IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 20-cv-0809-ABJ

PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT FEDERAL ELECTION COMMISSION

Plaintiff Campaign Legal Center ("CLC"), pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, respectfully moves for the entry of default judgment against Defendant Federal Election Commission ("FEC" or "Commission"). CLC brought this action on March 24, 2020, challenging Defendant's unlawful failure to act on Plaintiff's administrative complaint alleging violations of the Federal Election Campaign Act ("FECA"). Service was effected on March 25, 2020, such that the FEC's deadline to file a responsive pleading was May 26, 2020. *See* ECF No. 6. The FEC failed to appear, answer, plead, or otherwise defend this action as required by the Federal Rules of Civil Procedure, and the Clerk of Court entered a default against the FEC on May 28, 2020. *See* ECF No. 10.

For the reasons described below, entry of default judgment against the FEC is appropriate because the evidence establishes that the FEC has failed to act and that this failure to act is contrary to law. Plaintiff is therefore entitled to an order declaring that the FEC's failure to act is contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C), and directing the FEC to conform within 30

days. Plaintiff further requests that the Court assess $400 in court costs pursuant to 28 U.S.C. § 1920.

STATEMENT OF FACTS

1. On August 23, 2018, Campaign Legal Center ("CLC") filed with the FEC an administrative complaint showing that during the 2016 Presidential election cycle 45Committee, Inc. violated the Federal Election Campaign Act ("FECA") by failing to register as a political committee and failing to file reports disclosing its contributors, expenditures, and debts. *See* FEC Matter Under Review ("MUR") No. 7486 ("Admin. Complaint"), attached hereto as Exhibit 1.

2. Relying on the FEC's own records, the administrative complaint demonstrates that 45Committee reported spending $21,339,015 on independent expenditures opposing presidential candidate Hillary Clinton or supporting her opponent, Donald Trump; all of the communications were disseminated between October 4, 2016 and November 5, 2016. *Id*. ¶ 10. It additionally demonstrates that 45Committee reported spending $671,320 on electioneering communications opposing Florida U.S. Senate candidate Patrick Murphy; those communications were disseminated on October 27, 2016.11 *Id*.

3. According to 45Committee's tax returns, spending on these communications alone constituted over 48% of its spending in its 2016 tax year, which ran from April 1, 2016 to March 31, 2017, and likely constituted an even higher percentage of its spending during the 2016 calendar year. *Id.* ¶ 14-15, 27.[1]

[1] Indeed, the complaint demonstrates that 45Committee spent only $1,008,469 in the entire 2015 tax year. *Id.* ¶ 26. Even if all of that spending occurred between January 1 and March 31 of 2016, 45Committee would have spent approximately $22 million on campaign activity out of a total of approximately $42.5 million for 2016, meaning approximately 52% of its spending went to campaign activity. *Id.* ¶¶ 26-27.

4. Furthermore, the complaint demonstrates that nearly all of 45Committee's communications were disseminated in the weeks before the election and targeted voters in swing states. *Id.* ¶¶ 11, 28.

5. The administrative complaint also provides evidence that 45Committee actually spent up to $38.3 million—approximately 84% of its total expenditures—on campaign activity during 2016. *Id.* ¶ 29. Relying again on IRS records, the complaint documents 45Committee's payments to the vendors who produced or placed its independent expenditures and electioneering communications—payments that exceed the amounts reported to the FEC. *Id.*

6. The administrative complaint also documents public reporting on 45Committee as well as public statements by 45Committee's own operatives, indicating both that the entity was expressly created for the purpose of providing donors a vehicle through which they could anonymously advocate for then-candidate Donald Trump without having to suffer the "embarrassment" of associating themselves with his campaign, and that 45Committee raised money specifically earmarked for the presidential race. *Id.* ¶ 6-9.

7. Furthermore, the administrative complaint demonstrates that during the 2016 calendar year, every social media post made by 45Committee—whose name itself is a reference to the election of the 45th president—pertained to the 2016 election. *Id.* ¶ 12-13.

8. Despite its major purpose being campaign activity, 45Committee did not register as a political committee and did not file mandatory FEC reports disclosing its contributors, expenditures, debts, and obligations. *See* Committees, https://www.fec.gov/data/committees/?q=45+Committee (last visited May, 28, 2020) (search of entities registered with the FEC for "45Committee" turns up two results, one independent expenditure reporting entity and one electioneering reporting entity).

