ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5159

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 18-cv-0053 (TSC)
Before the Honorable Tanya S. Chutkan

OPENING BRIEF OF PLAINTIFF-APPELLANT CAMPAIGN LEGAL CENTER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiff-Appellant Campaign Legal Center ("CLC") hereby certifies as follows:

(a) Parties and *Amici.* CLC is plaintiff in the district court and appellant in this Court.

Pursuant to Circuit Rule 26.1, CLC certifies that it is a nonpartisan, nonprofit corporation that has no parent corporation, does not issue stock, and in which no publicly held corporation has any form of ownership interest. CLC works to protect and strengthen the U.S. democratic process across all levels of government, including by supporting campaign finance reform through litigation, policy analysis, and public education.

The Federal Election Commission ("FEC" or "Commission") is the defendant in the district court and appellee in this Court.

No *amici* appeared in the district court and no *amici* have yet appeared in this Court. Appellant understands that one or more parties may appear as *amicus curiae* in this appeal.

(b) Ruling Under Review. Plaintiff-appellant appeals the May 26, 2020 final order and judgment of the United States District Court for the District of Columbia (Chutkan, J.), which granted defendant-appellee's motion to dismiss. The opinion is unreported and was filed on this Court's docket on July 9, 2020.

(c) Related Cases. The ruling under review has not previously been before this Court or any other court. There are no related cases pending in this Court or any other court of which counsel are aware.

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*Cases upon which CLC chiefly relies are marked with an asterisk.

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GLOSSARY OF ABBREVIATIONS

BOP	Bureau of Prisons
CLC	Campaign Legal Center
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review

INTRODUCTION

Federal law prohibits federal contractors from directly or indirectly contributing to political committees. Yet in the months and days before the November 2016 election, GEO Corrections Holdings, Inc., a wholly owned subsidiary of private prison federal contractor GEO Group, Inc., contributed hundreds of thousands of dollars to Rebuilding America Now, one of the primary super PACs supporting then-candidate Donald Trump. CLC swiftly filed an administrative complaint with the FEC regarding this straightforward violation of FECA.

Nearly four years have passed and the FEC has announced no action on CLC's complaint. Congress granted administrative complainants the right to timely action by the FEC, granted administrative complainants the right to receive certain information upon the disposition of their complaints, and authorized administrative complainants to sue if the FEC fails to act within 120 days of receiving a complaint. Notwithstanding Congress's creation of statutory rights—including the right to *some* action by the FEC and informational rights long recognized by the Supreme Court and this Court as sufficient to confer standing—the district court concluded that CLC lacked standing to challenge the FEC's delay. That conclusion is inconsistent with this Court's standing precedent, and if affirmed would afford the Commission—already the source of frequent intransigence and inaction—with yet another tool for

delay Congress expressly sought to prevent. The district court's decision should be reversed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this timely appeal from a final judgment in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9). The district court exercised jurisdiction over the case under 28 U.S.C. § 1331 and 52 U.S.C. § 30109(a)(8)(A).

ISSUES PRESENTED

Whether the district court's finding that Plaintiff-Appellant lacked standing to sue the Federal Election Commission ("FEC") for failure to act on Plaintiff-Appellant's administrative complaint was in error because (1) Congress conferred a statutory right for administrative complainants to receive timely action by the FEC, such that administrative complainants have standing under 52 U.S.C. § 30109(a)(8) to seek redress for the FEC's unlawful failure to act; and (2) the FEC's nondiscretionary obligation to provide administrative complainants with certain information upon resolution of a matter independently confers standing upon such complainants in a suit under 52 U.S.C. § 30109(a)(8).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory provisions are printed in the Addendum to this Brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

Any person may file a complaint with the FEC alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). After reviewing the complaint and the recommendations of its Office of General Counsel, the Commission votes on whether there is sufficient "reason to believe" the Act was violated to justify an investigation. *Id.* § 30109(a)(2). After any investigation, if the Commission finds probable cause to believe a FECA violation occurred, *id.* § 30109(a)(3), it seeks a conciliation agreement with the respondent, which may include civil penalties, *id.* §§ 30109(a)(4)(A), (a)(5). If the Commission is unable to correct the violation and enter a conciliation agreement, it may institute a civil action in federal district court. *Id.* § 30109(a)(6)(A). All of these decisions require the affirmative votes of four of the FEC's six Commissioners. *Id.* § 30106(c).

If, at any of these decision-making junctures, fewer than four Commissioners vote to proceed, the Commission votes on whether to dismiss the complaint. Once the matter is closed, whether by conciliation, dismissal, or other resolution, the FEC must place materials from the MUR file on the public record. *Id.* § 30109 (a)(4)(B)(ii); *see also* 11 C.F.R. § 111.20(a); 81 Fed. Reg. 50702. "Any party aggrieved" by "a failure of the Commission to act on [a] complaint during the 120-day period beginning on the date the complaint is filed" may seek review in the

United States District Court for the District of Columbia to determine whether the failure to act is "contrary to law." 52 U.S.C. §§ 30109(a)(8)(A), (a)(8)(C). Decisions of the district court are subject to review by this Court. *Id*. § 30109(a)(9).

The administrative complaint underlying this action alleges a violation of the ban on federal contractors directly or indirectly contributing to political committees, and on political committees accepting such contributions. 52 U.S.C. § 30119(a)(1). Under § 30119(a)(1), it is unlawful for "any person . . . who enters into any contract with the United States or any department thereof . . . to make any contribution . . . to any political party, committee, or candidate for public office or to any person for an political party or use." *Id*. It is also unlawful "to solicit any such contribution from any such person." *Id.* § 30119(a)(2).

II. Factual Background

On August 18, 2016, then-Deputy Attorney General Sally Yates issued a memorandum instructing the Bureau of Prisons ("BOP") to phase out the use of privately operated correctional facilities, writing that private prisons "compare poorly to our own Bureau facilities" and "do not provide the same level of correctional services, programs, and resources; . . . do not save substantially on costs; and as noted in a recent report by [the Office of the Inspector General], . . . do not maintain the same level of safety and security." App. 7. The next day, August 19, GEO Corrections Holdings, Inc.—the wholly owned subsidiary of GEO Group, a

federal contractor that operates private prisons—contributed $100,000 to Rebuilding America Now, a "super PAC" supporting Donald Trump's campaign for president. App. 8.

