affiliates are "relitigating" *Giffords—Campaign Legal Ctr. v. Iowa Values*, No. 21-CV-389-RCL, 2021 WL 5416635, at *3 (D.D.C. Nov. 19, 2021)—directly undercuts Plaintiff's arguments. ECF No. 39 at 32-33. In *Iowa Values*, the plaintiff filed an administrative complaint with the FEC, and the FEC "did not take any action on the complaint," and in fact "never gave any indication that it ha[d]

acted on the matter." *Id*. at *2. The plaintiff was then authorized to file a citizen-suit directly against the defendant, and did so. *Id*. The defendant moved to dismiss the suit for, *inter alia*, lack of subject-matter jurisdiction, *but did so by raising the same exact arguments that the district court had considered in the prior suit*—most notably whether the FEC acted "expeditiously" in accordance with *Common Cause v. Fed. Election Comm'n*, 489 F. Supp. 738, 744 (D.D.C. 1980), and *Telecommunications Research and Action Center ("TRAC") v. Fed. Commc'n Comm'n*, 750 F.2d 70, 80 (D.C. Cir. 1984) (internal citations omitted). *See Iowa Values*, 2021 WL 5416635, at *3–4. Those were the same factors that *this* Court considered in *Giffords*—in fact, *Iowa Values* cites *Giffords* in reference to that same analysis, *see id*. at *4—but those factors are not at issue here. Further, while the *Iowa Values* court lamented that the defendant "seeks to relitigate the merits of the Court's decisions" made in the delay suit, that court *still addressed* the subject matter jurisdiction challenge *because it had to do so*, recognizing that a court "'cannot proceed at all' without subject matter jurisdiction." *Id*. at *3 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). So *Iowa Values* supports the result that it is both appropriate and necessary for this Court to evaluate whether it has subject matter jurisdiction in this case.

Finally, Plaintiff's speculation about potential implications upon FECA citizen suits in courts outside of the District of Columbia lacks merit. ECF No. 39 at 41-42. Such speculation is irrelevant, as this case is before the same Court that authorized this lawsuit. But Plaintiff also cannot tenably argue that a subsequent presiding federal court cannot confirm its own subject-matter jurisdiction over a dispute. This is especially necessary here, where the FEC has not only acted, but has made a final determination by way of the presence of the statement of reasons (which Plaintiff characterizes as being the FEC's "final determination," ECF No. 39 at 53 n.27).

B. Plaintiff failed to meet its burden because the preconditions for subject matter jurisdiction under Section 30109(a)(8) remain unsatisfied.

The NRA Affiliates moved to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction on the grounds that Plaintiff has failed show by a preponderance of the evidence that two conditions precedent to filing a citizen suit under section 30109(a)(8)—(1) that the FEC failed to act on Plaintiff's FEC Complaints, and (2) that the FEC had failed to comply with the Court's 30-day Order—have been satisfied. ECF No. 35, at 23-28. While Plaintiff went to great lengths in its Response to avoid addressing the substance of the NRA Affiliates' subject matter jurisdiction challenge, their sole substantive rebuttal appears to be that, because the FEC has not publicly announced formal dismissal of the underlying MURs, then it must have failed to act such that subject matter jurisdiction exists under section 30109(a)(8).

But Plaintiff's argument completely ignores both that (a) FEC policy makes clear that there are four possible *actions* that the Commission may take at the reason-to-believe stage, and (b) the Commissioners who comprised the controlling group in this matter submitted their written statement of reasons to the administrative record, bolstering the position that the Commission has indeed acted on the matters. Plaintiff has failed to rebut this factual challenge to subject matter jurisdiction, and has therefore failed to show subject matter jurisdiction by a preponderance of the evidence. Its Complaint should be dismissed for the reasons further stated below.

1. The FEC acted on Plaintiff's Complaint in the context of Section 30109(a)(8).

Because Plaintiff asks this Court to exercise its limited jurisdiction under 52 U.S.C. § 30109(a)(8), it may only proceed if all conditions precedent have been satisfied under the statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, the issue of whether this Court has subject matter jurisdiction over Plaintiff's claim begins and ends with the plain language of section 30109(a)(8). That statute provides two paths for seeking judicial review of the FEC's treatment of an administrative complaint: to proceed, Plaintiff must have been "aggrieved by an order of the Commission dismissing a complaint filed by such party under [section

30109(a)(1)], or *by a failure of the Commission to act on such complaint* during the 120-day period beginning on the date the complaint is filed[.]" 52 U.S.C. § 30109(a)(8)(A) (emphasis added).