9. On August 29, 2018, the FEC sent CLC a letter acknowledging receipt of the Complaint and designating it MUR 7486. *See* Aug. 29, 2018 Letter, attached hereto as Exhibit 3.

10. CLC has not received any further communication from the FEC regarding MUR 7643. Gaber Declaration ¶ 2, attached hereto as Exhibit 2.

11. CLC waited more than 575 days for the FEC to take action on its administrative complaint before filing this action on March 24, 2020.

12. To date, more than 645 days after CLC's administrative complaint was filed, the FEC has not taken any public action with respect to MUR 7486. *See* FEC, Enforcement Query System, https://eqs.fec.gov/eqs/searcheqs (search for "MUR 7486" yields the response "No Matches Found").

13. The FEC lost a quorum of commissioners on September 1, 2019. *See* Press Release, *FEC remains open for business, despite lack of quorum*, https://www.fec.gov/updates/fec-remains-open-business-despite-lack-quorum/ (Sept. 11, 2019) (attached hereto as Exhibit 4).

14. Without a quorum, the FEC was unable to "launch any new investigations, issue any advisory opinions, promulgate any rules, or render any decisions in pending enforcement actions." *See* FEC Chair Ellen L. Weintraub, *The State of the Federal Election Commission*, https://www.fec.gov/resources/cms-content/documents/2019-11-01-State-of-the-Commission-ELW.pdf, (Nov. 1, 2019) (attached hereto as Exhibit 5); 52 U.S.C. § 30106(c).

15. On May 19, 2020 the U.S. Senate confirmed the nomination of James E. Trainor III to be a member of the Federal Election Commission, restoring a quorum to the Commission. *See* Roll Call Vote 116th Congress – 2nd Session, *On the Nomination (Confirmation: James E. Trainor III to be a Member of the Federal Election Commission)*,

https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00096 (May 19, 2020).

16. Even before the loss of a quorum, the FEC was "plagued" with "ideological obstruction." *See* Ellen L. Weintraub, *The State of the Federal Election Comm'n: 2019 End of Year Report*, at 1 (Dec. 20, 2019) (attached hereto as Exhibit 6). As a result of this obstruction, the Commission has "frequently closed matters without so much as making a phone call to investigate potential wrongdoing" and "[e]nforcement actions pending before the Commission languished for months or years . . . causing some to near their statutory limitations," only for "Commissioners to then decline to investigate at all," or for the Commission "to end up with inadequate outcomes years too late to make a meaningful difference to the public." *Id*. at 2.

17. Indeed, between 2006 and 2016, the rate at which the Commission deadlocked on substantive votes regarding enforcement matters grew from 2.6% to 30%. Office of Comm'r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Comm'n Reveals the Unlikelihood of Draining the Swamp* at 1, (Feb. 2017) (attached hereto as Exhibit 7). As a result of these deadlocks, the FEC has routinely failed to investigate serious allegations of campaign finance violations and closed matters without resolution. *Id.*

18. At this time, the FEC remains in default with respect to this lawsuit, and has not appeared, filed an answer, or otherwise defended the action. That is so even though a new Commissioner has been confirmed by the Senate.

19. Plaintiffs have incurred $400 in court costs as defined under 28 U.S.C. § 1920 in seeking this default judgment. *See* ECF No. 1 (docket text showing receipt of payment for filing fee).

LEGAL STANDARD

I. Default by the Government under Rule 55

A plaintiff may seek a default judgment in a lawsuit where the defendant fails "to plead or otherwise defend." Fed. R. Civ. P. 55(a)-(b). But, "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). Although default against the government is disfavored, Rule 55(d) does not "relieve[] the sovereign from the duty to defend cases." *Doe v. Democratic People's Republic of Korea Ministry of Foreign Affairs Jungsong-Dong*, 414 F. Supp. 3d 109, 120 (D.D.C. 2019) (citing *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d. Cir. 1994)). "In determining whether the default judgment against the government is proper, the court may accept as true the plaintiff's uncontroverted evidence," *Payne v. Barnhart*, 725 F. Supp. 2d 113, 116 (D.D.C. 2010), including evidence submitted by affidavit, *see Estate of Botvin ex rel. Ellis v. Islamic Republic of Iran*, 684 F. Supp. 2d 34, 37 (D.D.C. 2010), and public record evidence, *see Doe*, 414 F. Supp. 3d at 120; *see also*, *e.g.*, Order, *Citizens for Responsibility and Ethics in Washington v. FEC*, Case No. 1:19-cv-2753-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.").

