IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. IOWA VALUES, Defendant.	Civ. No. 21-cv-00389-RCL

PLAINTIFF CAMPAIGN LEGAL CENTER'S STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT

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INTRODUCTION

Defendant Iowa Values is a dark money group that solicited and spent thousands of dollars in undisclosed money to influence a hotly contested race for the United States Senate. Defendant's actions were illegal, and its unlawful concealment of its election activities harmed Plaintiff Campaign Legal Center ("CLC"). Yet the Federal Election Commission ("FEC" or "Commission")—the agency responsible for enforcing federal campaign finance law—failed to take action to enforce the law. Congress recognized the possibility of such a scenario and "legislated a fix" to ensure the law could still be enforced when the FEC's abdication of its duties is "contrary to law" and the Commission violates a judicial order requiring it to correct the illegality. *Citizens for Responsibility & Ethics in Wash.* v. *Am. Action Network*, 410 F. Supp. 3d 1, 6 (D.D.C. 2019) ("*CREW v. AAN*"). That is precisely what happened here. This Court, in a related case, found the FEC's inaction on CLC's administrative complaint against Iowa Values contrary to law and ordered the FEC to act. After the FEC failed to conform to that order, the Court issued another order recognizing CLC's statutory right, under the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8)(C), to sue Iowa Values directly.

In this action under section 30109(a)(8)(C), CLC seeks information that Defendant has unlawfully withheld, and which CLC is statutorily entitled to receive. Given the FEC's inaction for the past sixteen months,[1] it is unsurprising that Defendant would prefer that this Court step

[1] "'The Federal Election Commission is the only government agency that does exactly what Congress designed it to do: nothing.'" *CREW v. AAN*, 410 F. Supp. 3d at 6; *see* Editorial, *The Election Watchdog That Can't Bark*, N.Y. Times, Aug. 29, 2019, https://www.nytimes.com/2019/08/29/opinion/fec-trump.html (observing "[t]he harsh truth" that the FEC "has been a model of dysfunction for over a decade," and listing among its problems "gridlock over enforcing laws").

aside and allow the matter to continue languishing before the Commission. But none of Defendant's arguments provides a legitimate basis for dismissing this case.

First, Defendant's challenge to the Court's subject matter jurisdiction is based entirely on unsupported speculation about why the FEC has failed to act on CLC's administrative complaint and what actions Defendant believes the FEC might take if given more time to do its job. Defendant's unfounded hypotheses provide no basis for questioning the Court's subject matter jurisdiction here.

Second, Defendant's attempt to challenge CLC's standing relies on legal arguments that the Supreme Court—*and this Court in a related case*—have already rejected and reflects a fundamental misunderstanding of the rights CLC seeks to vindicate here.

Third, Defendant's constitutional challenges misconstrue the relevant legal standards and fail to identify any constitutional defect in FECA's long-standing private right of action. The statute is not vague. Its empowerment of administrative complainants to pursue civil enforcement of the law in certain, limited circumstances is neither novel nor unconstitutional. And the provision promotes, rather than harms, First Amendment interests by ensuring that even when the FEC unlawfully fails to enforce campaign finance rules, the First Amendment right to access information about who is spending money to influence federal elections may still be protected.

Fourth, Defendant's Rule 12(b)(6) arguments misapply that rule, which requires only that a plaintiff state a claim that is plausible on its face. Defendant wrongly suggests that CLC must *prove* its claims, and that the Court should ignore CLC's well-pleaded factual allegations in favor of Defendant's self-serving characterizations. On the contrary, at this stage of the proceedings, CLC's allegations must be accepted as true and CLC, *not Defendant*, is entitled to the benefit of every reasonable inference that may be derived from the facts alleged.

Fifth and finally, Defendant's request to strike portions of the Complaint is improper and premature. Where, as here, a defendant is alleged to have violated FECA's registration and reporting requirements for political committees, a proper remedy "'might well require ordering [the defendant] to disclose everything it would have had to disclose had it complied with the law in the first instance." *CREW v. AAN*, 410 F. Supp. at 21. In other words, if the Court finds that Defendant violated FECA in 2019, Defendant's campaign spending in 2020 would be relevant to the question of what remedy may be appropriate here, and Defendant does not argue otherwise. Defendant's motion to strike CLC's request for attorneys' fees is likewise improper at this preliminary stage of the proceedings, where the issue is unripe and the parties have not yet briefed potential sources of fee-shifting authority.

For these reasons and those set forth below, Defendant's Motion to Dismiss should be denied.

BACKGROUND

I. Factual Background.

CLC's Complaint alleges that in the summer of 2019, Defendant commenced an "election-long effort" to support the federal election campaign of United States Senator Joni Ernst. Compl. ¶ 25 & n.3. Specifically, the Complaint alleges that in June 2019, the group launched a "six-month voter education and data collection blitz" and "six-figure[]" digital adverting campaign as part of a "large-scale effort" to target voters in Iowa with ads that promoted Senator Ernst as a "leader." *Id.* ¶ 26 & n.6. CLC's complaint discusses and incorporates by reference Defendant's fundraising and strategy documents establishing its "mission" and "focus" of supporting Senator Ernst's reelection effort. *See id.* ¶¶ 34-35.[2] For example, in one document, a fundraiser for Senator Ernst's

[2] *See* Compl. nn.16, 22-25 (citing and providing link to Defendant's strategy memo, https://assets.documentcloud.org/documents/6550822/Holloway-Email-Attachment-Iowa-

authorized campaign committee solicited contributions of $50,000 "on behalf of Iowa Values" to help the group "target" Iowa voters who "represent the 'firewall' between winning and losing in 2020 for Senator Ernst." *Id.* ¶ 32 & n.20.

The Complaint also discusses and incorporates by reference publicly available information establishing that Defendant spent at least $30,300 on ads promoting Senator Ernst in 2019, including ads declaring, "We Deserve Leaders Who Share Our Values Like JONI ERNST," and "We deserve leaders who have walked in our shoes and share these beliefs—like Joni Ernst. Standing up for Iowans all across our state and fighting for what we believe in." *Id.* ¶¶ 27-28.[3] The Complaint alleges that Defendant spent at least another $156,900 on ads supporting Senator Ernst's reelection during the months before the 2020 election. *Id.* ¶ 40 & n.32. In many of Defendant's ads, the only "issue" Iowa Values identified was Senator Ernst's character and qualifications as a "leader."

Defendant is a nonprofit 501(c)(4) corporation; it is not registered as a federal political committee. However, federal campaign finance law requires an organization like Defendant, whose "major purpose" is campaign activity and which receives "contributions" or makes "expenditures" aggregating in excess of $1000 during a calendar year, to register with the FEC as a political committee and file periodic reports disclosing its receipts, disbursements, and debts. 52 U.S.C. §§ 30103, 30104; *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).[4] CLC's Complaint

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Values-Strategy.pdf); *id.* ¶ 32 & n.18 (citing and providing link to fundraising email, http://www.documentcloud.org/documents/6570893-July-2019-Email-From-Fundraiser.html). As explained below, this Court may consider documents incorporated by reference in CLC's Complaint in deciding Defendant's motion. *See infra* pp. 8-9.

[3] *See* Compl. n.4 (citing and providing links to Google and Facebook digital ad library pages that include copies of Iowa Values ads promoting Senator Ernst).

[4] FECA defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i). "Expenditure" is similarly defined to include "any

alleges that in failing to comply with these registration and reporting requirements, Defendant violated federal law and harmed CLC by concealing critical information about the sources of its funding and the recipients of its spending in support of Senator Ernst. The Complaint details how Defendant's violations deprived CLC of information it relies on to carry out activities central to its mission, including producing reports and other materials to inform the public about campaign spending and the true sources and scope of candidates' financial support. Compl. ¶¶ 10-14.

II. CLC's Exhaustion of Administrative Remedies.

A. CLC's December 2019 administrative complaint.

CLC filed an administrative complaint alerting the FEC to Iowa Values's FECA violations on December 19, 2019, but the FEC failed to take action. Indeed, this Court issued an order more than two months ago in a related case mandating that the FEC take action on CLC's administrative complaint, Order, *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Feb. 11, 2021) (*hereinafter* "*CLC v. FEC*"), yet to date, the FEC has never offered any indication that it has taken action on the matter.