Media reports at the time reflected that Rebuilding America Now was a preferred super PAC of the Trump campaign: Trump's then-campaign manager Paul Manafort called into a meeting of its top donors and explained that it was the only super PAC he was addressing. *Id*. Attendees of that meeting were shown a quote from then-Governor Mike Pence saying that "[s]upporting Rebuild [*sic*] America Now is one of the best ways to stop Hillary Clinton and help elect Donald Trump our next president!" *Id*.

The week before the election—on November 1, 2016—GEO Corrections Holdings, Inc. made an additional $125,000 contribution to Rebuilding America Now, bringing its total contributions to $225,000. App. 10.

Two weeks following his confirmation, then-Attorney General Jeff Sessions issued a memo rescinding Yates's directive to phase out BOP's use of private prisons. App. 8. His single-paragraph memo stated that Yates's decision "changed long-standing policy and practice, and impaired [BOP's] ability to meet future needs of the federal correctional system," and he thus "direct[ed] [BOP] to return to its

previous approach."[1] App. 9. Media reports credited Sessions's memo with causing the stock prices of private prison companies to rise. *Id*. In April 2017, GEO Group was awarded a $110 million contract to build the first immigration detention center under the Trump administration. *Id*.

Citing the longstanding statutory ban on federal contractors directly or indirectly contributing to political committees (and on political committees accepting such contributions), 52 U.S.C. § 30119(a)(1), CLC filed an administrative complaint with the FEC on November 1, 2016 against GEO Corrections Holdings, Inc. and Rebuilding America Now. App. 8, App. 10. The FEC acknowledged receipt of the complaint on November 4, 2016, designating it as Matter Under Review ("MUR") 7180. App. 10.

A total of 1,413 days have passed since CLC filed its administrative complaint. The FEC has announced no action on the complaint to date. In the meantime, GEO Corrections Holdings, Inc.—still a wholly owned subsidiary of GEO Group, which is still a federal contractor—has continued to make political contributions. In 2017, it contributed $300,000 to super PACs supporting

[1] Responding to a Freedom of Information Act request, the Department of Justice indicated that the Office of Legal Counsel, BOP, and the Office of the Inspector General possessed no documents responsive to a request for "[a]ll factual materials, reports, and other evidence that the DOJ considered in reaching its conclusion to rescind the August 18, 2016 memo on private prisons." App. 10.

Republican congressional candidates.[2] App. 11. During the 2018 and 2020 election cycles, a second wholly owned subsidiary of GEO Group, GEO Acquisition II, made an additional $1,047,500 in contributions to political committees.[3]

III. District Court Proceedings

On January 10, 2018, CLC filed suit against the FEC under 52 U.S.C. § 30109(a)(8)(A), which provides that "[a]ny party aggrieved . . . by a failure of the Commission to act on [a complaint filed by such party] during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia." At that time, it had been 435 days since CLC had filed its administrative complaint with no indication from the FEC that it had taken any action.

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[2] In addition to the $200,000 in contributions listed in the Complaint, GEO gave an additional $100,000 contribution in December of 2017 that was not yet reported at the time the Complaint was filed. *See* FEC Contributor Search, https://www.fec.gov/data/receipts/?data_type=processed&contributor_name=GEO+corrections&two_year_transaction_period=2018&two_year_transaction_period=2020&min_date=01%2F01%2F2017&max_date=12%2F31%2F2020 (last visited Sept. 14, 2020).

[3] FEC Contributor Search, https://www.fec.gov/data/receipts/?data_type=processed&contributor_name=GEO+corrections&contributor_name=geo+acquisition&contributor_name=geo+acquistion&two_year_transaction_period=2020&two_year_transaction_period=2018&min_date=01%2F01%2F2017&max_date=12%2F31%2F2020 (last visited Sept. 14, 2020).

On March 19, 2018, the FEC moved to dismiss CLC's complaint, contending that CLC lacked standing to challenge the FEC's failure to act on CLC's administrative complaint. Briefing on the FEC's motion to dismiss was completed on April 9, 2018.

Over two years later—on May 26, 2020—the district court issued a four-page opinion granting the FEC's motion to dismiss. The district court wrote a single paragraph analyzing whether CLC had Article III standing. App. 14-15. The district court concluded that this Court's decision in *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997), a case involving standing to challenge *dismissals* of administrative complaints, compelled the conclusion that a party lacking standing to challenge dismissals necessarily lacks standing to challenge the FEC's failure to act. *Id.*

SUMMARY OF ARGUMENT

The district court erred in finding that CLC lacks standing to sue over the FEC's unlawful delay in acting on CLC's administrative complaint, which has now been pending for nearly four years. The district court's ruling should be reversed.

First, the Supreme Court and this Court have long recognized that Congress may enact statutes conferring rights the deprivation of which constitute an injury sufficient to satisfy Article III standing requirements. When it does so, as the Supreme Court has recognized with respect to FECA and as this Court has recognized with respect to the Freedom of Information Act ("FOIA"), the Sunshine

Act, and other statutes, the deprivation of the statutory right *is* the injury Article III requires for standing purposes. Here, Congress granted administrative complainants the right to have the FEC act on their complaints and authorized suit when the FEC fails to act after a period of 120 days. Just as a FOIA requestor has standing to sue when denied the information she seeks—without further proof of why she sought the information or how she is harmed by it being withheld—so too does CLC have standing to sue when it is denied the agency action Congress afforded it to receive. A contrary holding would create a unique hurdle for those seeking to enforce their rights under FECA that the beneficiaries of other statutory rights, such as under FOIA or those enforcing regulatory timelines under the Sunshine Act, do not face. There is no reason to treat FECA differently than these other statutes.

Second, CLC independently has standing to sue the FEC for unlawful delay in acting on its complaint because the Commission's delay denies CLC specific information to which it is entitled under federal law. As the Supreme Court held in *FEC v. Akins*, 524 U.S. 11 (1998), and as this Court has held specifically with respect to CLC, *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020), the denial of information CLC is entitled to receive constitutes an injury-in-fact for standing purposes. The FEC is required to release specific information upon closing an administrative complaint. By unlawfully delaying action, the FEC necessarily denies administrative complainants the information they are entitled to receive upon the closure of the

matter. This includes, for example, the results of any votes taken by the Commissioners on the matter and the portions of Commission's investigative and enforcement materials—including reports by the Office of General Counsel regarding the matter—that it is required to disclose once a matter is closed. The denial of this information creates a concrete and particularized injury for CLC. CLC relies upon this information to guide its enforcement efforts, to inform its public communications about campaign finance law, and to guide its programmatic decisions about legislative and regulatory reform advocacy. CLC is entitled to this information, which is crucial to its mission, and which the FEC can withhold indefinitely by unlawfully delaying action on CLC's complaint. This informational injury confers standing upon CLC sufficient to challenge the Commission's failure to act.