II. Contrary to Law Standard

A Plaintiff is entitled to relief where the undisputed facts show that the FEC has acted "contrary to law" by unreasonably delaying action on the underlying complaints. 52 U.S.C. § 30109(a)(8)(c). While FECA "does not require that an [enforcement action] be completed within a specific time period," *DSCC v. FEC*, No. Civ.A. 95-0349-JHG, 1996 WL 34301203, at *1

(D.D.C. Apr. 17, 1996), it does impose "an obligation to investigate complaints expeditiously," *id.* at *4; *see also Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980) ("Where the issue before the Court is whether the agency's failure to act is contrary to law, the Court must determine whether the Commission has acted 'expeditiously.'").

In determining whether the Commission has acted "expeditiously," the court may look to "the credibility of the allegation, the nature of the threat posed, the resources available to the agency and the information available to it, as well as the novelty of the issues involved." *Common Cause,* 489 F. Supp. at 744. In addition, the court may consider the factors outlined in *Telecomm. Research & Action Ctr. v. F.C.C.*:

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

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

Although the Commission's decision whether or not to investigate "is entitled to considerable deference, the failure to act in making such a determination is not." *DSCC*, 1996 WL 34301203, at *4.

ARGUMENT

Under the *Common Cause* and *TRAC* factors, the undisputed evidence demonstrates that the Commission has unlawfully failed to act on Plaintiff's administrative complaint. As such, Plaintiff is entitled to a default judgment against the Commission pursuant to Rule 55.

I. Plaintiff's Administrative Complaint States Credible Allegations that 45Committee Violated FECA.

Plaintiff's administrative complaint provides substantial evidence that 45Committee's major purpose was campaign activity, and thus its failure to register as a political committee and to file reports disclosing its contributors, expenditures, and debts violated FECA. *See* Ex. 1. FEC complaints are credible where they contain "specific documentation of the amounts spent and the purposes of the spending," along with specific evidence as to the violations alleged. *Citizens for Percy '84 v. FEC*, Civ. A No. 84-2653, 1984 WL 6601, at *4 (D.D.C. Nov. 19, 1984). Plaintiff's complaint specifically documents the amounts 45Committee spent on independent expenditures and electioneering communications, as well as additional amounts spent on media consultants connected to those communications, and provided specific evidence related to the timing of those communications, 45Committee's purpose as publically reported and as acknowledged by its operatives, and as demonstrated by its public statement. *See* Ex. 1 ¶¶ 6-15, 27-29. This evidence demonstrates that 45Committee's major purpose was campaign activity, and thus it constitutes a political committee under the standard established by 52 U.S.C. § 30101(4) and *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). *See* Ex. 1. ¶¶ 16-22. As such, Plaintiff's administrative complaint states credible allegations, supported by substantial evidence, demonstrating that 45Committee violated FECA by failing to register as a political committee pursuant to 52 U.S.C. §§ 30102 and 30103, and by failing to file reports identifying its contributors, expenditures, and debts pursuant to 52 U.S.C. § 30104.

II. The FEC's Delay in Acting on Plaintiff's Allegations Poses a Substantial and Ongoing Threat to the Electoral System.

The conduct alleged in Plaintiff's administrative complaint constitutes a substantial and ongoing threat to the integrity of the election system, because there is a substantial likelihood that

this type of illegal activity will continue, or even grow, absent any threat of enforcement. *See Percy*, 1984 WL 6601, at *3 (finding that "the significance of the threat to the integrity of [an] . . . election" is "obvious" where there is a "likelihood" that the illegal activity will continue); *see also DSCC*, 1996 WL 34301203, at *5 ("The threat to the electoral system is highlighted not only by the amounts of money involved and the impact upon close elections, but by the serious threat of recurrence."). Unreported contributions by undisclosed persons threaten the fundamental fairness of American elections by denying the electorate necessary information about precisely who is advocating for and against candidates for federal office. PAC disclosure requirements not only ensure that voters and candidates are able to evaluate messages and understand the agenda behind them, *see Citizens United v. FEC*, 558 U.S. 310, 369-70 (2010), but also are critical to enforcement of other aspects of FECA, including prohibitions on foreign spending, excess contributions, and coordination, *see Buckley*, 424 at 56-58. Furthermore, the nature of the threat is substantial where, as here, the conduct alleged is contrary to one of the principal purposes of FECA. *See, e.g.*, *DSCC*, 1996 WL 34301203, at *5 (finding that the underlying matter involved a substantial threat when it "involve[d] allegations" at the core of FECA's requirements).