B. CLC's June 2020 lawsuit over the FEC's failure to act.

On June 30, 2020, more than 190 days after filing its administrative complaint, CLC filed a civil action against the FEC under 52 U.S.C. § 30109(a)(8)(A), which provides an administrative complainant with a cause of action for "a failure of the Commission to act on [their] complaint

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purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *Id.* § 30101(9)(A)(i). In *Buckley*, the Supreme Court construed FECA's definition of "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79.

during the 120-day period beginning on the date the complaint is filed." That case, *CLC v. FEC*, No. 1:20-cv-01778-RCL, is related to the instant case, and both actions are before this Court.

On October 14, 2020, this Court issued an order in *CLC v. FEC*, finding that the FEC's failure to act on CLC's administrative complaint was contrary to law, awarding default judgment to CLC, and ordering the FEC to conform to the Court's order by taking action on CLC's administrative complaint within 90 days, *i.e.*, by January 12, 2021. *See* Order, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Oct. 14, 2020); *see also* 52 U.S.C. § 30109(a)(8)(C) (providing that court may declare FEC's "failure to act" to be "contrary to law" and "may direct the Commission to conform with such declaration within 30 days").

Two days later, on October 16, 2020, the United States Department of Justice ("DOJ") entered an appearance in *CLC v. FEC* and filed a Statement of Interest in which DOJ challenged CLC's standing to sue over the FEC's failure to act and urged this Court to vacate its October 14 Order awarding default judgment to CLC. DOJ clarified that its participation was neither requested by, nor "on behalf of the Commission," but rather was based on DOJ's independent interest in cases where agencies may face "structural barriers to representation." Statement of Interest of the United States of America, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Oct. 16, 2020).

After receiving substantial briefing from both CLC and DOJ on the issue of CLC's standing to challenge the FEC's failure to act, this Court issued an order on February 5, 2021, rejecting DOJ's challenge to CLC's standing and concluding that CLC had alleged a cognizable informational injury as recognized by the Supreme Court in *FEC v. Akins*, 524 U.S. 11 (1998). Order at 2, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Feb. 5, 2021). The Court explained that under *Akins*, "it does not matter whether the information [Plaintiff seeks] is out of reach because the FEC denied the party's administrative complaint *or because the FEC has yet to act.*" *Id.* at 4

(emphasis added). The Court "decline[d] the DOJ's invitation to vacate the Order of default judgment for lack of standing, because the DOJ's position is foreclosed by well-established law." *Id.* at 2.

The Court's February 5 order also noted the restoration of the FEC's quorum as of December 2020, following a period during which Commissioner vacancies deprived the agency of a quorum. *Id.* at 2. But even with a full complement of Commissioners and after three days of executive session meetings during the month of January, the FEC continued to defy this Court's October 14 order to conform.[5] Indeed, the FEC never appeared or attempted to defend itself in *CLC v. FEC*.

On January 27, 2021, CLC filed a motion asking the Court to issue an order finding that the FEC had failed to conform to the Court's October 14 order, and recognizing CLC's right, under 52 U.S.C. § 30109(a)(8)(C), to file a private right of action against Iowa Values to remedy the violations alleged in CLC's administrative complaint. Pl.'s Mot. for Order Declaring Def. Failed to Conform, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Jan. 27, 2021), ECF No. 22. The FEC never responded to that motion, and, after the FEC's deadline to respond passed, the Court granted CLC's request and issued such an order on February 11, 2021. Order, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Feb. 11, 2021). CLC then filed this lawsuit on February 12, 2021.

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[5] *See* FEC, Commission Meetings, https://www.fec.gov/meetings/?tab=executive-sessions (listing FEC Executive Session meetings on January 12, 14, and 26, 2021). During those meetings, the Commission voted to authorize defense of at least one other lawsuit alleging FEC inaction—a case filed *three months after* CLC's lawsuit concerning the FEC's inaction on the Iowa Values complaint. *See* Def. FEC's Mot. for Order Extending Time to Answer or Otherwise Respond to Pl.'s Compl. Nunc Pro Tunc at 2 ¶ 3, *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-02842-CJN (D.D.C. Jan. 26, 2021). In deciding this Motion to Dismiss, the Court may take judicial notice of these facts on the public record. *Covad Commc'ns Co. v. Bell Atl. Co.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005); *see infra* p. 9.

STANDARDS OF REVIEW

I. Motions to Dismiss Under Rules 12(b)(1) and 12(b)(6).

A court evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) "'must accept the factual allegations in the complaint as true'" and "'must assume that [plaintiff] states a valid legal claim.'" *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 871 (D.C. Cir. 2002)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted).

Likewise, a court evaluating a motion to dismiss under Rule 12(b)(6) "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Any ambiguities must be viewed in a light most favorable to the plaintiff, giving them the benefit of every reasonable inference drawn from the facts and allegations in the complaint to state a plausible claim for relief. *In re Interbank Funding Corp. Secs. Litig.*, 668 F. Supp. 2d 44, 47 (D.D.C. 2009) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). A plaintiff is not required to prove its allegations at the pleading stage but merely to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

It is well settled that in deciding a motion to dismiss under Rule 12(b)(6), a court may consider documents incorporated by reference in the complaint or "documents upon which the plaintiff's complaint necessarily relies even if the parties do not produce the document." *Tefera v. OneWest Bank, FSB*, 19 F. Supp. 3d 215, 220 (D.D.C. 2014); *see also, e.g.*, *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007); *Bullock v. Donohoe*, 71 F. Supp. 3d 31, 33–34

(D.D.C. 2014); *Busby v. Capital One, N.A.*, 932 F. Supp. 2d 114, 133 (D.D.C. 2013). Similarly, a court deciding a Rule 12(b)(6) motion may take judicial notice of facts on the public record, such as public records of official agency actions and meetings. *See Covad Commc'ns Co.*, 407 F.3d at 1222; *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1228 (D.C. Cir. 1993).

II. Motion to Strike Under Rule 12(f).

Rule 12(f) permits a court to strike from a pleading material that is "redundant, immaterial, impertinent, or scandalous." As Defendant recognizes, Def.'s Mem. Supp. Mot. Dismiss & Strike Pl.'s Compl. at 9, ECF No. 13 ("Def.'s Mem."), "motions to strike are generally not favored" in federal court. Even where allegations are "arguably irrelevant," courts have declined to strike them where "they are not scandalous or impertinent." *Uzlyan v. Solis*, 706 F. Supp. 2d 44, 58 (D.D.C. 2010).

ARGUMENT

I. The Court Has Subject Matter Jurisdiction Over This Case.

Defendant purports to challenge the Court's subject matter jurisdiction here by questioning CLC's satisfaction of FECA's statutory prerequisites for bringing a private action under section 30109(a)(8)(C). Specifically, Defendant contends that CLC has failed to prove that the FEC's inaction on CLC's administrative complaint against Iowa Values was contrary to law. Def.'s Mem. at 18. Defendant further argues that CLC has failed to prove that the FEC failed to conform to this Court's order requiring the FEC to act on that administrative complaint. *See id.* at 17 (speculating baselessly that FEC is currently working on CLC's administrative complaint). These assertions are puzzling given that CLC obtained judgment against the FEC in which *this Court* found that the FEC's failure to act on CLC's administrative complaint was contrary to law, that the FEC failed to conform its conduct, and that CLC was entitled to file suit directly against Defendant to remedy the violations alleged in CLC's administrative complaint. *See* Order, *CLC v. FEC*, No. 1:20-cv-

01778-RCL (D.D.C. Oct. 14, 2020); Order, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Feb. 11, 2021). This Court's rulings in CLC's favor in a related case undoubtedly provide sufficient evidence, particularly at the motion-to-dismiss stage, to establish that CLC properly exhausted its administrative remedies and is entitled to prosecute this action against Defendant for violating FECA pursuant to 52 U.S.C. § 30109(a)(8)(C). In other words, this Court's decisions in *CLC v. FEC* establish its subject matter jurisdiction over this action.