Third, the district court erred in applying the rule announced in *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997) (*per curiam*), to this action. The district court failed to distinguish between suits challenging the FEC's *dismissal* of an administrative complaint as contrary to law, like the suit at issue in *Common Cause*, and suits challenging the FEC's *failure to act* on an administrative complaint, like the suit brought here. In enacting 52 U.S.C. § 30109(a)(8)(A), Congress created a right to agency action and authorized suit to enforce that right, setting 120 days as the period after which delay may be deemed contrary to law. This is precisely the

type of statutory right the Supreme Court and this Court have held give rise to an Article III injury sufficient to support standing. By contrast, § 30109(a)(8)(A) creates a cause of action to challenge dismissals as contrary to law, but does not create a concomitant statutory right against which to judge whether the dismissal is contrary to law. The *Common Cause* Court had no occasion to consider standing with respect to failure-to-act cases, nor did it consider the type of informational injury FEC delay imposes upon administrative complainants. The district court thus erred by applying the *Common Cause* Court's holding regarding standing in *dismissal* suits to this suit about agency inaction.

CLC has standing to sue the FEC for its failure to act on CLC's administrative complaint. The district court's ruling to the contrary is error. Further, CLC is likely to succeed on the merits of its delay suit. But the statute of limitations on the violations underlying the administrative complaint are nearing, which could allow those violations to go unredressed. Although this is a suit about agency delay, its progression has been slowed by the nearly two years the FEC's motion to dismiss was pending before the district court. Only swift action by this Court and the district court on remand will ensure that the FEC complies with its statutory duty to enforce federal law.

This Court should reverse the district court's finding with respect to CLC's standing, vacate the order dismissing this action, and remand to the district court for further proceedings on an expedited basis.

STANDARD OF REVIEW

This district court's decision to grant the FEC's motion to dismiss is reviewed *de novo*. *See Cierco v. Mnuchin*, 857 F.3d 407, 414 (D.C. Cir. 2017). Allegations in a complaint are "taken as true for purposes of a motion to dismiss." *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (*per curiam*).

ARGUMENT

I. CLC Has Standing to Challenge the FEC's Failure to Act on Its Administrative Complaint.

CLC has standing to challenge the FEC's failure to act on its administrative complaint. To have standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755, 763 (D.C. Cir. 2020) (*en banc*). CLC satisfies each element.

A. CLC Is Injured Because the FEC Has Deprived CLC of Rights that Congress Conferred and Authorized Suits to Enforce.

CLC has suffered a cognizable injury-in-fact because the FEC has deprived it of rights that Congress conferred by statute and that Congress authorized suits to

enforce. As the administrative complainant, CLC is legally entitled to seek judicial review of the FEC's failure to "act on [its] complaint during the 120-day period beginning on the date the complaint is filed," by "fil[ing] a petition with" the district court. 52 U.S.C. § 30109(a)(8)(A). Congress thus granted administrative complainants a right to FEC action on their duly filed complaints by conferring upon them a cause of action to enforce that right. Moreover, Congress, by statute, and the FEC, by regulation, have granted administrative complainants a right to receive a substantial amount of information upon resolution of an administrative complaint. *See, e.g.*, 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20(a); 5 U.S.C. §§ 552(a)(2)(A), (a)(5). The FEC's 1,413-day—and continuing—failure to act on CLC's administrative complaint violates these rights and inflicts concrete injury on CLC in the process.

"Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975); *cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992); *id.* at 580 (Kennedy, J., concurring in part and concurring in opinion) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view."); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

Here, Congress provided a statutory mechanism by which CLC is entitled to file an administrative complaint with the FEC and a right to sue the Commission if it unduly delays in acting upon that complaint.

This Court explored the contours of "statutory standing"[4] in *Zivotofsky ex rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 618 (D.C. Cir. 2006). This Court explained that FOIA is a "common example" of statutory standing. *Id.* at 618. "Anyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances—why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing." *Id.* at 617. The requester is injured, this Court explained, "because he did not get what the statute entitled him to receive." *Id.*; *see also McGahn*, 968 F.3d at 766 ("[W]hen a person seeks to obtain information the government is required to disclose, the denial of the information is a concrete injury for standing purposes.").

The Supreme Court and this Court have also held that FECA, like FOIA, grants an entitlement to information the deprivation of which constitutes an injury sufficient to satisfy Article III standing. In *Akins*, the Supreme Court explained that FECA requires the production of information—useful for the recipient to receive

[4] The phrase "statutory standing" is sometimes used to refer to prudential standing, *i.e.*, whether an injury is within the zone-of-interest of a statute. In this brief, CLC uses the phrase "statutory standing" as this Court did in *Zivotofsky*, to refer to rights afforded by Congress by statute, the deprivation of which suffice to establish an injury that satisfies the requirements of Article III of the Constitution.

and communicate to others—the deprivation of which constitutes a "concrete and particular" injury sufficient to satisfy Article III standing. 524 U.S. at 21. The Court explained that a person injured by failing to receive information required to be produced under FECA experiences a concrete—albeit widely shared—injury that satisfies Article III. *Id.* at 23-24.

Beyond these informational injuries, this Court has likewise held that other statutes, such as the Sunshine Act, 5 U.S.C. § 552b, and the Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1-16, confer rights the deprivation of which "give a plaintiff standing to enforce the Government." *Zivotofsky*, 444 F.3d at 618. For example, the Sunshine Act sets forth various transparency requirements for federal agencies and provides that "[e]ach agency subject to the requirements of this section shall, within 180 days of enactment of this section, . . . promulgate regulations to implement [its requirements]." 5 U.S.C. § 552b(g). Congress further provided that "[a]ny person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein." *Id.* In *Rushforth v. Council of Economic Advisers*, the plaintiff—a D.C. attorney—sued the Council of Economic Advisers for, *inter alia*, its failure to timely promulgate the regulations required by the Sunshine Act. Citing the statutory provision quoted above, this Court held that "Mr. Rushforth clearly had standing as

to the Sunshine Act action." 762 F.2d 1038, 1039 n.3 (D.C. Cir. 1985). In *Zivotofsky*, this Court cited *Rushforth*'s holding regarding the Sunshine Act as an example of a statute providing a right sufficient to support Article III standing. 444 F.3d at 618.