Plaintiff proceeds under the latter—alleging that the FEC failed to act on its FEC Complaints. *See* Compl., ECF No. 1, at ¶¶ 10, 37. That in mind, the FEC has set forth a written policy outlining the four "actions" that it may take at the reason-to-believe stage—the same stage at which each of the underlying MURs in this case met their fate. *See* Federal Election Commission, "Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process," 72 FR 12545, March 7, 2007, *available at* https://www.federalregister.gov/documents/2007/03/16/E7-4868/statement-of-policy-regarding-commission-action-in-matters-at-the-initial-stage-in-the-enforcement (the "FEC Actions at Initial Stage"). Under that FEC policy:

> [A]t the initial stage in the enforcement process, the Commission will take one of the following actions with respect to a MUR: (1) Find "reason to believe" a respondent has violated the Act; (2) dismiss the matter; (3) dismiss the matter with admonishment; or (4) find "no reason to believe" a respondent has violated the Act. This policy statement is intended to clarify the circumstances under which the Commission uses each of these dispositions.

Id. at 12545 (emphasis added).

Here, the FEC took one of those four "actions" when it failed to find reason to believe a violation was committed. When the Commission fails to find reason to believe in a matter, the determination of the Commissioners who vote against reason to believe becomes the "controlling" position of the Commission. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under [52 U.S.C. § 30109(a)(8)]... [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide

a statement of their reasons for so voting." (citing *Democratic Cong. Campaign Comm. v. FEC*, 931 F.2d 1131,1133 (D.C. Cir. 1987)). Here, the Commissioners who constituted a controlling group for the purpose of that decision found no reason to believe and submitted to the administrative record their written statement of reasons explaining their position. *See* ECF No. 35, at 24-28 (outlining FEC actions). Yet, while Plaintiff's only substantive defense to the NRA Affiliate's subject matter jurisdiction challenge is the idea the FEC cannot possibly have acted on the FEC Complaints because the MURs have not been "dismissed," ECF No. 39 at 44-45, FEC policy clearly states that the Commission has four possible options at the pre-reason-to-believe stage and none of those actions rely upon the predicate of public announcement. *See* FEC Actions at Initial Stage. In other words, Plaintiff's theory that because the FEC has not publicly announced dismissal of the underlying MURs, then it must have failed to act such that subject matter jurisdiction exists under section 30109 (a)(8), completely contravenes FEC's policy on FEC Actions at Initial Stage, and its theory fails for that reason alone.

Plaintiff's theory falls flat factually, too. Plaintiff now attempts to distance itself from its admissions in *Giffords* that a reason-to-believe determination is an "act" under Section 30109 (a)(8), claiming in a footnote that those admissions were just to make the point that the FEC had not done *anything* with the FEC Complaints. ECF No. 39 at 56 n.28. But it is undisputed that the FEC has done much more than just *something*; based on the FEC's own representations in *Giffords*, it made a final determination that is now in the administrative record by virtue of the controlling commissioner's statement of reasons. As previously discussed, the only reason the Commission's votes on this matter are not public is the partisan scheme enacted by a certain Commissioner.

Finally, Plaintiff's "dismissal" theory contradicts the plain language of 30109 (a)(8), which provides for judicial review of the FEC's treatment of an administrative complaint where a

claimant has been aggrieved by either (a) "an order of the Commission **dismissing a complaint** filed by such party," **or** (b) "by **a failure of the Commission to act on such complaint** during the 120-day period beginning on the date the complaint is filed[.]" 52 U.S.C. § 30109(a)(8)(A) (emphasis added). The fact that Congress used different terminology (*i.e.*, "dismiss" and "failure…to act") in the same statute directly contradicts Plaintiff's assertion that a "dismissal" is required for the FEC to have "acted." After all, "[t]he use of different terms within related statutes generally implies that different meanings were intended." *United States v. Bean*, 537 U.S. 71, 76 n 4 (2002) (reasoning that the "APA draws a distinction between a 'denial' and a 'failure to act,'" and that "an applicant may obtain judicial review under the [APA] only if an application is denied.") (cleaned up). Applying that principle here, Congress intentionally chose the distinction between the more general language under the "failure to act" prong, and more specific language under the "dismissing a complaint" prong, when it enacted 30109(a)(8). Thus, an internal deadlock dismissal is sufficient for the FEC to have acted on the FEC Complaints under Section 30109(a)(8), and Plaintiff's Complaint must be dismissed.

2. The FEC complied with the Court's 30-day Order by submitting its final determination through the Controlling Commissioners' Statement of Reasons.