Defendant nonetheless challenges the Court's subject matter jurisdiction based on its disagreement with the Court determination that the FEC's failure to act was contrary to law. But Defendant's disagreement with this Court's ruling in the related case does not strip the Court of jurisdiction.

A. This Court correctly found that the FEC's failure to act on CLC's administrative complaint was contrary to law.

Defendant purports to defend the FEC's inaction on CLC's administrative complaint, asserting that it was not contrary to law because the FEC lacked a quorum for much, but not all of, the time that the administrative complaint was pending. Def.'s Mem. at 11-13. This argument fails for several reasons.

First, as this Court recognized in finding that the FEC's failure to act *was* contrary to law, the FEC had a quorum for a substantial period while CLC's administrative complaint was pending, and thus was "statutorily capable of acting on [Plaintiff's] complaint." Order, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Oct. 14, 2020). Defendant is simply incorrect in contending that the FEC's "longstanding lack of a quorum" rendered the FEC "legally prohibited from taking any action on Plaintiff's FEC complaint." Def.'s Mem. at 11.

Second, this Court's finding that the FEC's inaction was contrary to law was proper. Contrary to Defendant's insinuation, *id.* at 13, CLC did not allege, and this Court did not find, that

the FEC's inaction was unlawful simply because more than 120 days had elapsed since CLC filed its administrative complaint.[6] Although the FEC failed to appear or defend against CLC's complaint, CLC was nonetheless required to prove "its claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(a)-(b). That is why CLC supported its motion for default judgment with substantial evidence that the FEC's failure to act was unlawful under the *Common Cause* and *TRAC* factors. *See generally* Pl.'s Mot. Default J., *CLC v. FEC*, 1:20-cv-01778-RCL (D.D.C. Sept. 17, 2020). Specifically, CLC made an unrebutted showing that the evidence supporting its administrative complaint was sufficient to allow the FEC to proceed expeditiously, particularly given that "[m]uch of the information in the complaint could be verified from the FEC's own records," *id.* at 11 (citing *Citizens for Percy '84 v. FEC*, Civ. A. No. 84-2653, 1984 WL 6601, at *4 (D.D.C. 1984)), and that the complaint did not raise "novel" issues of the type that might otherwise demand substantial investment of agency time and resources, *id.* at 11-12.[7]

CLC also presented unrebutted evidence that the FEC's failure to act was not a function of competing priorities but rather a sign of regulatory breakdown and a violation of the rule of reason. *Id.* at 6, 13-14 (highlighting the dysfunction at the FEC including, *inter alia*, ideological

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[6] The 120-day period is a jurisdictional floor. Although complainants are entitled to file suit once 120 days have elapsed, there is no requirement that the Commission act on a complaint within 120 days. *See, e.g.*, *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986). CLC waited over 190 days to file suit against the FEC rather than filing at the 120-day mark. Compl. ¶¶ 43-44. As such, CLC's suit against the FEC was filed at the end of June—nearly a month after the FEC's quorum was restored, and after it had the opportunity to consider CLC's administrative complaint in executive session—rather than at the end of March when the FEC still lacked a quorum. *See, e.g.*, FEC, *Sunshine Act Notice for June 23 and 25 Open Meeting* (June 16, 2020), https://www.fec.gov/resources/cms-content/documents/Sunshine_Act_Notice_for_June_23_and_25_2020_ES.pdf (listing "compliance matters pursuant to 52 U.S.C. § 30109" and "matters concerning participation in civil actions or proceedings and arbitration" as agenda items).

[7] Indeed, Defendant's repeated descriptions of CLC's administrative complaint as "routine" and "alleging a garden variety registration and reporting violation" amount to a concession that CLC's claims do not present novel issues. Def.'s Mem. at 13-14.

obstruction to the enforcement of campaign finance law among Commissioners, the substantial increase in the rate at which the FEC deadlocks on substantive votes in enforcement matters, and the lack of urgency displayed by the President and the Senate in restoring the Commission's quorum during an election cycle).

CLC limits this response to the two factors addressed by Defendant, Def.'s Mem. at 15; however, this Court's award of default judgment in the related *CLC v. FEC* case necessarily reflects CLC's satisfaction of its evidentiary burden in that case of *all* of the *TRAC* and *Common Cause* factors. *See* Fed. R. Civ. P. 55(a)-(b); *see also, e.g.*, Order, *Citizens for Responsibility & Ethics in Wash. v. FEC*, No. 1:19-cv-02753-RCL (D.D.C. Apr. 9, 2020) (granting motion for default judgment where plaintiff demonstrated, "by evidence that satisfies the Court, that the FEC's failure to act on the administrative complaints . . . is contrary to law").[8]

B. Defendant's preference to allow this matter to continue languishing before the FEC is not a basis for dismissal.

Defendant expresses its preference for an approach taken by another court in this District *in a lawsuit pending against the FEC*, Def.'s Mem. at 16, but cites no decision or other law supporting its argument that *this case* should be dismissed so that CLC's administrative complaint can linger even longer at the Commission. Nor does Defendant offer any evidence to support its hypothesis that the FEC simply needs more time to resolve the underlying enforcement matter here. Rather, the available evidence suggests that the FEC routinely lacks sufficient votes to defend

[8] Defendant further attempts to buttress its misplaced defense of the FEC's inaction on CLC's administrative complaint with baseless, inflammatory accusations that CLC has engaged in "gamesmanship" in an "attempt to frustrate the Commission's presumptive jurisdiction over federal campaign finance law." Def.'s Mem. at 12 n.3. These accusations are unfounded and inappropriate, whether made by Defendant or a Commissioner of the Federal Election Commission. *See id*. (citing *Statement of Chair James E. "Trey" Trainor III on the Dangers of Procedural Disfunction* [sic], Aug. 28, 2020).

its unlawful inaction on administrative complaints, leaving enforcement matters in permanent limbo. *See Statement of Chair James E. "Trey" Trainor III on the Dangers of Procedural Disfunction* [sic], Aug. 28, 2020, https://www.fec.gov/resources/cms-content/documents/Trainor_Statement_on_FEC_Procedural_Disfunction_REDACTED.pdf. (noting that Commissioners may decline to vote to defend a delay suits where they disagree on the merits of the delay); *see also* Allen Dickerson, Sean Cooksey, & James E. "Trey" Trainor, *Draft Statement of Policy Re: Closing the File at the Initial Stage In The Enforcement Process*, Apr. 1, 2021, https://www.fec.gov/resources/cms-content/documents/mtgdoc-21-21-A.pdf.

This dysfunction is also a more likely explanation for why the FEC has *yet to act* on CLC's administrative complaint, more than sixteen months after it was filed and more than 120 days after the Commission's quorum was restored. It may also explain why the FEC has never contested the default judgment or this Court's finding that the agency's failure to act on CLC's administrative complaint was contrary to law, despite the full restoration of its quorum for nearly two months before this Court's order finding the FEC had failed to conform. Thus, whatever question may exist regarding whether FEC inaction may be found contrary to law when caused by the agency's lack of a quorum, that question is plainly not implicated here.[9]

The FEC's inaction on CLC's administrative complaint is unlawful for all the reasons asserted in CLC's motion for default judgment in *CLC v. FEC*, which the FEC itself has not contested. *See* Pl.'s Mot. Default J., *CLC v. FEC*, 1:20-cv-01778-RCL (D.D.C. Sept. 17, 2020). Default judgments "safeguard plaintiffs 'when the adversary process has been halted because of

[9] As this Court noted in *CLC v. FEC*, because the FEC *was* statutorily capable of acting on CLC's administrative complaint for a substantial period while it was pending with the FEC, Order at 1 n.1, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Oct. 14, 2020), the Court need not reach the question of how, if at all, the Commission's inability to act due to a lack of quorum would affect a judicial determination of whether FEC inaction was contrary to law.

an essentially unresponsive party. In that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights.'" *Mwani v. bin Laden*, 417 F.3d 1, 7 (D.C. Cir. 2005) (quoting *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980)). This Court properly safeguarded CLC's right by finding that the absentee FEC's failure to act was contrary to law. The Court therefore has subject matter jurisdiction over this action and should reject Defendant's invitation to endorse the FEC's continued dysfunction by further delaying resolution of the merits of CLC's claim.