III. The Commission's Failure to Act on Plaintiff's Administrative Complaint Is Not Excused by Lack of Resources, Competing Priorities, or Lack of Information.

Because the FEC has failed to appear in this case, it has put forward no evidence that its delay is caused by lack of resources, competing priorities, or lack of information. *Cf. Common Cause* 489 F. Supp. at 744; *TRAC*, 750 F.2d at 80. Indeed, the evidence gathered by Plaintiff and provided in its administrative complaint, much of which relies on the Commissions' own records and publically available IRS records, is more than sufficient to allow the Commission to proceed expeditiously. See *Percy*, 1984 WL 6601, at *4 (finding delay unreasonable where "[m]uch of the information in the complaint could be verified from the FEC's own records"). Thus, the FEC has

failed to carry its burden of showing that its delay is reasonable. *See id*. (placing the burden of showing lack of resources on the agency because "[k]nowledge as to the limits of [agency] resources is exclusively within the control of the Commission").

Furthermore, "[w]hatever deference an agency is due in resource allocation decisions, it is entitled to substantially less deference when it fails to take any meaningful action within a reasonable time period." *DSCC*, 1996 WL 34301203, at *5-*6. Here, the FEC has failed to take *any* official action on Plaintiff's complaint for nearly two years—a delay that is clearly unreasonable. *See infra* Section V.

Finally, even assuming the Commission's failure to act is due to the press of other business, ruling for Plaintiff will provide the FEC an opportunity to relieve its burden rather than add to it. Congress included an alternative enforcement mechanism in FECA, authorizing private actions against administrative respondents when FEC does not or cannot act. *See* 52 U.S.C. § 30109(a)(8)(C) (authorizing private right of action in federal court against administrative respondent should the FEC fail to conform to this Court's judgment within thirty days). If the FEC fails to conform due to its prioritization of other matters, or any other reason, FECA authorizes Plaintiff to file suit against 45Committee. Notably, that outcome would ease the Commission's enforcement burden, and would avoid any concern about "the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80.

IV. Plaintiff's Complaint Does Not Raise Novel Issues.

FECA's registration, reporting and disclosure requirements for political committees date back to the mid-1970s, and the test for whether an entity constitutes a PAC was adopted in *Buckley v. Valeo*, which was decided in 1976. The Commission has engaged in fact-bound major purpose analyses for political committees for decades. Plaintiff's allegations that 45Committee failed to

register as a political committee and failed to report its contributors, expenditures, and debts as required by FECA are not remotely a "novel" issue. *See Percy* 1984 WL 6601, at *1 (finding that issues that make up a substantial amount of the Commission's workload are not "novel"). The Commission routinely analyzes entities' major purposes in order to determine whether they constitute PACs. *See, e.g.*, *Crossroads GPS*, FEC MUR 6596, https://www.fec.gov/data/legal/matter-under-review/6596/ (last visited May 28, 2020); *Foundation for a Secure and Prosperous America*, FEC MUR 6974, https://www.fec.gov/data/legal/matter-under-review/6974/ (last visited May 28, 2020); *Commission on Hope Growth and Opportunity*, FEC MURs 6391 and 6471, https://www.fec.gov/data/legal/matter-under-review/6391/, https://www.fec.gov/data/legal/matter-under-review/6471/ (last visited May 28, 2020).

As such, the Commission is clearly familiar with the relevant law and regulations surrounding violations of 54 U.S.C. §§ 30102, 30103, and 30104. These issues are not novel.

V. The Commission's Delay Violates the "Rule of Reason," and Runs Contrary to Congress's Intent that the Commission Act Expeditiously.