While the NRA Affiliates do not necessarily agree that the standard for determining whether the FEC complied with the Court's Order declaring the FEC's failure to act was contrary to law was whether the FEC made a final determination within 30 days[1]—the standard this Court

[1] What if, for example, after the Court issued its 30-day order under Section 30109 (a)(8), the FEC found reason to believe a violation had occurred and decided by a vote of four or more Commissioners to commence enforcement proceedings? Surely, the Commissioner would not be expected to complete that proceeding within 30 days. That in mind, the NRA Affiliates submit that the appropriate standard for determining compliance with a 30-day order at the reason to believe stage is not whether the FEC made a final determination in that time period, but whether it took one of the four permissible actions in the Commission's "Statement of Policy Regarding Commission Action in Matter at the Initial Stage in the Enforcement Process," discussed above.

applied in *Giffords*—the Commission did make a final determination six days prior to the expiration of that 30-day window in the form of the statement of reasons submitted to the administrative record by the controlling commissioners.

To that end, it is well settled that "those Commissioners constitute a controlling group for purposes of the [Commission's] decision, [and] their rationale necessarily states the agency's reasons *for acting* as it did." *FEC v. NRSC.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (emphasis added). *See also CREW v FEC*, 993 F.3d 880, 897 (D.C. Cir. 2021) (J. Millett, dissenting) ("When, as here, a deadlocked Commission fails to follow the General Counsel's recommendation, those who voted to reject that recommendation—often referred to as the 'controlling commissioners'—**determine the final position of the Commission on the matter**, and 'must provide a statement of their reasons for so voting.'") (emphasis added) (cleaned up).

Plaintiff's attempts to downplay the Statement of Reasons are unpersuasive. For instance, Plaintiff characterizes the Statement of Reasons as a "draft," but nowhere in the record is such a characterization present. Rather, it surfaced for the first time in response to the NRA Affiliate's motion to dismiss. ECF No. 39 at 54-55. Indeed, not only is Plaintiff's characterization of the Statement of Reasons as a "draft" inaccurate, it misrepresents the FEC Counsel's actual comments regarding the Statement of Reasons from the November 1, 2021 hearing, during which counsel represented that on October 26th, "the two commissioners who had voted to find no reason to believe violations were committed and to close the file, they submitted to the administrative record their statement of reasons; **that** statement will be released publicly when the files in the matters are closed." (*Giffords*, No. 1:19-cv-1192-EGS, November 1, 2021, Transcript at 6:11-16) (emphasis added). The Statement of Reasons is not simply a draft, it represents **the only** statement

of reasons of the controlling commissioners. *Id.* It constitutes "the agency's reasons for acting as it did" and "the final position of the Commission on the matter[s]." *CREW*, 993 F.3d at 897.

Likewise, Plaintiff's assertion that the underlying MURs are still under consideration by the Commissioners lacks any support in the record, despite Plaintiff's burden to show subject matter jurisdiction by a preponderance of the evidence. ECF No. 39 at 51-52. To the contrary, the FEC's own counsel represented to the Court that the statement of reasons would be released publicly when the matters are closed, thus confirming no future alteration to the Commissioners' decision. (*Giffords*, No. 1:19-cv-1192-EGS, November 1, 2021, Transcript at 6:11-16). Plaintiff's theory is equally unsupported by the MURs cited in its Response. ECF No. 39 at 47-49. In those instances, commissioners changed their votes in subsequent reason-to-believe votes, whereas here, the Commission confirmed their votes *before* the controlling commissioners submitted their Statement of Reasons. Furthermore, the Commissioners confirmed they had not changed their votes as of October 26, 2021, ECF 35-1 at 27, and one commissioner has insisted that these repeated proclamations regarding future alterations are unfounded. *Id.* at 12 n.17. Again, Plaintiff has simply failed to carry its burden here where all existing evidence favors a lack of jurisdiction.

Finally, Plaintiff's attempt to downplay the Statement of Reasons by asserting it was "litigation driven" and not an "act" for purposes of section 30109 (a)(8) is unavailing. Indeed, the argument that the Statement of Reasons was "litigation driven" only further confirms that the FEC acted. The Court ordered the FEC to render a final determination within 30 days, after which the Commission met and confirmed that the votes had not changed since February, and the Controlling Commissioners submitted their Statement of Reasons. Thus, the Commissioners fully complied with the order. Plaintiff's argument that this Court should discount an act in compliance with its own order as "litigation driven," in order to find subject matter jurisdiction in this case, is bizarre.

3. To allow Plaintiff to proceed with a private suit based on an alleged "failure to act" where the Commission *did* act contravenes FECA.