II. CLC Has Standing to Bring This Lawsuit.

CLC has pleaded a cognizable injury sufficient to establish Article III standing under *Akins*, and Defendant's assertions to the contrary are unsupported and unavailing. As this Court recognized in the related *CLC v. FEC* case, "the denial of access to information is a cognizable injury [for Article III purposes] when two conditions are met: First, the plaintiff credibly claims that the information sought would help voters evaluate candidates for public office, and second, on plaintiff's view of the law, [FECA] requires the information sought to be made public." Order at 2-3, *CLC v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Feb. 5, 2021) (citing *Akins*, 524 U.S. at 21 and *Campaign Legal Ctr. v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020)). Indeed, the denial of access to this information is precisely the injury "that FECA seeks to address." *Akins*, 524 U.S. at 20; *see also Campaign Legal Ctr.*, 952 F.3d at 354 ("As the Supreme Court has repeatedly declared, the electorate has an interest in knowing 'where political campaign money comes from and how it is spent by the candidate.'" (quoting *Buckley*, 424 U.S. at 66; citing *McCutcheon v. FEC*, 572 U.S. 185, 223 (2014))).

Just as this Court found in the related action, the informational injury recognized by the Supreme Court in *Akins* "is precisely the deprivation [CLC] alleges here." Order at 2-3, *CLC v.*

FEC, No. 1:20-cv-01778-RCL (D.D.C. Feb. 11, 2021). Specifically, CLC has alleged that Defendant violated FECA by failing to register as a political committee and by failing to file reports disclosing its contributions, expenditures, and debts. Compl. ¶¶ 49-52, 55-57. Further, CLC alleges that Defendant has deprived it of information to which CLC is statutorily entitled, and upon which CLC relies to carry out activities central to its mission, including providing information to voters so they can evaluate candidates and political messaging and cast informed votes on Election Day. *Id*. ¶¶ 12-13, 53, 58.

Defendant's argument that *Akins* is inapplicable when a plaintiff sues a violator directly lacks any basis in law or logic. Defendant cites Justice Thomas's concurring opinion in *Spokeo, Inc. v. Robins* for this proposition, Def.'s Mem. at 27, but the majority in that case held that where a statute confers a right to information, injuries deriving from the deprivation of that information are sufficient to confer Article III standing and plaintiffs need not allege any additional harm. *See* 136 S.Ct. 1540, 1549 (2016) (citing *Akins*, 524 U.S. at 20-25). Further, Defendant's mischaracterization of this case as a "proxy for seeking to have the FEC take action," Def.'s Mem. at 27, reflects a fundamental misunderstanding of the rights CLC seeks to vindicate. CLC's interest is not simply in enforcing the law, but rather in obtaining information to which it is statutorily entitled and on which it relies to do its work. The remedy CLC seeks here—disclosure of Defendant's campaign activities as mandated by FECA—is no less specifically tailored to that interest simply because the defendant here is a private party rather than the FEC. The Court should reject Defendant's attempt to cabin *Akins* to cases seeking judicial review of agency action.

Finally, Defendant is also wrong when it contends that FECA does not sufficiently limit who may sue to redress an informational injury. Def.'s Mem. at 27. Defendant offers no support for the supposed requirement that private rights of action must be cabined by "specific and exacting

requirements for who may sue." *Id.* at 26. And although Defendant cherry picks two statutory private rights of action that it believes have more "specific and exacting" standards than FECA, it ignores the fact that section 30109(a)(8)(C) is just as specific as numerous other private rights of action created by Congress. *See infra* pp. 19. More fundamentally, Defendant's characterization of FECA's private right of action is inaccurate and ignores the rigorous statutory hurdles a plaintiff must overcome before it is entitled to bring a private action. Under FECA, a person asserting an informational injury cannot prosecute a case directly against a violator without first filing a written administrative complaint, allowing a statutorily prescribed amount of time to pass, filing an action against the FEC in federal court, proving that the FEC's failure to act is contrary to law, and allowing the FEC a judicially mandated amount of time to conform. Defendant offers no explanation why a plaintiff who meets these specific and exacting requirements should nonetheless be barred from obtaining relief.

"The law is settled that a denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Campaign Legal Ctr.*, 952 F.3d at 354. The Court should deny Defendant's Motion to Dismiss the Complaint for lack of standing.

III. The Federal Election Campaign Act's Private Right of Action is Constitutional.

Defendant next attacks the constitutionality of FECA's forty-year-old private right of action, arguing that it is vague, violates the Take Care Clause, and infringes on the First Amendment. Def.'s Mem. at 4. Defendant purports to challenge the statute on its face and as applied, but its arguments misconstrue the relevant constitutional standards and fail to identify any constitutional defect in the law.

As an initial matter, Defendant's request for facial invalidation of the statute fails to clear the high hurdle set for facial relief. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act could be valid."). Defendant does not even attempt to show that there is "no set of circumstances" under which FECA's private right of action would be valid; it presents arguments only of how the statute has affected Defendant. Consequently, its generalized claim for facial relief must fail.

Defendant's as-applied challenge likewise fails on the merits. FECA's private right of action is clear and unambiguous, not vague. Its empowerment of administrative complainants to pursue civil enforcement of the law in certain, limited circumstances, such as those that exist here, is neither unconstitutional nor novel. And the provision promotes, rather than harms, First Amendment interests.

A. FECA's private right of action is not vague.

First, Defendant claims that FECA's private right of action is void for vagueness, arguing that it "provides virtually no framework for how the private right of action is supposed to work." Def.'s Mem. at 19. This argument is frivolous, as it misapplies vagueness doctrine.

A statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). The constitutional concern underlying the doctrine is statutes that are "unclear as to what fact must be proved." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Vagueness is not about a need for "perfect clarity and precise guidance . . . even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989); *see also Grayned v. City of*

Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."); *United States v. Thomas*, 864 F.2d 188, 195 (D.C. Cir. 1988) (regulations "cannot, in reason, define proscribed behavior exhaustively or with consummate precision").

Defendant fails to identify any ambiguity in FECA's private right of action. Instead, what Defendant claims to be problems of constitutional vagueness are nothing more than routine procedural questions, *see, e.g.*, Def's Mem. at 19 (asking "what discovery is available to the plaintiff" and "what protections are available . . . to protect confidential information"), and gaps typical of succinct statutes, *see, e.g., id.* at 20 (questioning "[w]hat the court should do with [particular documents] available during the administrative compliant process"). These questions are easily addressed by reference to the Federal Rules of Civil Procedure and the Local Rules of this Court, *see* Fed. R. Civ. P. 1. ("These rules govern the procedure in all civil actions and proceedings in the United States district courts [and] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."); *see also* Fed. R. Civ. P. 26; LCvR 26.2, and the discretion and case management of this Court.

Defendant also raises concerns about would happen if "the FEC votes to close the matter," or "votes to find a violation and [] brings its own case against the defendant" and, if the latter, "[w]hat happens if the FEC's decision to enforce is based on a different rationale from the private plaintiff's action." Def.'s Mem. at 20. These hypothetical concerns are entirely speculative here, where the FEC has failed to act on the underlying administrative matter. *See supra* pp. 5-7. But even if any of these events were to occur, Defendant would be free to bring such developments to the Court's attention at that time. To be sure, untimely action by the FEC would not convert this

section 30109(a)(8)(C) lawsuit against Iowa Values into an administrative review case under section 30109(a)(8)(A). But the Court would still be free to consider the potential relevance of any action or decision by the FEC in making its *independent* determination regarding whether Defendant violated FECA.