Congress's power to define rights and chains of causation establishing injury is not unlimited. "[T]he Supreme Court has qualified statutory standing in one respect": the statutory right created by Congress must be "particularized" in that "the injury must affect the plaintiff in a personal and individual way." *Zivotofsky*, 444 F.3d at 618 (quoting *Lujan*, 504 U.S. at 560 n.1). In other words, a plaintiff cannot bring suit merely to vindicate a statutory interest in the abstract. But "[w]hen a plaintiff is the 'object of [government] action (or forgone action) . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* (quoting *Lujan*, 504 U.S. at 561-62).

In *Zivotofsky*, the plaintiff was born in Jerusalem and alleged that Congress had, by statute, conferred a right for such persons to have "Israel" listed as their place of birth on their passports. *Id.* at 619. The government contended that the plaintiff lacked standing because he was three years old and it was conjectural whether he would suffer psychological harm in the future from the government's refusal to list Israel as his place of birth on his passport. *Id.* at 617. This Court rejected the government's argument, holding that it sufficed that the plaintiff alleged that

Congress had created a right to have Israel listed on his passport, and that the Secretary of State violated that right. "Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute. Such an injury is concrete because it is of 'a form traditionally capable of judicial resolution.'" *Id.* at 619 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974)). That injury is likewise "particular because, as the violation of an *individual* right, it 'affect[s] the plaintiff in a personal and individual way.'" *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1) (emphasis in original).

Here, CLC has standing because Congress created a statutory right for administrative complainants to receive timely FEC action on their complaints, as well as a statutory right to receive information from the FEC upon its disposition of the matter. The FEC's failure to act—now approaching four years after CLC submitted its administrative complaint—has deprived CLC of these statutory rights and thereby inflicted a concrete injury-in-fact.

1. CLC Has Been Deprived of Its Substantive Statutory Right to Prompt Agency Action on Its Administrative Complaint.

CLC has been deprived of its substantive statutory right to timely FEC action on its administrative complaint—an injury that establishes standing to sue. When Congress enacts a statute authorizing a person to request agency action, and creates

a cause of action to challenge the agency's failure to act upon that request, it exercises its authority to "define injuries and articulate chains of causation." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in opinion). As a result, the party requesting the agency action has standing to file the lawsuit Congress expressly authorized in order to remedy the injury to the right Congress expressly created. *See Rushforth*, 762 F.2d at 1039 n.3 (holding that plaintiff "clearly" had standing to sue to enforce 180 day deadline for agency to promulgate regulations); *Zivotofsky*, 444 F.3d at 618 (citing Sunshine Act's provision and *Rushforth* as examples of statute creating a right the deprivation of which constitutes an injury sufficient for Article III purposes); *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 538 (S.D.N.Y. 2009) (noting that government correctly abandoned its Article III standing objection at oral argument in suit by plaintiff challenging agency delay in responding to its rulemaking petition).

In concluding that the plaintiffs properly invoked the court's jurisdiction in *Families for Freedom*, the court cited this Court's decision in *In re American Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004). In *American Rivers*, plaintiffs sued an agency for its non-response to a petition requesting that it engage in interagency consultation regarding an infrastructure project's environmental ramifications. This Court held that the legal basis for the rulemaking petition was "beside the point" in a suit challenging the agency's failure to respond. *Id.* at 419.

The Court explained that it was "not concerned [] with what answer [the agency] might ultimately give the petitioners," but instead with "its failure to give them *any* answer."[5] *Id.* (emphasis in original). This Court did not doubt the plaintiff's standing in *American Rivers*.

A statutory right to have an agency act on one's administrative complaint, and to sue in the absence of that action, is indistinguishable for Article III standing purposes from a statutory right to petition for rulemaking and sue in the absence of a response to the merits of the petition, or a statutory right to receive government information and sue when that information is withheld. In each instance, Congress has created a right the deprivation of which injures a person, "even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Zivotofsky*, 444 F.3d at 617. Just as it is "irrelevant to [a FOIA plaintiff's] standing" to probe "why he wants the information, what he plans to do with it, what harm he suffer[s] from the failure to disclose," *id.*, these questions are likewise irrelevant to the standing of a person filing a statutorily authorized suit to compel

[5] This was not a novel holding. *See, e.g.*, *WWHT, Inc. v. FCC*, 656 F.2d 807, 813 (D.C. Cir. 1981) ("[A]n agency must receive and respond to petitions for rulemaking . . . ."); *Nat'l Parks Conservation Ass'n v. Dep't of Interior*, 794 F. Supp. 2d 39, 44 (D.D.C. 2011) ("[A]n agency 'is required to at least definitively respond to . . . [a] petition—that is, to either deny or grant the petition.'" (quoting *Families for Freedom*, 628 F. Supp. 2d at 540)); Richard J. Pierce, *Administrative Law Treatise* 517 (5th ed. 2013) ("At a minimum, the right to petition for rulemaking entitles a petitioning party to a response to the merits of the petition.").

agency action. In both instances, the person "is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive," *id*. at 618, be it information or timely agency action.

These authorities demonstrate why CLC has standing to sue the FEC for failing to act upon CLC's administrative complaint. Congress provided that "[a]ny person who believes a violation of [FECA] has occurred[] may file a complaint with the [FEC]," and that "[a]ny party aggrieved by an order of the [FEC] dismissing a complaint filed by such party . . . *or by a failure of the [FEC] to act* on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia." 52 U.S.C. § 30109(a)(8)(A) (emphasis added). In such a proceeding, "the court may declare . . . the failure to act is contrary to law, and may direct the [FEC] to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* § 30109(a)(8)(C).