The Commission's delay is unreasonable. Although "Congress did not impose specific time constraints upon the Commission to complete final action . . . it did expect that the Commission would fulfill its statutory obligations so that [FECA] would not become a dead letter." *DSCC*, 1996 WL 34301203, at *7. Thus, although courts have declined to find that the Commission must act on every complaint within 120 days or within an election cycle, *see FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986), this "is not the equivalent of unfettered FEC discretion to determine its own timeline." *DSCC*, 1996 WL 34301203, at *8. Indeed, the multitude of "*short* deadlines governing the speed with which such complaints must be handled," *Rose*, 608 F. Supp. at 11 (emphasis in original), itself demonstrates that Congress expected enforcement actions to

advance expeditiously. This is because "the deterrent value of the Act's enforcement provisions are substantially undermined, if not completely eviscerated, by the FEC's failure to process administrative complaints in a meaningful time frame." *DSCC*, 1996 WL 34301203, at *8; *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (finding that an agency's unreasonable delay "signals the breakdown of regulatory processes") (internal quotation marks omitted). The Commission's failure to take any official action on Plaintiff's complaint for nearly two years is just such a regulatory breakdown.[2] Indeed, it seems likely that the only way the allegations raised in Plaintiff's administrative complaint will be investigated and adjudicated in any reasonable time frame is by this Court ordering the Commission to conform, failing which Plaintiff may avail itself of FECA's private right of action.

VI. The Commission's Delay Prejudices Plaintiff and the Public.

The Commission's failure to act undermines public confidence in our elections by allowing apparent violations of the law to go uninvestigated and unredressed. So too, the lack of enforcement and corresponding lack of any consequence for illegal behavior necessarily encourages 45Committee and others who seek to emulate 45Committee's activities to continue to violate campaign finance law. *See DSCC*, 1996 WL 34301203, at *8 ("[T]hreats to the health of our electoral processes . . . require timely attention [and] should not be encouraged by FEC lethargy . . . ."). Because the Commission has failed to act, CLC and the voting public will continue to be harmed because they will be denied the information to which they are statutorily entitled about precisely who is advocating for and against candidates for federal office.

[2] The Commission's recent lack of a quorum does not justify its continued delay. Plaintiff's administrative complaint was pending with the FEC for over a year before the Commission lost its quorum on September 1, 2019. *See* Ex. 1, Ex. 4. In any event, the FEC now has a quorum, *see supra* ¶ 17, and as such nothing is preventing the Commission from acting on Plaintiff's complaint either on its own initiative on pursuant to an order of this Court.

Furthermore, the excessive delay in acting on Plaintiff's complaint, together with the Commission's history of inaction and deadlock, gives rise to the appearance of impropriety.[3] *See Kessenich v. Commodity Futures Trading Comm'n*, 684 F.2d 88, 97 (D.C. Cir. 1982) (explaining that the appearance of impropriety can pose a "concrete danger" to the perceived integrity of an agency and the court). This delay is yet one more instance where the Commission has declined to investigate or enforce serious allegations of campaign finance violations, *see supra* ¶ 16-17. This pattern continues to give rise to an appearance of impropriety.

VI. Amicus New Civil Liberties Alliance Fundamentally Misunderstands Plaintiff's Claim and the Applicable Law.

The New Civil Liberties Alliance ("NCLA") has filed a brief as *amicus curiae* in this action, nominally in support of the Commission. *See* NCLA Mot. at 3-4, ECF No. 7; ECF No. 8. NCLA contends that Plaintiff CLC lacks standing. In so doing, NCLA fundamentally misunderstands Plaintiff's claim and misapplies the relevant law. NCLA's brief should be disregarded.

A. Plaintiff CLC Has Suffered an Injury in Fact

NCLA argues that Plaintiff lacks standing because CLC has not suffered an injury stemming from the Commission's failure to act. NCLA Br. at 9, ECF No. 8. The law in this circuit is clear, however, "that a denial of denial of access to information qualifies as an injury in fact where a statute . . . 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. v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (quoting *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019)

[3] Although evidence of impropriety may buttress a plaintiff's claim that the Commission has acted contrary to law, "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *TRAC*, 750 F.2d at 80. Thus, the Court need not . . . make such findings" to rule in Plaintiff's favor. *Rose*, 209 F. Supp. at 12.