Defendant's only other basis for claiming the statute is unconstitutionally vague—that FECA's private right of action is less specific than the False Claim Act's private right of action, *see* Def.'s Mem. at 20—is equally unpersuasive. First, it ignores the fact that FECA imposes a substantial number of prerequisites that a plaintiff must satisfy before it is entitled to avail itself of the private right of action. *See supra* p. 16 (describing conditions necessary to bring private action under § 30109(a)(8)(C)). Furthermore, FECA's private right of action is just as specific as any number of congressionally created private rights of action, including 42 U.S.C. § 1983 and rights of action under the Voting Rights Act, *see* 52 U.S.C. § 20510(b), the Americans with Disabilities Act, *see* 42 U.S.C. § 12188(a), the Fair Housing Act, *see* 42 U.S.C. § 3613(a), the Racketeer Influenced and Corrupt Organizations Act, *see* 18 U.S.C. § 1964(c), and numerous environmental statutes—not to mention the implied private right of action under Title IX, *see Barnes v. Gorman*, 536 U.S. 181, 185 (2002). None of these statutes delineate specific procedures beyond the right to sue, yet none of them is unconstitutionally vague.[10] FECA's private right of action is equally constitutional.

B. FECA's private right of action does not violate the Take Care Clause.

Second, Defendant erroneously argues that the private right of action violates the Take Care Clause, which vests executive power in the President to "take Care that the laws be faithfully

[10] Instead, these statutes, like FECA's private right of action, require a plaintiff to prove standing. That is how they protect against vague, generalized claims.

executed." U.S. Const. art. II, § 2. Defendant posits that "FECA is nothing, if not a statute creating public, not private rights," and that by giving citizens a right to sue after the FEC has failed to act, the private right of action infringes on the Executive's prosecutorial discretion, vested in the FEC. Def.'s Mem. at 21-22. But this argument rests on a misunderstanding of both the statute and the nature of this action.

The private right of action is not about the vindication of public rights. It allows one private party to sue another private party to remedy a violation of law that has caused the plaintiff injury, in the limited circumstances when the FEC's failure to act on a complaint, or its dismissal of that complaint, is "contrary to law." 52 U.S.C. § 30109(a)(8)(C); *see also Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (noting that "private actors suing other private actors" is "traditional grist for the judicial mill"). The plaintiff is not a stand-in for the FEC, and the mere fact that both a government agency and a private party may litigate an alleged violation does not make it so. *See* 52 U.S.C. § 30109(a)(8)(C) ("the complainant may bring, *in the name of such complainant*, a civil action to remedy the violation involved in the original complaint") (emphasis added). Thus, CLC is suing in its own name to redress its own individualized harm caused by Defendant's violation of FECA.

Indeed, the very fact that CLC alleges an individualized injury—as it must for Article III standing, *see supra* pp. 14-16—confirms that CLC is not suing to vindicate public rights, as a party "pursuing legal process on its own behalf to prevent a legally cognizable injury to itself . . . is not endeavoring to 'take care that the laws be faithfully executed' or [to] vindicate a general public interest in the proper administration of law." *U.S. House of Representatives v. U.S. Dep't of Com.*, 11 F. Supp. 2d 76, 96 (D.D.C. 1998); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 129 (1998) (O'Connor, J., concurring) (explaining that "[i]t is hard to see . . . how [an

environmental statute's] citizen-suit provision impinges on the power of the Executive" where the private litigant had standing to sue); *Arpaio v. Obama*, 797 F.3d 11, 31 (D.C. Cir. 2015) (Brown, J., concurring) ("By prohibiting abstract, general claims, the [standing] doctrine aims to ensure that the President's 'most important constitutional duty, to "take Care that the Laws be faithfully executed"' is not transferred to the courts.").[11]

Defendant also fails even to acknowledge that a court in this District has already addressed the issue of prosecutorial discretion as it relates to FECA's private right of action. The court in *CREW v. AAN* denied the defendant's motion to dismiss a complaint brought under the same provision at issue here, after the FEC dismissed the plaintiff's administrative complaint and the court found that dismissal contrary to law. *See* 410 F. Supp. 3d. at 6. The court upheld the private right of action under the Take Care Clause, stating emphatically: "'[c]ontrary to law' dismissals simply do not implicate prosecutorial discretion." *Id.* at 26. There is no reason that "contrary to law" inaction should be any different. Indeed, "prosecutorial discretion does not grant the Executive Branch authority . . . to disobey a court order finding agency [inaction] 'contrary to law.'" *Id.*

Finally, despite Defendant's best efforts to paint FECA's private right of action as novel, Congress's empowerment of administrative complainants to pursue civil enforcement of the law

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[11] Conceding later that "CLC may face an informational harm," Defendant insists that "that is still a public right" because "everyone will be able to see Iowa Value's registration and disclosure reports if the FEC were to determine that it is a political committee." Def.'s Mem. at 21. This is a non sequitur, as it does not follow that public disclosure of Iowa Values' information—which would occur only after a determination of its status as a political committee—somehow transforms CLC's individualized injury into a public right. If it did, no party would ever have standing to assert an informational injury based on violation of a public disclosure law. Indeed, the Supreme Court in *Akins* specifically recognized that the fact that the informational injury alleged in a case like this is "widely shared" does not deprive an individual plaintiff of its own informational injury for Article III purposes. 524 U.S. at 24-25.

in certain, limited circumstances is not unique. "Enforcement by private attorneys general has become a feature of many modern legislative programs." *Spann*, 899 F.2d at 30; *see also CREW v. AAN*, 410 F. Supp. 3d at 27-28 (citing private rights of action under the Fair Housing Act, the Clayton Act, the Racketeer Influenced and Corrupt Organizations Act, numerous environmental statutes, and *qui tam* litigation under the False Claims Act).[12] Thus, by arguing that FECA's private right of action is unconstitutional *because* it allows a private litigant to sue an alleged statutory violator directly, Defendant calls into question the constitutionality of numerous other "long-established" private rights of action. *See CREW*, 410 F. Supp. 3d at 28. As the court in *CREW* recognized, "[t]hat simply cannot be right." *Id.*

Defendant's second argument thus fails because CLC does not ask to wield any power of government. It seeks only the right to pursue this action in its own name against another private party to remedy a violation of federal law that has caused CLC injury—"traditional grist for the judicial mill." *Spann*, 899 F.2d at 30.

C. FECA's private right of action advances First Amendment interests and does not silence political speech.

Defendant's final constitutional claim is that FECA's private right of action "allows private litigants to trample on First Amendment rights" and "to use the judicial process to silence political speech." Def.'s Mem. at 22, 24. Not only are these claims untrue, they fail to appreciate that the private right of action actually *promotes* critical First Amendment interests by ensuring that FEC inaction does not hinder public access to information necessary to "'make informed choices in the

[12] Defendant attempts to distinguish these other private rights of action by claiming that they, unlike section 30109(a)(8)(C), "generally involve specific damages to the plaintiff." Def.'s Mem. at 21. This too is a non sequitur, as the specificity of the remedy prescribed does not determine whether a citizen has a constitutional right to sue in the first place. What matters is that CLC has demonstrated an individualized injury sufficient for standing. *See supra* pp. 14-16.

political marketplace.'" *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 197 (2003)).

First, Defendant claims that allowing CLC to proceed with this suit would result in discovery that "would afford Plaintiff an unprecedented opportunity to learn immense amounts of information about people's constitutionally protected private associational interests and Iowa Values' . . . mission." Def.'s Mem. at 24. But Defendant's hypothesized injuries are speculative and amount to little more than a generalized claim that discovery may lead to disclosure of sensitive information to the other side. That may be cause for case management, but not for finding the private right of action unconstitutional. *Cf. Hispanic Leadership Fund, Inc. v. Walsh*, No. 1:12-CV-1337 (MAD/TWD), 2014 WL 12586844, at *4-5 (N.D.N.Y. June 9, 2014) (rejecting claim to First Amendment exemption from civil discovery in constitutional challenge to state campaign finance law and concluding that any purported harm may be addressed by making disclosures pursuant to confidentiality and protective order previously issued in case).