Through this statutory scheme, Congress exercised its power to "define injuries and articulate chains of causation that will give rise to a case or controversy" sufficient to confer Article III standing. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Here, Congress expressly defined an injury and a chain of causation—the FEC's failure to act upon an administrative complaint, and the lapsing of at least

120 days of such inaction—and thus CLC's complaint, filed pursuant to the express cause of action Congress created, states a "case or controversy" seeking to redress the injury to its statutorily conferred right.[6] *Id.* Such redress is available through the district court's authority to order the FEC to take action pursuant to 52 U.S.C. § 30109(a)(8)(C). Just like the plaintiffs who had standing to sue for inaction in *Rushforth* and *Families for Freedom*, CLC has standing to sue for inaction here. Moreover, the fact that CLC's administrative complaint seeks enforcement rather than rulemaking is irrelevant for standing purposes. Just as an agency must explain why it takes any given rulemaking action, the FEC must "explain coherently the path [it is] taking" when it resolves an enforcement matter. *DCCC v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987). The FEC's prosecutorial discretion does not permit it to simply ignore administrative complaints. *Cf. CREW v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017) ("When the FEC exercises prosecutorial discretion, its controlling statement of reasons must be sufficiently detailed so as to allow a reviewing court to determine why the controlling commissioners decided to forego

[6] That Congress intended to define injuries and chains of causation sufficient to confer standing is amply demonstrated by the plain text of § 30109(a)(8)(A) & (C), but the legislative history underscores the point. Senator Claiborne Pell, the chair of the relevant Senate committee, stated that the provision was designed to ensure "that the Commission does not shirk its responsibility to decide" whether to pursue administrative complaints, and thus Congress "provide[d] that a total failure to address a complaint within 120 days is a basis for a court action." 125 Cong. Rec. S19099 (daily ed. Dec. 18, 1979) (statement of Sen. Pell).

prosecution."). With its suit, CLC seeks for the FEC to take *some* action, not any particular enforcement action.

Indeed, CLC's position is even stronger that the plaintiffs in *Rushforth* and *Families for Freedom* because its injury is more personalized and concrete: unlike the Sunshine Act's authorization for *any person* to sue, FECA limits delay suits to those who have first filed an administrative complaint; and unlike the claimed delay in *Families for Freedom*, here Congress set an explicit timetable in FECA. *See* 52 U.S.C. § 30109(a)(8)(A). In other words, Congress carefully narrowed the scope of plaintiffs entitled to sue under 52 U.S.C. § 30109(a)(8)(A), and there is no question that CLC falls within that scope. Because Congress created in section 30109(a)(8)(A) a tangible right for a limited and narrowly defined set of persons—as opposed to just any observer desiring timely FEC consideration of enforcement matters—Congress did not improperly "confer[] upon *all* persons [] an abstract . . . 'right' to have the Executive observe the procedures required by law." *Lujan*, 504 U.S. at 573 (emphasis in original); *see also Akins*, 524 U.S. at 24 ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'"); *Pub. Citizen v. DOJ*, 491 U.S. 440, 449-50 (1989) (reasoning that party demanding disclosure under Federal Advisory Committee Act did not suffer a "lessen[ed] . . . injury" merely because another group could have requested disclosure and sued, citing similar rule with respect to FOIA). CLC is not seeking to

vindicate an abstract desire that the FEC obey the law; it is seeking to require—as Congress required—that the FEC take action on CLC's own administrative complaint. This could not be more concrete or particularized.

It is likewise a particularized injury because the FEC's failure to act "affect[s] [CLC] in a personal and individual way." *Zivotofsky*, 444 F.3d at 618; *Akins*, 524 U.S. at 21 (holding that deprivation of rights guaranteed by FECA constitutes a concrete and particularized injury for Article III standing purposes). As the administrative complainant, CLC invested its resources into commencing the administrative proceedings in reliance on the statutory guarantee of timely FEC action. As this Court has explained, "[w]hen a plaintiff is the 'object of [government] action (or forgone action) . . . there is ordinarily little question that the action or *inaction* has caused him injury, and that a judgment preventing or requiring the action will redress it."[7] *Zivotofsky*, 444 F.3d at 618 (quoting *Lujan*, 504 U.S. at 561-62) (emphasis added).

Moreover, Congress did not create a mere procedural right. Rather—as the text and case law demonstrate—it created a substantive right, the deprivation of which conveys standing. The right to timely FEC action exhibits congressional

[7] Article III's plain text confirms this. The Constitution requires a "controversy." U.S. Const. art. III. CLC contends the FEC has failed to act as Congress specifically required; the FEC (presumably) contends it will act within a reasonable time. How could this dispute not be a "controversy"?

awareness of the importance of election law to the democratic process—a process that does not tolerate delay. The decision to include a 120-day timeframe for agency action in § 30109(a)(8)(A) reflects Congress's reasoned judgment about FECA enforcement, a judgment to which this Court should defer. Members of Congress, all of whom were candidates in federal elections, understood well that each election is an exigent event and that FECA enforcement can be rendered ineffective by extensive delays. *Cf. Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (*per curiam*) (explaining that FECA was designed, in part, to inform the electorate so it could make decisions in evaluating candidates). Indeed, Congress was sufficiently worried about failures to vindicate FECA before Election Day that it provided an abbreviated timeframe for the FEC to "correct or prevent" violations committed—or "about to [be] commit[ted]"—shortly before an election. *See* 52 U.S.C. § 30109(a)(4)(A)(ii).

Congress's 120-day window is best understood as reflecting this firsthand knowledge and attempting to ensure that, when possible, complainants have their complaints acted upon fast enough so that the FEC's eventual action on the complaint is not meaningless. Congress was surely not blind to the reality that once an election law matter reaches the judiciary, it is unlikely that it will be resolved prior to Election Day. *See, e.g.*, *Herron for Congress v. FEC*, 903 F. Supp. 2d 9, 14 (D.D.C. 2012) (noting that "most electoral controversies" cannot "be fully litigated prior to election day"). Thus, Congress enacted § 30109(a)(8)(A) to emphasize the

importance of a complainant's right to efficient action at the agency level and to make that right judicially enforceable. The 120-day timeframe prior to judicial review reflects a congressional intent to give the FEC sufficient time to act while also ensuring that complainants faced with FEC foot-dragging could turn to the federal judiciary—not to address the underlying dispute in the first instance, but to force the FEC to do so. Indeed, "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 v. FEC*, No. Civ.A. 95-0349(JHG), 1996 WL 34301203, at *8 (D.D.C. Apr. 17, 1996). The significance of the complainant's right to sue underscores the right's substantive character. And even if the complainant's right to sue is nonetheless characterized as procedural, the important context in which it operates would make it the type of "violation of a procedural right granted by statute [that] can be sufficient . . . to constitute injury in fact." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).[8]

[8] Indeed, the Supreme Court cited a case involving FECA in identifying rights created by Congress the deprivation of which cause an injury satisfying the requirements of standing. *See Spokeo*, 136 S. Ct. at 1549 (citing *Akins*, 524 U.S. at 20-25).