(internal quotation marks omitted) and citing *FEC v. Akins*, 524 U.S. 11, 21 (1998)). Thus, where a plaintiff alleges "violations of FECA provisions that require accurate disclosure of contributor information . . . and the filing of public reports by political committees, [52 U.S.C.] §§ 30102, 30103, 30104," they have standing to under § 30109(a)(8) if they can show that such disclosures "would further their efforts to defend and implement campaign finance reform." *Id.*

CLC is "a nonprofit, nonpartisan organization dedicated to supporting and enforcing campaign finance laws." *Id.* at 355-56; *see also* Gaber Dec. ¶ 2. And, "[t]o further its mission, Campaign Legal Center participates in 'public education, litigation, regulatory practice, and legislative policy.'" *Campaign Legal Ctr.*, 952 F.3d at 356; Gaber Decl. ¶ 2. Just as in *Campaign Legal Center*, "[t]here is no reason to doubt" that 45Committee's failure to register and file reports as a political committee pursuant to 52 U.S.C. §§§ 30102, 30103, and 30104 obstructs CLC's efforts to "defend and implement campaign finance reform." *Id.* Thus, CLC has demonstrated injury in fact. *Id.*

B. Plaintiff CLC's Injury Is Redressable

Amicus NCLA argues that CLC's claim is not redressable because the Commission's decision whether to act on a complaint is entirely discretionary, and thus not properly subject to this Court's jurisdiction. Not so. As noted above, although the Commission's determination of whether to proceed with enforcement on a particular matter "is entitled to considerable deference, *the failure to act in making such a determination is not.*" *DSCC*, 1996 WL 34301203, at *4 (emphasis added).

NCLA's suggestion that the FEC has total discretion over whether to act is not supported by either FECA's text or judicial precedent. FECA established four stages of enforcement for complaints such as those filed by Plaintiff. *See* 52 U.S.C. § 30109(a). The Commission can vote

to dismiss a complaint at any stage of the enforcement process, and it can vote to investigate at any time after receiving a response from the respondent. *See id*. But the Commission does not have discretion to simply decide not to decide. *See DSCC*, 1996 WL 34301203, at *4; *cf. In re Nat. Congressional Club*, Nos. 84-5701, 84-5719, WL 148396 (D.C. Cir.1984) (holding that inaction by the Commission is subject to the same "standards generally applicable to review of agency inaction," not that it is subject to agency discretion); *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1081) (holding that the FEC's handling of an administrative complaint was "substantially justified" because the Commission acted "immediately upon receiving [the complaint];" gave it "prompt and sustained agency attention;" and engaged in "thorough consideration of the issues it raised"; not because the agency had discretion over whether to act at all).

Indeed, if the FEC had total discretion to act or not, then § 30109(a)(8)(A)'s "failure to act" provision would be meaningless because the Commission's failure to act would never be contrary to law. Furthermore, if the Commission's obligation to act were merely precatory rather than mandatory, there would be no reason to analyze "the credibility of the allegation, the nature of the threat posed, the resources available to the agency and the information available to it, as well as the novelty of the issues involved." *Common Cause,* 489 F. Supp. at 744. Nor would there be any reason to probe the reasonableness of the delay, the interests prejudiced by the agency's failure to act, or the appearance or reality of any impropriety in the Commission's delay. *See TRAC*, 750 F.2d at 80.

Next, NCLA suggests that any non-discretionary obligation to act on a complaint kicks in only after the Commission determines there is reason to believe a violation has occurred. This contention also runs counter to the text of FECA. FECA provides complainants a right to file an action against the FEC for unlawful failure to act, and the only condition it imposes is that the

complainant cannot commence such a suit within 120 days of filing its administrative complaint. 52 U.S.C. 30109(a)(8). The statute does not require complainants to wait until the reason to believe determination has been made. *See id.* Indeed, courts routinely consider whether the FEC unlawfully delayed in *making* the reason to believe determination, and find such delays unlawful. *See, e.g.*, *DSCC*, 1996 WL 34301203, at *9 (finding that the FEC acted contrary to law in delaying 27 months before making a reason to believe determination, despite finding "no evidence that the FEC . . . failed to act reasonably in the investigation of the complaint [once] the 'reason to believe' determination was made."); *Percy*, 1984 WL 6601, at *4 (finding the FEC acted unreasonably in delaying making a reason to believe determination for more than five months).