It is well-settled law that the FEC has exclusive jurisdiction with respect to civil enforcement of FECA. 52 U.S.C. §30106(b)(1). To allow Plaintiff to proceed with a *brand new* citizen suit, despite the FEC having made a final determination in the NRA Affiliate's favor, contravenes FECA, which both grants the FEC exclusive jurisdiction to decide whether to investigate, and also provides administrative claimants the right to judicial review of whether those determinations are contrary to law. *Id.*; § 30109(a)(8)(C).

Such a result also defies logic. Surely, Congress would bristle at the notion that even in cases in which the FEC lacks four votes to proceed with an investigation, and the controlling commissioners have set forth the justification for their decision in a statement of reasons that in any other circumstances would serve as the basis for judicial review of the FEC's actions in the matter, a claimant could still file an entirely new lawsuit as though no such FEC proceedings had ever happened—without even first reviewing the statement of reasons reflecting the Commission's final determination to not exercise its exclusive jurisdiction. Indeed, the outcome urged by Plaintiff would permit losing commissioners to negate the controlling commissioners' decision, and prevent a district court from reviewing the basis for that decision, through sheer obstinacy. Congress surely did not intend to create a scheme in which a minority bloc of commissioners (or potentially even just one commissioner, when the Commission is short-handed) could arbitrarily derail the statutorily-established enforcement process, divert select complaints into private litigation, and *simultaneously* render the courts blind in reviewing the Commission's actions.

Stated simply, the FEC "acted." If Plaintiff wishes to challenge that action as contrary to law, it can pursue such a challenge as it relates to the Statement of Reasons, if warranted when the Statement of Reasons is made public. The NRA Affiliates, as Defendants in this matter, are not

responsible for the FEC's refusal to close the outstanding MURs and that refusal does not give rise to subject matter jurisdiction for Plaintiff's challenge against them.

II. Plaintiff has Failed to Show Article III Standing by a Preponderance of the Evidence.

The NRA Affiliates also moved to dismiss Plaintiff's Complaint on the grounds Plaintiff failed to establish Article III standing by a preponderance of the evidence. And while Plaintiff's grounds for Article III standing were less than clear from the face of its Complaint, to the extent Plaintiff alleged a theory of competitor standing, the NRA Affiliates further argued that Plaintiff could not rely upon that doctrine here for a number of reasons—most notably that Plaintiff is not a candidate planning to compete in a future election.

In its response, Plaintiff now claims two separate grounds for standing. First, Plaintiff claims competitor standing on the grounds it allegedly suffered "competitive injury" as a result of the alleged FECA violations because it "competes" with the Defendants, ECF No. 39 at 26. Second, Plaintiff claims to have standing based on its new claim that it has been denied access to information such that it suffered an "informational injury." *Id.* at 35-38. But Plaintiff bears the burden of establishing Article III standing by preponderance of the evidence, *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 69 (D.D.C. 2011) and has failed to do so under either of the theories in its Response. Accordingly, Plaintiff's Complaint should be dismissed.

A. Plaintiff lacks competitor standing.

Plaintiff urges the Court to accept its novel theory of competitor standing, which is based on Plaintiff's acting in "competition" with the Defendants. ECF No. 39 at 26-27 (claiming that the NRA Affiliates' alleged "contributions to the Candidate Defendants and other federal candidates injure Giffords as a political competitor of Defendants, forcing Giffords to compete on an illegally structured playing field…"). But the idea of "competitor standing" is not so easy a hurdle to clear, and no prior court has extended it to a political organization such as Plaintiff. And while Plaintiff

attempts to create new grounds for competitor standing by amalgamating various decisions of this Court and others, those authorities—explained below—actually cut against Plaintiff's theory.

Stated simply, competitor standing is not a shortcut to Article III standing, and Plaintiff has failed to connect the necessary dots to apply the doctrine in this case. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013) (refusing to apply "boundless" theory of competitor standing *whenever a competitor benefits from something allegedly unlawful*). Plaintiff's claimed "injury" is just that, and without any factual support it is not sufficiently particularized or concrete for purposes of asserting competitor standing. Plaintiff's theory fails for the reasons stated below.

1. The *Shays* decision does not support Plaintiff's competitor standing theory.

Plaintiff relies almost exclusively on *Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005) to counter the arguments raised in the NRA Affiliates' motion, including the NRA Affiliates' reliance on *Gottlieb v. FEC*, 143 F.3d 618 (D.C. Cir. 1998). But *Shays* did not overrule *Gottlieb*; nor does *Shays* stand for the proposition that competitor standing will extend to just *any* political actor (including a political organization such as Plaintiff).

For instance, the NRA Affiliates recognized in the motion that no court has applied competitor standing in the manner Plaintiff attempts to use it here: where a political *organization* claims an "injury" based upon a competitive disadvantage in past and future elections. ECF No. 35, at 40-41. In response, Plaintiff characterizes *Shays* as disproving that assertion despite the fact that the plaintiffs in *Shays* were, yet again, candidates. *Shays*, 414 F.3d at 85 ("Shays and Meehan, *as regular candidates for reelection*, suffer injury to a statutorily protected interest if under FEC rules they must compete for office in contests tainted by BCRA-banned practices.") (emphasis added). In fact, Plaintiff goes so far as to insinuate that the language in *Shays* stands for the proposition that competitor standing "extends not just to candidates, but also to 'parties in a position to exploit FEC-created loopholes.'" ECF No. 39 at 30.

But nowhere in *Shays* does the D.C. Circuit so hold. In fact, the very language cited by Plaintiff distinguishes *Shays* from cases, like *Gottlieb*, in which competitor standing did not apply: "Shays and Meehan—unlike the *Gottlieb* plaintiffs—clearly do face genuine rivalry from candidates and parties in a position to exploit FEC-created loopholes." 414 F.3d at 87. And, in light of that distinction, the D.C. Circuit reasoned that its prior decisions "support analogizing [the plaintiff-candidates'] situation to a business rivalry." *Id.*

Indeed, the D.C. Circuit was clear in expressing the circumstances in which competitor standing might apply in the political environment, reasoning that "rival *candidates*" are "the election analogue to participants in a market," and that *Gottlieb* foreclosed competitor standing in the case of a PAC because "*[o]nly another candidate could make such a claim*." *Id.* at 86-87 (emphasis in original). It was only against that backdrop that *Shays* concluded that the plaintiff-candidates' "claimed injury, *having to seek reelection in illegally structured contests*… may support Article III standing." *Id.* at 90 (emphasis added); *id*. at 92 ("Because BCRA establishes campaign procedures designed to protect the Congressmen's concrete interest *in winning reelection*, Shays and Meehan possess standing to insist on those procedures…") (cleaned up).

In its plainest reading, *Shays* does **not** stand for the proposition that competitor standing may extend to a political "actor" other than a candidate. As a result, Plaintiff's effort to convince this Court to apply competitor standing to a non-candidate political actor lacks legal support, and this Court should adhere to existing case law by finding Plaintiff, a political organization, cannot claim competitor standing. *See generally Gottlieb*, 143 F.3d 618 (D.C. Cir. 1998).

2. *Gottlieb* and *Nader* foreclose Plaintiff's claim of competitor standing.

Plaintiff's reliance on *Shays* underscores another fault in Plaintiff's competitor standing theory: Plaintiff claims its injury here is "even clearer than that in *Shays*" because Plaintiff's Complaint alleges "actual, concrete FECA violations by Defendants" that it claims occurred in

past elections. ECF No. 39 at 28. But for purposes of establishing competitor standing, past injury is not redressable by the court. *See Nader v. FEC*, 725 F.3d 226, 228 (D.C. Cir. 2013) (finding that plaintiff's claim for competitor standing arising out of past violations would not be redressable).

Plaintiff attempts to counter *Nader* by insisting it has "definitive plans to continue to compete against Defendants in the future," ECF No. 39 at 32, but that allegation does not change the fact that competitor standing would only apply if Plaintiff were actually competing as a *candidate* in the election. *See Gottlieb*, 143 F.3d at 621 ("[o]nly another [candidate-]competitor could make such a claim"). Plaintiff's attempt at a flexible application of precedent illustrates just how novel, and unsupported, its argument for standing truly is. The fact of the matter remains; Plaintiff—a political *actor* and not a candidate—cannot show that any "concrete and particularized" injury in fact is "almost certain" to occur. *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010); *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008).

Finally, while Plaintiff insinuates that the authorities in the NRA Affiliates' opening brief are somehow inapplicable because they relate to Article III standing rather than competitive standing, *see* ECF No. 39 at 33, it is well settled that competitor standing is merely a subset of the "injury" element of Article III standing,[2] meaning the case law offered by the NRA Affiliates is certainly applicable here. In fact, because Plaintiff cannot show competitor standing based on the factual allegations in its Complaint, those portions of *Gottlieb* relied upon in the NRA Affiliates' motion are equally as authoritative as *Shays* or any other case cited in Plaintiff's Response.

3. Plaintiff has not established competitor standing by a preponderance of the evidence.

[2]*See Canadian Lumber*, 517 F.3d at 1332 ("competitor standing…relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact") (cleaned up).