2. The FEC's Failure to Act on CLC's Administrative Complaint Deprives CLC of Information It Has a Legal Right to Receive and Impedes CLC's Ability to Effectuate Its Mission.

The FEC's unlawful delay in acting on CLC's administrative complaint deprives CLC of information to which it is entitled under FECA, FOIA, and binding agency regulations. This informational injury is itself sufficient to confer standing upon complainants bringing suit under § 30109(a)(8)(A). *See CLC*, 952 F.3d at 356 (finding that "denial of access to information qualifies as an injury in fact where [FECA] requires that the information be publicly disclosed"); *see also Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (finding cognizable injury where agency inaction deprived plaintiff of key information needed to effectuate mission). As such, CLC has standing to challenge the Commission's failure to act, and the lower court's decision must be overturned.

Complainants like CLC are entitled to receive specific information related to their complaints upon the conclusion of the Commission's review, but are denied any and all such information until the matter is closed—*i.e.*, until the Commission has acted. This is because administrative investigations into potential FECA violations remain confidential until the Commission completes its administrative process. 52 U.S.C. § 30109(a)(12). Once the Commission takes final action on a complaint, however, it has a non-discretionary duty to disclose its findings to the complainants and make certain materials in the enforcement file available to the

public. *See* 52 U.S.C. § 30109(a)(4)(B)(ii) (requiring the Commission to disclose conciliation agreements and any "determination that a person has not violated [the law]."); 11 C.F.R. § 111.20(a) (requiring the Commission to release any "finding of no reason to believe or no probable cause to believe" or other "terminat[ion of] proceedings" and "the basis therefor"); *see also* 5 U.S.C. §§ 552(a)(2)(A), (a)(5) (requiring agencies to make public all opinions and orders in adjudications as well as commissioner voting records in all agency proceedings); *cf. Doe 1 v. FEC*, 920 F.3d 866, 870-71 (D.C. Cir. 2019) (noting that the FEC has bound itself to disclose a variety of materials related to enforcement actions). By unreasonably delaying action on CLC's complaint for nearly four years, the FEC has deprived CLC not only of its statutorily guaranteed right to action on its complaint, but also the subsequent release of specific factual information gathered and generated by the FEC.

This Court recently confronted the importance of the FEC's release of enforcement file documents upon resolution of a matter. In *Doe 1*, this Court affirmed the district court's order denying a requested injunction by plaintiffs—a trust and its trustee—who sought to block the release of their names in the FEC's enforcement file of a straw donor investigation. *Id.* at 868-69. Only once this Court's mandate issued following the denial of certiorari were the trust's and trustee's identities as a link in the contribution chain revealed. *See* Statement of Reasons of

Commissioner Weintraub (Apr. 7, 2020), https://www.fec.gov/files/legal/murs/6920/6920_2.pdf; Third General Counsel's Report (MUR 6920), https://www.fec.gov/files/legal/murs/6920/17044435484.pdf (recommending FEC find reason to believe trust and trustee violated straw donor statute). The *Doe* litigation—the purpose of which was to shield the evidence obtained by the Commission from the complainants and the public—underscores the value of the information release guaranteed to administrative complainants by statute and regulation.

Obtaining information about the FEC's disposition of its enforcement complaints is necessary for CLC to effectuate its mission. *See, e.g.*, *CLC*, 952 F.3d at 356 (finding "no reason to doubt" that information required to be disclosed under FECA would further CLC's "efforts to defend and implement campaign finance reform."); *CLC v. FEC*, No. 1:19-cv-2336, 2020 WL 2996592 at *6 (D.D.C. June 4, 2020) (finding that the information CLC obtains through enforcement proceedings is "crucial to CLC's mission of 'improving democracy and promoting representative, responsive, and accountable government for all citizens.'"). *See Am. Anti-Vivisection Soc'y*, 946 F.3d at 619. The relevant information that CLC lacks includes not just the analysis and conclusions of the Commission's enforcement staff and the results of any votes by the Commissioners on CLC's complaint, but also the additional factual information discovered by the FEC through its investigation of the

matter, which ultimately forms the basis of the staff's recommendations and the Commissioners' decisions. Here, for example, that could include information related to the "true source" of the funds contributed by GEO Corrections Holdings, Inc., and whether those funds can be directly or indirectly traced to its parent, GEO Group. *See* ECF No. 18 at 6 n. 4 (noting that CLC lacks sufficient information to determine whether GEO Corrections Holdings, Inc. was the true source of the contributions at issue in the underlying complaint); *see also* FEC Mot. to Dismiss at 10-11 (acknowledging that lack of information related to the "true source" of a contribution confers informational standing on complainants), ECF No. 16; *cf. Doe I*, 920 F.3d 866 (seeking to shield the true source of a contribution from disclosure by the FEC in the MUR file released at the close of an administrative complaint.

Furthermore, without understanding *how* the FEC evaluates and decides enforcement matters or prioritizes its docket, including here with respect to the ban on federal contractor contributions, CLC cannot effectively engage in advocacy, rulemaking, or advisory proceedings before the FEC "to ensure the agency is properly interpreting and enforcing federal election laws," App. 6, nor can it provide informed policy analysis to the public and partner organizations or identify and prioritize necessary reforms to the campaign finance laws. All of these programmatic efforts rely on knowing how the FEC is interpreting and applying FECA.

The disclosure of information related to the Commission's enforcement proceedings is justified by FECA's purposes of "deterring future violations and promoting Commission accountability." *Doe I*, 920 F.3d at 870-71. Because such disclosure is triggered only by the closure of a matter under review, however, the Commission can subvert these interests by simply refusing to take dispositive action. *See* 52 U.S.C. § 30109(a)(12). Thus, even if § 30109(a)(8) were wrongly construed not confer a right to sue upon complainants subject to unlawful delay—*cf. supra* Part I.A.1—the informational injury inherent in unlawful delay is an alternative and sufficient basis for standing. *See Akins*, 524 U.S. at 21 ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.").

CLC has suffered an injury-in-fact as a result of the FEC's unlawful delay because it has been denied the information to which it is entitled as a result of the Commission acting on its administrative complaint. As such, CLC has standing to challenge the agency's failure to act.