Importantly, the various protections offered to respondents by FECA's enforcement process under section 30109(a) have near exact analogues under the Federal Rules. *Compare* 52 U.S.C. § 30109(a) *with* Fed. R. Civ. P. 3; 4; 12, 12(b)(6); 16(b); 26(f); 56. The only significant difference is that FECA affords a respondent the option of maintaining the confidentiality of the FEC proceeding during the course of an administrative investigation. *See* 52 U.S.C. § 30109(a)(12)(A) (prohibiting publication of any "notification or investigation" made under section 30109 without respondent's written consent). Even in an administrative proceeding, however, complainants may make their allegations against administrative respondents available to the public. And, to the extent Defendant here could demonstrate a legitimate need for confidentiality, federal courts are well versed in managing discovery and have myriad procedures

for protecting sensitive information and the privacy of both litigants and third parties, including protective orders, sealed filings, and other special procedures for filing documents containing highly sensitive information, and *in camera* review of potentially confidential materials. The potential need to employ routine case management procedures is not a basis for finding FECA's private right of action unconstitutional.

To the extent that Defendant's argument depends on its discomfort with disclosure more broadly, *see* Def.'s Mem. at 24, it disregards the First Amendment interests that political transparency requirements advance and protect. As the Supreme Court has explained, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices [in elections] is essential." *Buckley*, 424 U.S. at 14-15. Because our system of democracy is premised on "enlightened self-government," *Citizens United*, 558 U.S. at 339, disclosure laws directly serve the democratic values that animate the First Amendment—"secur[ing] the widest possible dissemination of information from diverse and antagonistic sources" and facilitating "uninhibited, robust, and wide-open" public debate on political issues. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 270 (1964). In this way, disclosure promotes meaningful participation in the political process and ensures that elected officials remain accountable to the people—bedrock principles in our democracy. *See Citizens United*, 558 U.S. at 339 ("[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it"). The private right of action is a vital mechanism to ensure that this First Amendment interest—access to information about who is spending money to

influence federal elections—may still be protected, even when the FEC unlawfully fails to enforce campaign finance rules.[13]

Second, Defendant alleges that FECA's private right of action "opens the country up to the threat of elections by lawsuit" and creates "a means by which duly appointed and confirmed Officers may circumvent their Article II responsibilities" by "delay[ing] action and refus[ing] to defend its inaction." Def.'s Mem. at 25 (citing *Statement of Vice Chair Ellen L. Weintraub Regarding* CREW v. FEC & American Action Network, Apr. 19, 2018, https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf). Here again, Defendant misses the mark. The filing of this lawsuit is not a perversion of the law but rather proof that the private right of action is functioning exactly as Congress intended.

The private right of action is an integral part of FECA designed to provide a release valve when paralysis afflicts the FEC—a six-member bipartisan agency prone, by design, to gridlock. *See CREW v. AAN*, 410 F. Supp. 3d at 6. The provision ensures that FEC complainants retain a mechanism to vindicate their rights, even when the FEC declines, fails, or is unable to do so. Without it, the law might not be enforced at all.[14]

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[13] Importantly, in the context of upholding FECA's disclosure requirements, the Supreme Court has recognized the availability of a narrow, as-applied exemption where a group demonstrates a reasonable probability that disclosure would result in "threats, harassment, or reprisals." *Citizens United*, 558 U.S. at 370. But Defendant's anticipatory concerns about the possibility that its donors may be deposed or required to produce documents, *see* Def.'s Mem. at 24, falls far short of the evidence proffered in other cases where parties have unsuccessfully attempted to invoke that exemption. *See, e.g.*, *John Doe No. 1 v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wash. 2011); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

[14] Commissioner Weintraub explained the private right of action as a "[b]reak glass in case of emergency" provision—necessary, in the face of FEC inaction, to the meaningful enforcement of campaign finance laws. *See Statement of Vice Chair Ellen L. Weintraub Regarding* CREW v. FEC & American Action Network.

So here, where this Court has already found the FEC's failure to act was "contrary to law," CLC is using the only other congressionally prescribed avenue available to seek redress for its informational injury. It is entirely within its right to do so, just as commissioners of the FEC are within their right—their duty even—to ensure that the laws they are responsible for upholding are actually enforced. This includes ensuring that FECA's private right of action functions as intended.

In sum, all three of Defendant's constitutional claims lack merit. FECA's private right of action is not vague, does not violate the Take Care Clause, and advances rather than undermines the First Amendment rights of all Americans, "increasing, not limiting, the flow of information. The [F]irst [A]mendment profits from this sort of governmental activity." *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 278 (D.C. Cir. 1975).

IV. CLC's Complaint States a Claim to Relief.

Defendant's alternative argument that CLC's Complaint fails to state a claim for relief misapplies Federal Rule of Civil Procedure 12(b)(6), and improperly asks the Court to construe CLC's allegations in Defendant's favor rather than in the light most favorable to CLC, as is required. But CLC has satisfied the pleading requirements of Rule 12(b)(6) by establishing a "plausible claim" that Defendant qualified as a federal political committee and, consequently, that it violated FECA by failing to register and file reports as required by the statute.

A. Defendant misapplies Rule 12(b)(6).

In moving to dismiss CLC's Complaint for failure to state a claim, Defendant misapplies Rule 12(b)(6) in at least two critical ways. First, Defendant wrongly argues that CLC must support its Complaint with "proof," Def.'s Mem. at 32, at this stage of the case. But Rule 12(b)(6) merely requires a plaintiff to "'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Here, CLC has established "a plausible claim" by pleading

"factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678-79.

Second, Defendant's Rule 12(b)(6) motion improperly relies on Defendant's own self-serving characterizations of the facts at issue. For example, Defendant contends that its Google and Facebook advertisements were "classic examples of issue advocacy." Def.'s Mem. at 34. But the only "issue" referenced in many of those ads was Senator Ernst's qualifications as a "leader." *See, e.g.*, Compl. ¶¶ 27-28; *see also supra* pp. 3-4. Similarly, Defendant urges the Court to dismiss its repeated admissions of its electoral purpose in strategy and fundraising materials as mere "passing remarks." Def.'s Mem. at 35 n.12. But under Rule 12(b)(6), CLC's Complaint "must be construed in the light most favorable to the *plaintiff* and 'the court must assume the truth of all well-pleaded allegations.'" *Demery v. Montgomery Cnty.*, 602 F. Supp. 2d 206, 212 (D.D.C. 2009) (quoting *Warren v. Dist. of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004) (emphasis added)). CLC is entitled to "'the benefit of all reasonable inferences that can be derived from the facts alleged.'" *CREW v. AAN*, 410 F. Supp. 3d at 12 (quoting *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006)). It is certainly reasonable to infer that Defendant meant what it said.

B. CLC's Complaint adequately alleges that Defendant violated FECA's requirements for political committees.

FECA defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A). The Supreme Court has narrowly construed the Act's definition of "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79; *see also*

McConnell, 540 U.S. at 170 n.64; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*").

Federal law thus establishes a two-prong test to determine political committee status: (1) whether an organization's "major purpose" is the "nomination or election of a candidate," *Buckley*, 424 U.S. at 79; and (2) whether the organization has received "contributions" or made "expenditures" exceeding $1,000 in a calendar year, 52 U.S.C. § 30101(4)(A); *see also supra* note 4 (setting out FECA's definitions of "contribution" and "expenditure"). An organization that qualifies as a political committee under this standard must submit a statement of organization to the FEC, 52 U.S.C. § 30103, 11 C.F.R. § 102.1(d); comply with FECA's organizational and recordkeeping requirements, *see* 52 U.S.C. § 30102; 11 C.F.R. §§ 102.7, 102.9; and file periodic reports with the FEC disclosing its contributions and expenditures, among other information. 52 U.S.C. § 30104; 11 C.F.R. §§ 104.1, 104.3-104.5, 104.8, 104.9, 104.11-13.

Here, CLC has adequately alleged that by the summer of 2019, Defendant had the "major purpose" of reelecting Senator Joni Ernst, a federal candidate, and had received "contributions" or made "expenditures" of more than $1,000. In other words, CLC has stated a "plausible claim" that Defendant met both prongs of the test for federal political committee status and therefore violated FECA by failing to register and report as a political committee. Defendant's Rule 12(b)(6) motion should be denied.

1. The Complaint alleges that Defendant's "major purpose" was reelecting Senator Joni Ernst.

CLC has adequately alleged that, by summer 2019, Defendant's "major purpose" was to help reelect Senator Ernst. The FEC has explained that determining a particular organization's major purpose entails a "case-by-case analysis of [the] organization's conduct." *Supplemental Explanation & Justification on Political Committee Status*, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

As Defendant correctly observes, determination of its major purpose "is factually intense and involves an examination of how Iowa Values solicited its funding, how it spent its funds, what it did and how much it did in areas not involving candidates, and its overall strategy and goals." Def.'s Mem. at 22. In other words, determining Defendant's major purpose is a particularly *inappropriate* question to resolve at the motion-to-dismiss stage.

In addition to Defendant's fundraising and spending for federal campaign activity, Defendant's own characterizations of its purpose and activities in its public statements, communications with supporters, and fundraising appeals are relevant to identifying its major purpose. *See* FEC Advisory Op. 2006-20, at 4-5 (Unity 08); *Supplemental Explanation & Justification on Political Committee Status*, 72 Fed. Reg. at 5601. In support of CLC's allegations, the Complaint discusses and incorporates by reference a number of Defendant's communications and internal documents in which Defendant described its strategy and stated its objective to help Senator Ernst win reelection in 2020. Specifically, the Complaint cites and incorporates Defendant's June 27, 2019 press release announcing the start of a "six-month voter education and data collection blitz" and "six-figure[]" advertising campaign in Iowa, which the press release noted was "just the beginning of an election-long effort by Iowa Values to highlight the work of Sen. Joni Ernst." Compl. ¶ 26 & n.3 (describing and providing link to Defendant's June 27, 2019 press release, https://mailchi.mp/7abf732cf9ed/releaseconservative-organization-begins-voter-outreach?e=%5bUNIQID). The Complaint also cites and incorporates a 2019 strategy memo in which Defendant declared that its "mission" and "focus" were "to shore up" *support for Senator Ernst among Iowa voters* who "represent the 'firewall' between *winning and losing in 2020 for Senator Ernst*." *Id.* ¶¶ 30, 34-35 (emphases added; citing strategy memo produced by Defendant).

As alleged in the Complaint, Defendant's strategy memo described a comprehensive plan of action to "identify and communicate directly with specific segments of the *electorate* that will be determinate in *winning or losing in 2020*," including by targeting pro-Ernst messaging to suburban, college-educated women, whom Defendant identified as "an irreplaceable part of a *winning coalition*" for Senator Ernst in 2020. *Id.* ¶¶ 34-35 (emphases added). Defendant's strategy memo concluded by stating, "We believe that there is critical work with segments of the *electorate* that must begin now in 2019 *so that Senator Ernst has the best possible jumping off point in 2020*." *Id.* ¶ 36 (emphases added).

As further alleged in the Complaint, this strategy memo was attached to a fundraising email sent by Claire Holloway Avella—*a registered fundraiser for Senator Ernst's campaign committee*—to prospective Iowa Values donors in July 2019. *Id.* ¶¶ 32-33. The fundraising email, which is cited and incorporated by reference in the Complaint, solicited a $50,000 contribution "on behalf of Iowa Values" to advance its "purpose" of "push[ing] back" against "negative attacks" on Senator Ernst. *Id.*

Rather than identify any defect in CLC's allegations, Defendant attempts to minimize the significance of these revealing statements, in which Defendant announced, and sought to raise money to advance, its goal of helping to reelect Senator Ernst. Def.'s Mem. at 35 n.12, 36. In particular, Defendant urges the Court to disregard its admissions as "passing remarks." *Id.* at 35 n.12. But under Rule 12(b)(6), it is CLC's allegations, not Defendant's self-serving, post-hoc characterizations, that must be "accepted as true." *Iqbal*, 556 U.S. at 678.

Further, Defendant misconstrues the Supreme Court's decision in *MCFL*. That decision does not require this Court to treat Defendant's statements as a less "significant factor" in determining Defendant's major purpose. Def.'s Mem. at 36. In *MCFL*, the Supreme Court held

that an organization whose stated purpose was promoting and defending "the right to life" could nevertheless have the major purpose of engaging in campaign activity if the organization's "independent spending bec[a]me so extensive." 479 US. at 262. But neither *MCFL* nor any other decision Defendant cites holds that an organization's explicit admission that its purpose is to elect a federal candidate should be treated as a less "significant factor" in the major purpose analysis.

Nor does the Supreme Court's observation in *MCFL* that "discussion of issues and candidates . . . may often dissolve in practical application" support Defendant's attempt to recast its explicit statements about its goal of reelecting Senator Ernst as "issue advocacy." Def.'s Mem. at 35 n.12. Defendant's interpretation of that language is backwards. While the Supreme Court has recognized that a discussion of policy issues in the context of an election campaign may blur the distinction between issue and candidate advocacy, it has never held that a group's explicit admissions that its purpose is supporting a specific candidate should be considered "issue advocacy" simply because candidates often are "intimately tied to public issues." *Compare* Def.'s Mem. at 35 n.12, *with, e.g.*, *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 188 (D.D.C. 2016) (three-judge court) (explaining that "it takes little imagination to envision the electoral impact that could arise *from linking candidates with proposed legislation*") (emphasis added); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) (observing that it "blinks reality" to conclude that certain ads discussing candidates and issues "were not designed to influence the election or defeat of a particular candidate in an ongoing race").

In sum, Defendant's own statements in its strategy and fundraising documents are more than sufficient to establish a plausible claim that Iowa Values had the major purpose of reelecting Senator Ernst.

2. The Complaint alleges that Defendant received "contributions" or made "expenditures" in excess of $1,000 in 2019.

The allegations in CLC's Complaint also satisfy Rule 12(b)(6)'s pleading requirements to meet the statutory definition of "political committee," *i.e.*, that Defendant received contributions or made expenditures in excess of $1,000 in 2019. *See* 52 U.S.C. § 30101(4)(A). In fact, CLC has alleged that Defendant both received contributions *and* made expenditures in excess of $1,000 in 2019. Specifically, CLC's Complaint alleges that Defendant raised and spent thousands of dollars in 2019 on ads that targeted Iowa voters and championed Joni Ernst's "values" and abilities as a "leader," further indicating that Defendant's major purpose was reelecting Senator Ernst. Compl. ¶¶ 27-31.

As explained above, *see supra* pp. 3-4, 29-30, the Complaint cites and incorporates an email from a fundraiser for Senator Ernst's campaign soliciting a $50,000 contribution "on behalf of Iowa Values" to advance Defendant's "purpose" of "push[ing] back" against "negative attacks" on Senator Ernst. *See* Compl. ¶ 32 & n.18. As alleged in the Complaint, the email attached Defendant's 2019 strategy memo, which identified Defendant's "mission" as targeting pro-Ernst communications to "specific segments of [Iowa's] electorate that will be determinant in winning or losing in 2020." *Id.* ¶¶ 34-35.

The Complaint alleges that Defendant's email solicited contributions for the purpose of reelecting Senator Ernst in 2020, including funds used to pay for Defendant's "six-figure[]" digital ad campaign and voter outreach "blitz" in 2019. *Id*. ¶ 38. The close proximity of this fundraising appeal to Defendant's digital advertising campaign over the summer of 2019, during which it spent thousands of dollars on ads promoting Senator Ernst as a "leader," strongly suggests that Defendant raised more than $1,000 in FECA-regulated contributions in response to the solicitation.

Courts have held that when a fundraising appeal "leaves no doubt that the funds contributed" will be used to advocate for a federal candidate, the solicitation and any money received as a result are regulated under FECA. *See FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995). Likewise, requests for funds "clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office" are solicitations under the Act. *Id.*; *cf. Free Speech v. FEC*, 720 F.3d 788, 796 (10th Cir. 2013) (citing solicitation standard from *Survival Educ. Fund, Inc.* and rejecting argument that the standard is unconstitutionally vague).[15]

Here, the contents of Defendant's solicitation and the attached strategy memo, which were both circulated to prospective donors just days after Defendant publicly announced the launch of its "election-long effort . . . to highlight the work of Sen. Joni Ernst," Compl. ¶ 26, are more than adequate to state a plausible claim that Defendant solicited more than $1,000 in contributions. And Defendant's spending of more than $1,000 on ads promoting Senator Ernst, *see infra* p. 34, supports a "reasonable inference" that Iowa Values did receive more than $1,000 in contributions in response to that solicitation. *See Iqbal*, 556 U.S. at 678-79. These allegations alone are sufficient to satisfy the statutory test for federal political committee status. 52 U.S.C. § 30101(4)(A).

CLC's Complaint also alleges that Defendant made expenditures aggregating more than $1,000 in 2019. Specifically, the Complaint cites and incorporates publicly available information documenting thousands of dollars that Defendant spent on Google and Facebook ads in 2019, at least a dozen of which focused exclusively on Joni Ernst's qualities as a "leader" and included no meaningful discussion of policy or legislative issues. Compl. ¶¶ 27-31 & nn.7-15 (describing ads

[15] *See also* Stip. for Entry of Consent Judgment, *FEC v. Club for Growth, Inc.*, No. 1:05-cv-01851-RMU (D.D.C. Aug. 22, 2007), https://www.fec.gov/files/legal/murs/5365/000061CA.pdf (applying standard from *Survival Education Fund, Inc.* to fundraising communications).

and providing links to Google and Facebook digital ad libraries, which archive copies of these advertisements); *see also supra* pp. 3-4. For example, the Complaint alleges that Defendant spent more than $1,000 on one widely distributed ad on Google's network, which declared, "We Deserve Leaders Who Share Our Values Like JONI ERNST." Compl. ¶ 27 & n.7 (describing ad and citing Google Transparency Report). The Complaint alleges that Defendant spent between $3,000 and $3,500 on another advertisement, distributed on Facebook, in which it advocated, "We deserve leaders who have walked in our shoes and share these beliefs—like Joni Ernst. Standing up for Iowans all across our state and fighting for what we believe in." *Id.* ¶ 28 & n.11 (describing ad and providing link to file in Facebook Ad Library).

Defendant dismisses these advertisements for their lack of "magic words" of express advocacy, Def.'s Mem. at 34, but ignores FEC regulations that define "express advocacy" to include ads like Defendant's, which lack "magic words" like "vote for" but nevertheless could only be interpreted by a reasonable person as advocating Senator Ernst's reelection. *See* 11 C.F.R. § 100.22(b). Given the ads' unambiguous promotion of Joni Ernst's "character, qualifications, [and] fitness for office," and their explicit advocacy that viewers "deserve" a "leader" like Ernst, the Complaint has more than plausibly alleged that these advertisements are "susceptible of no reasonable interpretation other than as an appeal to vote for" Ernst in 2020. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007); *see* 11 C.F.R. § 100.22(b) (defining "expressly advocating" to include a communication about which "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."). Defendant's attempt to portray these ads as "classic examples of issue advocacy," Def.'s Mem. at 37, is belied by the actual content of the ads, which focus entirely on Joni Ernst's leadership qualifications. But even if the Court finds the ads to be

ambiguous, on this Rule 12(b)(6) motion, CLC, *not Defendant*, is entitled to the benefit of every reasonable inference that may be derived from the facts alleged.

CLC has sufficiently stated a plausible claim that Defendant satisfied the test for federal political committee status in 2019, and Defendant's failure to register and report as a political committee is not in dispute. The Court should therefore deny Defendant's motion to dismiss under Rule 12(b)(6).

V. Defendant's Request to Strike Portions of the Complaint Should Be Rejected.

A. Defendant's continued undisclosed campaign spending during the run-up to the 2020 election is neither immaterial nor irrelevant to the proper remedy for its FECA violations.

The Court should reject Defendant's request to strike references to Defendant's campaign spending during the run-up to the 2020 election from Plaintiff's Complaint. Once an organization qualifies as a political committee under FECA, its statutory obligation to disclose its receipts and disbursements is ongoing until the group terminates its PAC status. Here, CLC has alleged that Defendant qualified as a political committee in the summer of 2019. But Defendant never registered with the FEC, and it has, of course, never terminated its status as a political committee. Although this Court's jurisdiction to determine Defendant's *liability* may be limited to the claims CLC alleged in its original administrative complaint, even Defendant does not contest the relevance of that spending to the Court's determination of an appropriate *remedy*. *See* Def.'s Mem. at 29 (arguing that allegations regarding Iowa Values's spending on ads promoting Senator Ernst in 2020 is "entirely irrelevant to whether Defendant *is liable* for failing to register and report as a 'political committee'") (emphasis added). As another court in this District recognized in a similar private action under FECA, where the plaintiff's "alleged injury is the lack of information that FECA requires political committees to disclose, and political committees must disclose that

information in perpetuity until they take certain steps to terminate that status," and where the defendant "has not taken those steps," making the plaintiff "'whole' might well require ordering [the defendant] to disclose everything it would have had to disclose had it complied with the law in the first instance." *CREW v. AAN*, 410 F. Supp. at 21; *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975) (explaining that an appropriate remedy should place injured party "as near as may be, in the situation [it] would have occupied if the wrong had not been committed"). Thus, "[i]f the facts . . . establish a registration violation during the period covered by [CLC's] original complaint, [Iowa Values's] subsequent disclosure obligations could be implicated as a matter of remedy." *CREW v. AAN*, 410 F. Supp. 3d at 21.

Indeed, as the court recognized in *CREW v. AAN*, FECA "permits this suit to 'remedy the violation involved in the original complaint,' . . . [a]nd Congress has conferred upon the courts broad equitable powers to remedy FECA violations.'" *Id.* (citing 52 U.S.C. § 30109(a)(8)(C); *FEC v. Craig for U.S. Senate*, 816 F.3d 829, 847 (D.C. Cir. 2016)). "Congress's broad grant of equitable powers in this context" permits consideration of Defendant spending at least $156,900 on ads promoting Senator Ernst during the run-up to the 2020 election "in crafting an appropriate remedy to ensure that [CLC] is placed as closely as possible in the position it would have been in had [Iowa Values] complied with FECA in the first instance." *CREW v. AAN*, 410 F. Supp. 3d at 22.

Defendant's argument that this Court must ignore its extensive pre-election spending on campaign ads would yield an "odd" situation in which Congress established "a potentially time-intensive process, including judicial review of an agency dismissal, before the citizen-suit provision can be invoked, . . . mandated periodic reporting requirements for political committees, created a time-intensive direct-suit mechanism to remedy FECA violations . . . , but then declined to permit courts to consider any attendant legal violations post-dating a complaint when crafting a

remedy." *Id.* The Court should deny Defendant's motion to strike paragraphs 40, 40.a, 40.b, and 41 of the Complaint.

B. Defendant's request to strike CLC's claim for attorneys' fees is premature.

CLC has properly preserved its right to seek attorneys' fees by including a claim for fees in its Complaint. Defendant's motion to strike that request at this preliminary stage is premature and unnecessary to deciding its motion for dismissal. *See CREW v. AAN*, 410 F. Supp. 3d at 30 n.11 (rejecting motion to strike demand for attorneys' fees at the motion-to-dismiss stage because the issue of fees is "not ripe" and the parties had not yet briefed "potential sources of fee-shifting authority").

Defendant's request to strike is also improper at this stage because it cannot demonstrate the absence of any set of circumstances in which this Court could award fees in the course of this litigation, whether as a result of the Court's inherent equitable powers, *see, e.g.*, *Nat'l Ass'n of Letter Carriers, AFL-CIO v. U.S. Postal Serv.*, 590 F.2d 1171, 1176 (D.C. Cir. 1978), or other federal statutes, including 52 U.S.C. § 10310 (authorizing fees "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment").

The Court should deny Defendant's motion to strike CLC's request for attorneys' fees.

CONCLUSION

For the foregoing reasons Defendant's Motion to Dismiss and Strike Portions of CLC's Complaint should be denied.

Dated: April 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2021, I caused the foregoing to be served on all counsel of record via the Court's CM/ECF system.

/s/ Richard A. Graham
Richard A. Graham

Counsel for Plaintiff Campaign Legal Center