Finally, NCLA suggests that the entry of a default judgment would "unconstitutionally" transfer executive authority to this Court by allowing it to adjudicate whether 45Committee violated FECA. But even after the entry of a default judgment, that question would only come before this Court if the FEC continues to violate FECA by failing to conform its actions to the law within 30 days, triggering Plaintiff's private right of action under § 30109(a)(8).[4] Nonetheless, NCLA contends that where a lack of quorum or a deadlock precludes the FEC from defending a lawsuit or conforming to a court order, concerns over separation of powers would preclude this

[4] NCLA also appears to conflate CLC's complaint against the FEC for failure to act with CLC's underlying administrative complaint against 45Committee; and to misconstrue the relief sought by CLC in this Court. CLC does not seek a determination in this action that 45Committee violated FECA. Nor does CLC seek an order from this Court directing the FEC to find that there is reason to believe 45Committee violated FECA. All CLC asks is for the remedy it is statutorily entitled to under § 301019(a)(8): a declaration that the FEC has unlawfully failed to act on Plaintiff's complaint, and an order directing the FEC to conform with the law. The Court's authority to grant a plaintiff the relief they are entitled to under statute for a violation of federal law lies at the heart of Article III power. In doing so, the Court would effectuate — not "usurp[ ]" — FECA's statutory enforcement process.

Court from entering default because only the political branches are authorized to resolve such a situation.

NCLA's amorphous assertion does not bear on the narrow question before the Court, which is whether CLC has provided sufficient evidence supporting its claim for a default judgment. *See* Fed. R. Civ. P. 55(d). But even assuming its contention were relevant, NCLA ignores the rather obvious fact that the political branches *have* acted to resolve any concerns with respect to a default judgment due to lack of quorum or a deadlocked vote. Thus, the FEC now has a quorum. *See supra* ¶ 15. As such, nothing precludes the Commission from taking a vote on whether to defend this lawsuit or proceed with enforcement against 45Committee. Furthermore, the private right of action is the precise statutory mechanism through which FEC deadlock can be resolved: the entry of default judgment would not bar the FEC from adjudicating this matter, but rather would start the clock ticking on the statutory remedy Congress created for continued FEC intransigence.

C. NCLA's Request that the Court Dismiss the Suit Without Prejudice Should Be Rejected.

NCLA's request that the Court dismiss this suit without prejudice should be rejected.[5] This is a suit about agency delay, and CLC already exercised restraint and afforded the FEC far beyond the statutorily authorized 120 day period before filing suit.[6] It would be prejudicial to CLC to make it refile this lawsuit to give the FEC 60 *more* days to file an answer. Moreover, with only four Commissioners, a unanimous vote would be required to defend this action, 52 U.S.C. §§ 30106(c), 30107(a)(6), and unanimous FEC votes are hard to come by. It makes no sense to start the litigation

[5] NCLA is an amicus, not an intervenor, and as such has no standing to request dismissal of this suit.

[6] NCLA posits that CLC engaged in gamesmanship by waiting to file its delay suit until after the Commission lost its quorum. This makes little sense. CLC certainly had no way to know that the FEC's Vice Chair would resign, much less when he would do so. Nor did CLC have any way to know that the vacancy would last for three quarters of a year.

clock over to find out if this will be the rare case where unanimity prevails. If the Court enters default judgment, and if the Commission wishes to defend, it can seek to file a timely motion to vacate that default judgment. But the only mechanism to force the Commission to do *something* is for this Court to act, not to decline to act as NCLA suggests.

CONCLUSION

The uncontested evidence demonstrates that the Commission has acted contrary to law in failing to act on Plaintiff's administrative complaint. Plaintiff CLC has standing to bring this claim, and is entitled to entry of a default judgment against the Commission. Accordingly, Plaintiff respectfully requests that the Court enter judgment that the Commission has acted contrary to law; order the Commission to conform to the judgment within 30 days, and assess $400 in court costs pursuant to 28 U.S.C. § 1920.[7]

Dated: June 1, 2020

Respectfully submitted,

/s/ Mark P. Gaber

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[7] Plaintiff respectfully requests that the Court retain jurisdiction over this matter until Defendant takes final agency action with respect to Plaintiff's administrative complaints. *Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001) (noting district court's discretion to "retain jurisdiction until a federal agency has complied with its legal obligations" and to "compel regular progress reports in the meantime"); *Alegent Health-Immanuel Med. Ctr. v. Sebelius*, 917 F. Supp. 2d 1, 3 (D.D.C. 2012) (noting that court may retain jurisdiction in "cases alleging unreasonable delay of agency action").