3. The District Court Erred in Concluding that This Court's *Common Cause* Decision Forecloses CLC's Standing.

The district court erred in concluding that this Court's decision in *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997) (*per curiam*), forecloses CLC's standing in this case. In *Common Cause*, the plaintiff filed suit challenging the FEC's *dismissal* of its administrative complaint that chiefly alleged that two political

committees made contributions in excess of FECA's limits. *Id.* at 415. That is, the plaintiff alleged that it was aggrieved "by an order of the Commission dismissing a complaint," 52 U.S.C. § 30109(a)(8)(A); there was no allegation that the plaintiff was aggrieved "by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed," *id.* As the *Common Cause* court explained, the plaintiff's contention was that "it 'suffered a particularized injury when the FEC dismissed its complaint in a manner contrary to law.'" 108 F.3d at 418 (quoting Appellant's Supp. Br. at 11). The *Common Cause* court rejected plaintiff's contention, reasoning that § 30109(a)(8)(A)[9] "does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Id.* at 419.

The court below concluded that *Common Cause* was "dispositive" and foreclosed CLC's standing in this case because "*Common Cause* did not distinguish between challenges to action and challenges to inaction; it stated unambiguously that § 30109(a)(8)(A)—which governs both types of challenges—does not confer standing." App. 15. The district court's conclusion was erroneous.

First, *Common Cause* is not binding precedent on the question of standing in "failure to act" cases under § 30109(a)(8)(A) because that issue was not before the

[9] At the time of the *Common Cause* decision, this provision was codified at 2 U.S.C. § 437g(a)(8)(A).

court. "[B]inding circuit law comes only from the holdings of a prior panel, not from its dicta." *Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir 2017) (quoting *Gersman v. Grp. Health Ass'n*, 975 F.2d 886, 897 (D.C. Cir. 1992)). A court's holding is only that which is "determinative of the result." *Gersman*, 975 F.2d at 897. Because there was no "failure to act" claim in *Common Cause*, the decision is not binding precedent on that question. Any reasoning or statements by the prior panel on that topic were not essential to its judgment or determinative of the result in the case. The district court erred by concluding otherwise.

Second, even if the *Common Cause* decision can be read to suggest that a plaintiff must prove it has suffered some harm beyond the harm of FEC inaction identified by Congress—*i.e.*, that the unlawful conduct that underlies the administrative complaint itself has independently harmed the plaintiff—that would be unpersuasive dicta that should not be followed here. Congress created two causes of action—the first for administrative complainants who are aggrieved "by an order of the Commission dismissing a complaint filed by such party" and the second for administrative complainants who are aggrieved "by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed." 52 U.S.C. § 30109(a)(8)(A). But Congress only defined what it means to be "aggrieved" with respect to the second cause of action—*i.e.*, an administrative complainant may be aggrieved if the FEC does not act within 120 days of the filing

of its complaint. Congress did not define the conditions under which an administrative complainant would be aggrieved by a dismissal of its complaint. So in creating two causes of action, Congress also created a new substantive right—the right to timely FEC action on an administrative complaint.

This understanding is consistent with the *holding* of *Common Cause*. For suits challenging dismissals of administrative complaints, § 30109(a)(8)(A) "does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause*, 108 F.3d at 419. This is because § 30109(a)(8)(A) does not add to the substantive rights of FECA that would be at issue in a suit challenging the FEC's dismissal of an administrative complaint, it merely creates a right to sue to challenge such dismissals. *See id.*; *see also Gettman v. DEA*, 290 F.3d 430, 433-34 (D.C. Cir. 2002) (holding that party cannot rely upon statutory right to participate in agency proceeding for standing to challenge substance of agency decision through statute authorizing judicial petition for review of final agency action); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 24, 27 (D.C. Cir. 2002) (holding that plaintiff had no standing to seek judicial review of final SEC action for procedural right created by SEC regulations).

But with respect to failure-to-act claims, Congress defined a complainant as "aggrieved" after 120 days of FEC inaction: that is the point at which the complainant "did not get what the statute entitled [it] to receive." *Zivotofsky*, 444

F.3d at 618; *see Akins*, 524 U.S. at 19 (1998) (noting that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly"). Thus, unlike in dismissal cases, Congress "enact[ed] [a] statute[ ] creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Zivotofsky*, 444 F.3d at 617 (quoting *Linda R.S.*, 410 U.S. at 617 n.3); *see Rushforth*, 762 F.2d at 1039 n.3 (holding "any person" "clearly ha[s] standing" to sue an agency for failing to promulgate regulations within 180 days of the enactment of the Sunshine Act).

Moreover, as discussed above, *see supra* Part I.A.2, here the FEC's nearly four-year delay in acting on CLC's complaint has denied CLC information related to the FECs enforcement activities vis-à-vis its administrative complaint. This is precisely the type of informational denial that the Supreme Court and this Court have held sufficient to support Article III standing. *See, e.g.*, *Akins*, 524 U.S. at 23-24; *CLC*, 952 F.3d at 356. The withholding of this information imposes a concrete and particularized injury upon CLC's mission, by thwarting its ability to both communicate to the public about the alleged violations it has devoted resources to pursuing and to advocate for legislative and regulatory change in light of information contained within the FEC's enforcement file and any explanation accompanying the disposition of the matter. In *Common Cause*, this Court did not consider the effect FEC delay may have in injuring an administrative complainant's right to obtain this

information because this was not at issue in the case, which related to a dismissal, not delay.

In *Common Cause*, this Court had no occasion to consider these issues because it was not faced with a failure-to-act claim. The district court declined to engage with any of the reasons why failure to act claims are distinct from dismissal claims for purposes of Article III standing and thereby erred in concluding *Common Cause* was dispositive. CLC satisfies the requirement to show an injury in fact.

II. CLC's Injury Is Fairly Traceable to the FEC and Likely to Be Redressed by a Favorable Decision.

CLC satisfies the remaining two elements of standing. Its injury—the FEC's failure to act—is for obvious reasons traceable to the FEC. Nearly four years have passed during which the FEC has announced no action. Moreover, CLC's injury is likely to be redressed by a favorable decision in its suit because the court has the power to order the FEC to act on CLC's administrative complaint. *See* 52 U.S.C. § 30109(a)(8)(C). The FEC has not disputed that CLC satisfies these two elements of the standing analysis.