This Circuit has emphasized that the requirement common to all assertions of competitor standing is that the allegedly unlawful competitive benefit must "almost certainly cause an injury in fact." *Sebelius*, 610 F.3d at 73; *Canadian Lumber*, 517 F.3d at 1332. As with all elements of Article III standing, Plaintiff must establish this "almost certain injury" by a preponderance of the evidence." *Schmidt*, 826 F. Supp. 2d at 69 (D.D.C. 2011). Plaintiff has not done so here.

Attempting to establish its standing as a competitor to the Defendants in this case, Plaintiff relies on several self-serving allegations in a declaration attached to its Response. *See* ECF No. 39-1. Even accepting as true Plaintiff's declarations regarding its intent to "compete" in future elections against the Defendants in this case, as well as its recounting of past "harms" suffered as a result of the alleged violations, that alleged harm-to-be would still be too attenuated to constitute the "almost certain" injury necessary to apply competitor standing.

First, there is no guarantee that the NRA Affiliates will support the same candidates, or candidates in opposition to those supported by Plaintiff, in the same manner in future elections as they have in the past. While Plaintiff claims "it is competing with the NRA in 2022" and that it "plans to support candidates opposed by the NRA," it has no knowledge of the NRA Defendant's future campaign finance activities, and therefore cannot claim a certain injury. ECF No. 39-1 at ¶¶ 18-19. Moreover, Plaintiff itself has experienced significant *victories* in competitive elections despite the alleged violations, all of which undercut Plaintiff's claim that it will "almost certainly suffer an injury in fact" in any future election. *Canadian Lumber*, 517 F.3d at 1332. The attenuated "injury" alleged by Plaintiff is not concrete or certain enough to establish competitor standing, falling far short of its burden to prove each of the Article III elements by a preponderance of the evidence. As explained in the NRA's opening brief, the multitude of factors that affect the outcome of any given election, as well as the policy decisions of any one candidate or officeholder, render

any such alleged injury simply too attenuated to satisfy the elements of Article III standing. ECF No. 35 at pp. 36-38. Plaintiff has failed to meet its burden, and its Complaint should be dismissed.

B. Plaintiff does not possess informational standing.

Plaintiff also asserts, seemingly for the first time in its Response, that it possesses "informational standing" based on the claim that it has been denied access to information. ECF No. 39 at 35. To establish an informational injury, Plaintiff must show a specific instance where a statutory provision has explicitly created a right to information, of which Plaintiff has been deprived. *E.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989).

Plaintiff's informational standing argument fails for several reasons, chief among them being that Plaintiff does not seek information that must be disclosed under FECA, but instead seeks a legal determination that Defendants violated the law. For instance, Plaintiff asserts that "nonreporting of in-kind contributions in the form of coordinated communication" deprived Plaintiff of the accurate disclosure of campaign information. ECF No. 39 at 36. While Plaintiff attempts to distinguish this case from *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), that decision squarely forecloses Plaintiff's informational standing theory because Plaintiff already has access to *all* the information the NRA Affiliates are required to disclose under FECA. The only "information" of which Plaintiff claims to have been deprived is the *characterization* of the expenditures as also in-kind contributions, rather than just independent expenditures. This is a legal conclusion and not the type of information necessary for informational standing. In fact, taking Plaintiff's argument to its logical conclusion, *any* allegation of *any* inaccuracy within a campaign finance report would theoretically give rise to informational standing.

Stated simply, the information Plaintiff claims to have been deprived of has been disclosed as expenditures as required under FECA. The fact that they were not reported as "coordinated" communications does not establish informational standing because Plaintiff's theory depends on

the legal determination that the expenditures were indeed coordinated communications, when they were not, and Plaintiff is not entitled to a legal determination holding otherwise. Despite its burden to do so, Plaintiff has failed to point to any specific information to which it is entitled under FECA but did not receive. That alone warrants dismissal for lack of standing. *Campaign Legal Ctr. v. FEC*, 2021 WL 6196985, at *4–5 (D.D.C. Dec. 30, 2021) (rejecting plaintiff's information injury theory and dismissing complaint for lack of standing where the campaign finance spending at issue had been disclosed—albeit in a form other than what would have been required under Plaintiff's legal theory—and plaintiff failed to proffer evidence to the contrary).

Here, as in *Wertheimer*, Plaintiff's true objective is "a legal characterization or duplicative reporting of information that under existing rules is already required to be disclosed." 268 F.3d at 1075. As such, there is no informational standing present and Plaintiff's Complaint should be dismissed. *See CLC*, 2021 WL 6196985, at *5 ("While it is true that the plaintiffs do not need to identify in granular detail each and every campaign expenditure that is missing . . . plaintiffs must show by a preponderance of the evidence that this Court has standing to hear the case," and it insufficient "for the plaintiff to rest on bare legal conclusions [or] unsupported inferences.") (cleaned up); *but see Campaign Legal Center, et al. v. FEC & Hillary for America, et al.,* 2020 WL 2996592, at *6 (D.D.C. June 4, 2020) (finding informational injury where plaintiffs were not seeking information that under existing rules is already required to be disclosed).

Lastly, even accepting Plaintiff's assertion that such a legal conclusion constitutes the type of "information" sufficient to give rise to informational standing, it is unclear how any of Plaintiff's claimed reasons for requiring accurate information would in any way be hindered or harmed by the reporting of a coordinated contribution as an independent expenditure. Plaintiff is fully capable of carrying out its stated "mission," despite the claimed deprivation of information and, thus, has

once again not carried its burden as it relates to standing by failing to show any injury by a preponderance of the evidence. (*See* ECF No. 39 at 22).

III. Plaintiff's Pre-November 2016 Claims are Barred by the Statute of Limitations.

As discussed in the NRA Affiliate's Motion, Plaintiff's pre-November-2016 claims (the "Earlier Claims") are time-barred by the five year statute of limitations under 28 U.S.C. § 2462. ECF No. 35, at 42-50. In response, Plaintiff argues that its Earlier Claims are not time-barred because (1) the statute of limitations allegedly did not begin to run against Plaintiff until November 1, 2021; and (2) the statute of limitations would not bar Plaintiff from seeking the injunctive and declaratory relief sought in its Complaint. ECF No. 39 at 57-62. Plaintiff's arguments, each of which will be addressed in turn, are meritless.

First, Plaintiff argues that the statute of limitations in Section 2462, which begins to run from "when the claim first accrued," did not begin to run until November 1, 2021, when this Court authorized Plaintiff's suit. ECF No. 39 at 58-59. In so arguing, Plaintiff relies primarily upon *Citizens for Resp. & Ethics in Washington v. Am. Action Network*, 410 F. Supp. 3d 1, 25 (D.D.C. 2019) ("*AAN*"), to argue that the statute of limitations does not begin to run for a citizen suit until a plaintiff has "exhausted all administrative remedies" and may file suit in this Court. *Id*. Thus, Plaintiff claims that it had "a 'complete and present' cause of action under section 30109(a)(8)(C) when the FEC failed to conform to this Court's order to act within 30 days" on November 1, 2021, and that "[a]s such, Plaintiff's claim is not barred by the statute of limitations." *Id*. at 59.

Plaintiff's position is unavailing. Plaintiff expressly "does not dispute that the FEC's claim to enforcement accrues from the date of the violation," *Id*. at 59 n.31, and Plaintiff's attempt to create a distinction between FEC-initiated lawsuits and citizen-initiated lawsuits for determining when a claim "first accrues" has no statutory support. Here, *Plaintiff*'s filing of an administrative complaint with the FEC initiated the FECA investigatory process—and therefore, it was within

Plaintiff's control as to when the process began. 52 U.S.C. § 30109 (a)(1). Further, regardless of whether a civil action is ultimately initiated by the FEC, *id*. at 30109(a)(6), or by an aggrieved party, *id*. at 30109(a)(8), the FECA process applies. *See, e.g.*, *FEC v. Nat'l Republican Senatorial Comm.*, 877 F.Supp. 15, 18 (D.D.C. 1995) ("*NRSC (1995)*") ("If the FEC finds probable cause to believe that a violation of FECA has occurred, it must attempt to resolve the matter through informal methods before it can bring suit. Thus, enforcement suits are to be used only after the informal conciliation process fails."). And importantly, FECA provides a remedy for an aggrieved party to expedite the process—"[a]ny party aggrieved . . . by a failure of the Commission to act on such a complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with . . ." this Court. *Id*. Section 30109(a)(8)(A), (C).

The law is clear that an agency may not toll the statute of limitations based upon any difficulty in discovering an alleged violation, or any other such delays based upon inadequate staffing, or an ill-designed or inefficient enforcement program. *3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994); *see also generally NRSC (1995)*, 877 F.Supp. at 19 ("We can discern no reason why [the FECA] process cannot easily be accomplished by the agency within the five year limitation in § 2462, even with discovery and subpoena enforcement delays of many months or even years."). Rather, the claim first accrues as of the "date of the violation." *Id*. Similarly, here, any asserted difficulty by Plaintiff in filing an administrative complaint with the FEC, or waiting far more than 120 days to file a petition to remedy any alleged failure to act, should not entitle a claimant to a later accrual date than that imposed upon the FEC.

Indeed, Plaintiff's position would lead to absurd and undesirable results. Here, for example, Plaintiff waited nearly *four years* from the 2014 alleged violations to file its complaints with the FEC. (Compl. ¶ 118). Then, upon filing its administrative complaint regarding the 2014 alleged

violations, Plaintiff waited more than *nine months* to file a petition with this Court—five months after Plaintiff was authorized to do so under 30109 (a)(8)(A). (Compl. ¶¶ 118, 129). Thus, more than four years—and almost all of the five year period comprising the statute of limitations under section 2462—were delays of Plaintiff's own making. Yet, Plaintiff now claims that it should have *another* five years from November 1, 2021, to assert claims for the alleged violations dating back to 2014. In fact, under Plaintiff's theory, there would be nothing to prevent a complainant filing a complete a decade after the statute of limitations for FEC enforcement had already run—fifteen years after the violation—and the Commission could, merely by declining to formally dismiss that complaint, permit the complainant to "resurrect" it in a private civil action against the respondent.

Plaintiff's position would render the statute of limitations meaningless—a result which should be of particular concern in this context, where the FEC has explained that "[s]tatutes of limitations are especially important for campaign-finance law." *In the Matter of Independent Women's Voice*, MUR 7181, March 18, 2021 ("IWV"); NRA Br. ECF No. 35, at 48-49. Certainly, providing a longer limitations period to a citizen-initiated lawsuit than to the FEC does nothing to address concerns that "[a]n agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after alleged violations are finally discovered." *3M*, 17 F.3d at 1462. Indeed, statutes of limitations are not designed to protect plaintiffs; rather, they "reflect the judgment that there comes a time when the potential defendant ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations." *Id*. at 1457. In sum, just as a claim indisputably accrues as of the date of a violation for an FEC-initiated lawsuit, the same holds true for a FECA-based lawsuit initiated by a private citizen.

Second, Plaintiff argues that Section 2462 does not bar Plaintiff from seeking the injunctive or declaratory relief purportedly sought in the Complaint for alleged violations preceding November of 2016. ECF No. 39 at 60-62. According to Plaintiff, it does not seek to impose a penalty, so the concurrent remedies doctrine does not bar the prohibitory injunctive relief sought by Plaintiff. *Id*. Plaintiff's arguments lack merit.

Indeed, the Complaint requests that this Court "assess an appropriate civil penalty against each Defendant in accordance with 11 C.F.R. § 111.24, to be paid to the United States, for each violation Defendants are found to have committed," (Compl. at Requested Relief ¶ 8), including for alleged violations predating November of 2016. Plaintiff's request for purported equitable relief based upon these same alleged facts and alleged violations are therefore time-barred under the concurrent remedies doctrine. *See Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (applying the concurrent remedies doctrine to FEC's claim for injunctive relief, and concluding that "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both"); *Nat'l Parks & Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1327 (11th Cir. 2007) (concluding "the civil penalties and equitable relief sought in this case are concurrent because an action at law or equity could be brought on the same facts," and time-barring the request for equitable relief).

Independently, Plaintiff's requests for injunctive and declaratory relief also seek to impose a penalty beyond compensating Plaintiff for its alleged harm, thereby subjecting it to the statute of limitations on that basis as well. To that end, Plaintiff claims, *inter alia*, that the NRA's alleged schemes "allow the NRA to evade federal contribution limits and shield millions of dollars of political spending from public scrutiny in violation of FECA." (Compl. ¶ 40). Plaintiff alleges violations of FECA—alleged violations of "public laws" that, if committed, are committed against

the United States rather than an aggrieved individual. *Cf. Iowa Values*, 2021 WL 5416635, at *1 ("Among other things, [the FEC] works to 'minimize[ ] the potential for abuse of the campaign finance system' by requiring disclosure to 'arm[ ] the voting public with information.'" (quoting *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 223–24 (2014)).

CONCLUSION

The NRA Affiliates respectfully request that the Court grant their motion and dismiss Plaintiff's Complaint with prejudice in its entirety for lack of subject matter jurisdiction, or, in the alternative, due to an absence of Article III standing. In addition, the Court should dismiss Plaintiff's pre-November-2016 claims as time-barred by the five year statute of limitations.

Dated: March 4, 2022

Respectfully Submitted,

DICKINSON WRIGHT PLLC

/s/ Charles R. Spies
Charles R. Spies, Bar ID: 989020
1825 Eye Street, N.W., Suite 900
Washington, D.C. 20006
Telephone: (202) 466-5964
Facsimile: (844) 670-6009
cspies@dickinsonwright.com

Robert L. Avers, Bar ID #MI0083
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com

Attorneys for Defendants the National Rifle Association of America & the National Rifle Association of America Political Victory Fund

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2022, 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.

/s/ Charles R. Spies
Charles R. Spies