III. Time Is of the Essence.

This is a case about delay. The violations underlying CLC's administrative complaint occurred over four years ago, during the prior presidential election cycle. An entire federal election cycle has taken place in the interim, during which GEO has continued to violate the ban on federal contractor contributions, and the current

presidential cycle is rapidly drawing to a close. Nonetheless, CLC's administrative complaint has been pending for 1,413 days without any action by the Commission. CLC is likely to succeed on the merits of its claim that the FEC has unlawfully delayed, but the statute of limitations on the underlying violations of election law is looming. As such, CLC respectfully requests not only that this Court move with all reasonable speed to resolve the question of standing, but also requests that upon remand the district court be instructed to move expeditiously to resolve the merits of this matter with sufficient time to allow for further appeals, before the statute of limitations runs.

A. CLC Is Likely to Succeed on the Merits.

In evaluating whether the Commission's failure to act is contrary to law pursuant to 52 U.S.C. § 30109(a)(8), courts look to the factors laid out in *Common Cause v. FEC*, 489 F. Supp. 738 (D.D.C. 1980) and *Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("TRAC"). These factors include "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. Courts also consider whether the delay is reasonable, and whether it comports with the timetable identified by Congress, if any; the impact of expediting action on other agency priorities; the nature and extent of the interests prejudiced by delay; and whether the

agency's lassitude gives rise to the appearance of impropriety, though no such finding is necessary to hold that the delay is unreasonable. *TRAC*, 750 F.2d at 80.

Here, the underlying complaint states credible allegations that GEO Corrections Holdings, Inc.—a wholly owned subsidiary of a private prison company holding federal contracts—violated the ban on direct or indirect contributions by federal contractors by contributing in excess of $200,000 to a super PAC endorsed by and supporting the Trump campaign. These allegations do not present a novel or complex area of law, because they raise only a straightforward application of the longstanding ban on contractor contributions. *See, e.g.*, *Wagner v. FEC*, 793 F.3d 1, 12-14 (D.C. Cir. 2015) (*en banc*) (noting that the contractor contribution ban was initially enacted in 1940, was later incorporated into FECA in 1976, and has been in place without change since). The complaint is credible because it contains "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). And the complaint relies extensively on the Commission's own records of these contributions, and provides sufficient evidence to allow the Commission to proceed expeditiously with enforcement. 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").

The extent of the delay belies any argument that the FEC's inaction can be explained by competing priorities. Indeed, "[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." *Democratic Senatorial Campaign Comm. v. FEC*, No. Civ.A. 95-0349, 1996 WL 34301203, at *5-*6 (D.D.C Apr. 17, 1996) ("DSCC"). Here, the FEC has failed to take any official action on Plaintiff-Appellant's complaint for nearly four years. Not only is this delay unreasonable, it poses a substantial and ongoing threat to the electoral system. In the absence of any enforcement action by the FEC, GEO affiliated companies have continued to contribute to political committees, including over $1 million in contributions during the 2018 and 2020 election cycles. *See supra* at 7; *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); *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.").

A four-year delay in acting on a straightforward complaint alleging a clear violation of FECA violates the "rule of reason," *TRAC*, 750 F.2d at 80, runs contrary to Congress's intent that the Commission act expeditiously, and prejudices CLC and the public by allowing apparent violations of FECA to go uninvestigated and

unredressed. *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 . . . ."). 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. That is precisely the risk that the Commission's delay presents here. This is because "[t]he 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 at 418 (finding that an agency's unreasonable delay "signals the breakdown of regulatory processes") (internal quotation marks omitted).

Furthermore, while FECA does not contain an explicit statute of limitations, courts have routinely "applied the catch-all five year limitations period set forth in 28 U.S.C. § 2462" to cases brought by the FEC seeking civil penalties against those who violate FECA.[10] *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 23 (D.D.C. 2019). As such, time is running out for the Commission to hold GEO accountable

[10] It is well-established, however, that this statute of limitations does not apply to actions for declaratory or injunctive relief. *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20 (D.D.C. 1995); *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010), abrogated in part by *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

for its violations of federal law *at all*, much less in a reasonable time frame. Delay that risks permanently depriving the Commission of its ability to enforce FECA is inherently unreasonable, and gives rise to the appearance of impropriety. *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).

B. Further Proceedings in this Matter Must Be Resolved Expeditiously.

In light of the rapidly approaching statute of limitations, and CLC's likelihood of success on the merits of its delay claim, CLC respectfully requests that this Court move with all deliberate speed to resolve this appeal, and that the district court be instructed on remand to set a schedule that will ensure resolution of this matter on the merits before the statute of limitations runs. Appellate courts have jurisdiction to remand an action and "decree or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. To allow the FEC to run out the clock so that violations of federal law go unredressed would make a mockery of judicial review of FEC inaction. Unfortunately, the risk of such a scenario coming to pass here is substantial, and has been exacerbated in part by the two-year period during which the motion on appeal here was pending before the district court. Thus, CLC respectfully requests that the district court be instructed to move expeditiously

to resolve the merits of this matter with sufficient time to allow final resolution, including further appeals, before the statute of limitations runs.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed, and the case remanded for further proceedings.

September 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation because it contains 9,836 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. R. 32(a)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

September 14, 2020

/s/ Mark P. Gaber
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(c), that on September 14, 2020, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

September 14, 2020

/s/ Mark P. Gaber
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ADDENDUM

STATUTES AND REGULATIONS

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5 U.S.C. § 552(a)(2)(A)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:
. . .

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format-

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases

5 U.S.C. § 552(a)(5)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

. . .

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

28 U.S.C. § 2106

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

52 U.S.C. § 30109(a)(4)(B)(ii)

§ 30109. Enforcement

(a) Administrative and judicial practice and procedure

. . .

(4)(B)(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

52 U.S.C. § 30109(a)(8)

§ 30109. Enforcement

(a) Administrative and judicial practice and procedure

. . .

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

52 U.S.C. § 30119(a)

§30119. Contributions by Government contractors

(a) Prohibition

It shall be unlawful for any person-

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land, or buildings, directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(2) knowingly to solicit any such contribution from any such person for any such purpose during any such period.

11 C.F.R. § 111.20(a)

§ 111.20 Public disclosure of Commission action (52 U.S.C. 30109(a)(4))

(a) If the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent.