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

REPLY BRIEF OF PLAINTIFF-APPELLANT CAMPAIGN LEGAL CENTER

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GLOSSARY OF ABBREVIATIONS

CLC Campaign Legal Center

FEC Federal Election Commission

FECA Federal Election Campaign Act

SUMMARY OF ARGUMENT

For almost eighty years, federal law has barred persons or entities contracting with the federal government from making direct or indirect campaign contributions. *See* 52 U.S.C. § 30119. And for good reason: the contractor contribution ban was "the outgrowth of a decades-long congressional effort to prevent corruption and ensure the merit-based administration of the national government," concerns that remain every bit as urgent as they were in 1940. *Wagner v. FEC*, 793 F.3d 1, 14, (D.C. Cir. 2015) (en banc). Indeed, as this Court has recognized, "if there is an area that can be described as the 'heartland' of such [corruption] concerns, the contracting process is it." *Id.* at 22.

The Federal Election Commission ("FEC") failed to heed this admonition in its continuing failure to take action on the administrative complaint here. Nearly four years have now elapsed since plaintiff-appellant Campaign Legal Center ("CLC") filed an administrative complaint alleging clear violations of the contractor contribution ban—namely, that Geo Corrections Holdings, Inc., a wholly owned subsidiary of private prison federal contractor GEO Group, Inc., contributed hundreds of thousands of dollars in 2016 to a federal super PAC supporting Donald Trump in violation of 52 U.S.C. § 30119—but the agency still has yet to act.

Unable to defend this protracted delay on the merits, the FEC has instead focused its defense on the claim that CLC lacks standing. That claim is wrong, and

as explained in CLC's opening brief, the district court was wrong to adopt it. CLC suffers concrete injuries as a result of the FEC's delay, both to its statutory right to receive *some* action in response to its administrative complaint and to informational rights long recognized as sufficient to confer standing. The FEC and its *amicus* offer no cogent basis for finding that these injuries somehow fail to clear the Article III bar.

First, Congress created a right to FEC action on administrative complaints by authorizing a judicial remedy for unlawful FEC delay when the agency fails to act within 120 days. As a complainant under the Federal Election Campaign Act ("FECA"), CLC thus has a right to timely action on its administrative complaint—as evidenced by Congress's authorization of a judicial remedy to enforce that right if the FEC fails to "act on [its] complaint during the 120-day period beginning on the date the complaint is filed." 52 U.S.C. § 30109(a)(8)(A). Under longstanding Supreme Court and D.C. Circuit precedent, Congress may define statutory rights the deprivation of which constitute an injury sufficient to satisfy Article III standing requirements.

The FEC contends that FECA stands alone as an exception to this rule, but its arguments are unavailing. Just as a FOIA requestor has standing to sue when denied the information she seeks, so too does CLC have standing when it is denied the agency action Congress prescribed. Nor does *Common Cause v. FEC*, 108 F.3d 413

(D.C. Cir. 1997), mandate a contrary conclusion. *Common Cause* was a dismissal case, not a delay case, and unlawful FEC delay is distinct from an unlawful FEC dismissal for constitutional standing purposes.

Second, CLC suffers a distinct informational injury because the FEC's continuing failure to resolve its administrative complaint means no information about the proceedings can be made publicly available, including any of the FEC's legal conclusions, factual findings, or vote records. *See id.* § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20(a); Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702 (Aug. 2, 2016); *see also* 5 U.S.C. § 552(a)(2), (a)(5). CLC's public education, legislative policy, and regulatory reform programs depend on this information, so the FEC's failure to act seriously impairs CLC's ability to effectuate its organizational mission. Without the ability to compel agency action in court, complainants have no way to uncover "the basis" of FEC inaction, *see* 11 C.F.R. § 111.20(a), although statutory and regulatory provisions all anticipate that FEC enforcement proceedings will be handled "expeditiously," 52 U.S.C. § 30107(a)(9), and thereafter be made public, *id.* § 30109(a)(4)(B)(ii). *See also* 5 U.S.C. § 552(a)(2), (a)(5). Nothing in the Act or longstanding FEC enforcement regulations and policies permits the Commission to simply hold a matter open in perpetuity and thereby preempt these disclosure requirements.

The FEC's claim that dismissal and delay actions under FECA must be treated identically for standing purposes fails for these reasons. Indeed, the delay here—which now threatens to extend beyond the five-year statute of limitations, risks permanently depriving CLC of information to which it is entitled under FECA. The unique informational deficits arising in a delay suit thus give rise to Article III injuries wholly distinct from those at stake in *Common Cause*.

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

ARGUMENT

I. CLC Has Standing to Enforce Its Statutory Right to Agency Action.

CLC has standing to enforce its statutory right to agency action. As this Court has held, Congress may create statutory rights, the deprivation of which give rise to Article III standing, even if the harm alleged would not otherwise confer standing. In such cases, a plaintiff is injured for Article III purposes "because he did not get what the statute entitled him to receive." *Zivotofsky ex rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 618 (D.C. Cir. 2006). This Court has recognized this type of "statutory standing" in a number of contexts, including the Freedom of Information Act ("FOIA"), *id.*, the right to have Jerusalem listed as the place of birth on a birth certificate, *id.*, rights created under the Federal Advisory Committee Act ("FACA"),

id. at 618; *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); and the right to agency action to promulgate rulemaking under the Sunshine Act, *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1039, 1039 n.3 (D.C. Cir. 1985). As CLC has explained, *see* Opening Br. at 12-25, it has standing to enforce its statutory right to FEC action on its administrative complaint for the same reasons a plaintiff has standing to enforce its statutory rights under the Foreign Relations Authorization Act, FOIA, FACA, and the Sunshine Act: CLC has not received what Congress statutorily entitled it to receive. The FEC contends that the Federal Election Campaign Act ("FECA") stands alone as an exception to this rule, but its arguments are meritless.

First, the FEC contends that this Court's decision in *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997) (per curiam), forecloses CLC's standing. Not so. Here, CLC challenges the FEC's *delay*—its failure to act on CLC's administrative complaint within 120 days, whereas in *Common Cause*, the plaintiff challenged the dismissal of its administrative complaint. Section 30109(a)(8)(A) establishes two different causes of action: one to challenge the FEC's failure to act on an administrative complaint, and one to challenge the FEC's dismissal of an administrative complaint. Although those two causes of action are located in the same statutory paragraph, they are in fact distinct. The actions implicate different legal standards, with delay suits assessed under factors related to the reasonableness

of the delay, *see Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"), and dismissal cases turning on factors such as "the thoroughness, validity, and consistency of [the FEC's] agency's reasoning," *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). The actions are brought at different (and mutually exclusive) stages of the FECA enforcement process—delay suits only when the FEC has failed to take action, and dismissal suits only after the FEC has made a final determination. *See* 52 U.S.C. § 30109(a). And the actions implicate different harms to complainant-plaintiffs: delay suits involve harm to plaintiffs who are denied their statutory right to expeditious agency action in the time-sensitive area of election law, while dismissal suits involve harm to plaintiffs who are deprived of the information or substantive protections FECA guarantees. *See FEC v. Akins*, 524 U.S. 11 (1998).

The FEC highlights the *Common Cause* decision's characterization of that plaintiff as desiring "a prompt and lawful resolution of the complaint" in a "reasonable period of time." FEC Br. at 13 (quoting *Common Cause*, 108 F.3d at 418). But the timeliness of the FEC's consideration was not at issue in the case. The Court's passing statements on that topic are not precedent, had no bearing on the issue actually before the Court, and were not informed by the arguments CLC raises here. *See Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017) ("[B]inding circuit law comes only from the holdings of a prior panel, not

from its dicta." (internal quotation marks omitted)). Likewise, *Common Cause*'s reasoning that the plaintiff lacked standing to assert that "the FEC failed to process [a] complaint in accordance with law," 108 F.3d at 419, does not refer to § 30109(a)(8)(A)'s delay suit provision, but rather FECA's substantive requirements at play in the FEC's decision to *dismiss* an administrative complaint. That is all it could have referred to, given the absence of a delay claim in *Common Cause*.

The FEC suggests that *Common Cause* treated § 30109(a)(8)(A) "as a whole," rather than specifically addressing the dismissal prong of the statute. *See* FEC Br. at 16. Although the delay and dismissal provisions co-exist in the same sentence of the same statutory subpart, the two causes of action differ in the key respect that only the delay provision confers a substantive right. *Common Cause* was a dismissal case, and this Court explicitly decided it as such. *See* 108 F.3d at 419 ("Common Cause has failed to demonstrate that it has suffered a legally cognizable injury as a result of the FEC's *dismissal of its complaint*." (emphasis added)). That the Court referred to § 30109(a)(8)(A) says nothing about the aspect of that provision the Court had no occasion to consider. This Court does not accidentally make precedent by failing to announce that it is not deciding statutory issues not presented by a pending case.[1]

[1] *Amicus* GEO Corrections Holdings, Inc. ("GEO") highlights several district court decisions concluding that plaintiffs lacked standing to challenge FEC delay, *see* Geo Br. at 9-10, but the arguments advanced by CLC here were not raised, analyzed, or decided in any of those cases.

Second, the FEC contends that § 30109(a)(8)(A) "does not support the strict parsing" advanced by CLC. FEC Br. at 17, based on its theory that the provision contains "equal phrases" defining when a complainant "*may* be aggrieved." *Id.* at 18 (emphasis in original). But, the FEC does not explain what it means by "equal phrases," suggesting only that Congress did not define what it means to be aggrieved under either statutory provision. The FEC's argument is misplaced.

To begin, the FEC omits from its statutory quotations the substantive standard adopted by Congress to determine when a delay may begin to be unreasonable—a failure to act "during the 120-day period beginning on the date the complaint is filed." 52 U.S.C. § 30109(a)(8)(A). Although this Court has held that this provision does not impose a 120-day *deadline* for final agency action, *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986), Congress's choice of 120 days reflects its judgment as to when a delay may begin to become unreasonable, *see Democratic Senatorial Campaign Comm. v. FEC*, No. Civ.A. 95-0349(JHG), 1996 WL 34301203 at *7 (D.D.C Apr. 17, 1996) ("*DSCC*") (noting that 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"); *TRAC*, 750 F.2d at 80 (requiring courts to balance, among other factors, the timetable identified by Congress in determining whether

delay is unreasonable). The FEC's contention ignores the statutory text and would render the 120-day timeline chosen by Congress substantively meaningless.

Moreover, the FEC is wrong to characterize "by a dismissal" and "by a failure to act [within 120 days]" as "equal phrases." FEC Br. at 18. To be sure, they are *two* phrases, but they are not "equal," whatever that means, for purposes of statutory injury. Congress defined only in broad terms the injury arising from dismissal of an administrative complaint under § 30109(a)(8)(A), authorizing suit by any complainant "adversely affected or aggrieved" by a dismissal. *Akins*, 524 U.S. at 19-20 (noting that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly"). In contrast, Congress specifically identified a distinct statutory right to have the FEC take *some* action on one's administrative complaint, *see* § 30109(a)(8)(A) and it set 120 days as "the timetable," *TRAC*, 750 F.2d at 80, for courts to consider in weighing whether the delay is unreasonable.

Consider the different lawsuits. A party challenging a *dismissal* of its complaint cannot point to anything in § 30109(a)(8)(A) for the court to consider in ascertaining whether it has been aggrieved by that dismissal. Nothing in § 30109(a)(8)(A) aids the court in determining whether the complainant has suffered an injury or whether the FEC acted consistent with, or contrary to, law in dismissing the complaint. Rather, the court must consider the factual allegations, and the substantive FECA provisions at issue, to determine whether the complainant has

been aggrieved by the dismissal. In contrast, a party challenging *failure to act* can point directly to § 30109(a)(8)(A) to demonstrate that it is aggrieved: in that statute Congress granted a right to *some* action and provided a timetable against which to judge the agency's progress and weigh whether the conferred right has been violated. Further, the two causes of action involve completely different records for courts to consider: delay cases require courts to consider evidence regarding the Commission's actions and priorities, while dismissal cases require courts to evaluate the Commission's application of law to fact. The two provisions are not coterminous or "equal," either in practice or in text. Indeed, the FEC only arrives at its assumption of parallel meaning by excising the substantive metric adopted by Congress for determining when a complainant's right to prompt agency action has been violated.

Third, the FEC contends that FECA should stand as an exception to the rule that Congress may confer rights by statute the denial of which satisfy standing requirements. *See* FEC Br. at 20. But the FEC provides no persuasive justification for this Court to treat FECA differently. In particular, the FEC offers nothing to distinguish *Zivotofsky*—where this Court detailed the concept of statutory standing and held that a person could sue over the deprivation of a statutory entitlement—other than to say that unlike the statute at issue there, "FECA creates no such substantive right." FEC Br. at 20. This conclusory assertion is wrong. *See supra* at 4-7.

Likewise, the FEC's effort to urge a different outcome than *Rushforth* is unavailing. In *Rushforth*, this Court held that a plaintiff had standing to sue an agency for its failure to promulgate regulations within the 180-day period required by the Sunshine Act. 762 F.2d at 1039 n.3. The FEC contends that the Court's holding in this regard is not precedential because "standing was uncontested," "merely lurk[ed] in the record," and was "neither brought to the attention of the court nor ruled upon." FEC Br. at 20 (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004)). Not so. This Court squarely considered and decided the standing question: "Mr. Rushforth clearly had standing as to the Sunshine Act action." *Rushforth*, 762 F.2d at 1039 n.3. Moreover, this Court examined the *Rushforth* decision a second time in *Zivotofsky* and reaffirmed that the promulgation deadline in the Sunshine Act was an example of a statutory right sufficient to support Article III standing. 444 F.3d at 618 ("The [plaintiff] is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive. . . . The same injury can give a plaintiff standing to enforce the Government in the Sunshine Act, 5 U.S.C. § 552b . . . ." (citing *Rushforth*, 762 F.2d at 1039 n.3)). Contrary to the FEC's assertion, this Court has considered whether the Sunshine Act grants a statutory right to timely agency action sufficient to confer Article III standing, and held that it does.

The FEC also seeks to distinguish the Sunshine Act by contending that it "created a right to agency action and a specific deadline for that action," whereas "FECA does not." FEC Br. at 20-21. But FECA's plain text does precisely that: a party has a right to sue based upon the FEC's "failure . . . to act on [its administrative complaint] during the 120-day period beginning on the date the complaint is filed." 52 U.S.C. § 30109(a)(8)(A). FECA's provision does not cease to be a statutory right merely because a court is required to consider suits on a case-by-case basis to determine whether the particular length of delay is unreasonable. Section 30109(a)(8)(A) grants a right to *some* agency action, and provides a metric to consider in determining whether the delay is unreasonable. The FEC does not explain why the strict deadline in the Sunshine Act creates a right sufficient for Article III purposes but the deadline under FECA falls short of Article III simply because it is marginally more flexible. Nothing about a FECA delay suit makes it less of a Case or Controversy, *see* U.S. Const. art. III, than a Sunshine Act delay suit.

Nor does the FEC explain why a FOIA requestor has standing to sue anytime she is denied information she is statutorily entitled to receive, but an administrative complainant under FECA should not have standing to sue when she is denied the agency action—here, meaning *some* agency decision—she is statutorily entitled to receive. As this Court has explained, a FOIA requestor might request information that she has no actual interest in. *See Zivotofsky*, 444 F.3d at 617-18 ("Anyone whose

request for specific information has been denied has standing to bring an action; the requestor'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."). All that matters is that FOIA entitles her to the information, and she has standing to sue if denied the information to which she is entitled. That is so even if she intends never to look at the information, and to immediately toss it in the trash. The FEC offers no explanation why the statutory entitlement to agency fulfillment of a FOIA request suffices to establish standing but the statutory entitlement to agency action on a FECA complaint does not.

Indeed, the right to agency action Congress conferred in FECA exists for weighty reasons that bear on the functioning of our democracy. *See* Opening Br. at 24-25; *DSCC*, 1996 WL 34301203, at *8 ("[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."). Congress chose to create a bipartisan Commission to ensure that enforcement decisions were not motivated by improper partisan aims; but Congress ensured that an improper partisan desire to *prevent* enforcement could be checked by private complainants exercising their right to ensure action on their complaint. The delay suit is thus essential to ensuring compliance with FECA's substantive campaign finance laws, which exist to prevent corruption and ensure an informed

electorate. *See Buckley v. Valeo*, 424 U.S. 1, 3 (1976). The right to agency action afforded by FECA is no less substantive than the identity of the city listed on a birth certificate, the receipt of a government document one might discard, or the timely promulgation of agency regulations. Even if it could be called "procedural," the right to agency action conferred by Congress in FECA is of such a weighty concern that it easily supports Article III standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (noting that violation of procedural right may suffice to constitute injury in fact).

The Court should reject the FEC's invitation to create a different set of rules for FECA compared to other statutory rights and to insulate the FEC from judicial review.

II. The FEC's Failure to Act Deprives CLC of Information to which It Is Entitled by Statute and Directly Impedes CLC's Ability to Effectuate its Mission.

A plaintiff "suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Akins*, 524 U.S. at 21. Here, the FEC's failure to act deprives CLC of information to which it is entitled by FECA, FOIA, and binding agency regulations, namely the results of the FEC's consideration of CLC's administrative complaint, and the bases for those results. *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 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). As such, CLC has suffered an injury-in-fact sufficient to support standing and the district court’s opinion should be overturned.

The Commission and *amicus* GEO[2] assert that CLC is not injured by the FEC’s failure to act because the underlying administrative complaint seeks only determination of the legality of GEO’s contributions, and not additional disclosure related to the same. *See* FEC Br. at 23-24; GEO Br. at 15-20. This argument conflates the relief sought by CLC’s administrative complaint—enforcement of FECA against GEO—with the relief sought in *this* action—to force the Commission to comply with the law by acting on CLC’s complaint.

In support of this flawed theory, the FEC and GEO rely on a series of cases in which courts found that plaintiffs lacked informational standing to challenge the

[2] GEO Corrections Holdings, Inc. is the respondent in the underlying administrative matter. GEO Br. at 8.

FEC's unlawful *dismissal* of administrative complaints because enforcement of those complaints would not result in the disclosure of additional information. *See, e.g.*, *Citizens for Responsibility and Ethics in Washington [CREW] v. FEC*, 475 F.3d 337 (D.C. Cir. 2007) ("*CREW*"); *CREW v. FEC*, 267 F. Supp. 3d 50 (D.D.C. 2017); *Nader v. FEC*, 725 F.3d 226 (D.C. Cir. 2013) ("*CREW II*"). In each of these cases, however, the information sought by CLC here—the Commission's enforcement decision, the votes of the Commissioners, and the bases thereof—had already been disclosed. For instance, in *CREW*, 475 F.3d at 338, the court cited to evidence disclosed during the course of the FEC's investigation, including materials provided by the respondents in that case and "described in great detail in the [FEC] General Counsel's report"; the Commission's vote to adopt its General Counsel's recommendations; and the Commission's release of "materials relating to the matter . . . on the public record" at the close of the investigation). *See also CREW II*, 267 F. Supp. at 52 (noting the General Counsel's recommendation that the Commissioners vote in favor of investigation; that "only three of the six Commissioners so voted"; and that "both sides explained on the record the reasons for their vote"); *Nader v. FEC*, 823 F. Supp. 2d 53, 55 (D.D.C. 2011) (describing in detail the factual and legal findings contained in the General Counsel's report and adopted by the Commission). Indeed, the information had been disclosed precisely because in those cases the Commission *acted* on the complaints. Here, the

Commission's unlawful *inaction* necessarily denies CLC that very information. As such, these cases are easily distinguishable.

The only delay cases cited by the FEC and GEO are similarly inapposite. In *Free Speech for People v. FEC*, the plaintiffs sought disclosure of information related to a single alleged in-kind contribution, and the court found no injury because the participants in the scheme had already admitted to and disclosed the information sought, 442 F. Supp. 3d 335, 343 (D.D.C. 2020). The plaintiffs thus did not allege—and thus the court did not consider—the informational injury CLC has suffered here—the denial of information statutorily required to be disclosed by the *Commission* rather than the respondent. *Id.* In contrast, the plaintiff in *Judicial Watch v. FEC* did allege that he was entitled to "the information resulting from a thorough and complete investigation" of the underlying complaint, 293 F. Supp. 2d 41, 47 (D.D.C. 2003). But there the plaintiff lacked an injury-in-fact because the matter concerned his *own* contributions, so he was already aware of all the information that would result from any investigation by the Commission. *Id*. Here, in contrast, GEO has admitted that it has disclosed information to the FEC that has *not* been disclosed to CLC—including "responses filed with the FEC" in which GEO purports to "demonstrate[ ] that it is not a contractor and has not violated FECA." *See* GEO Br. at 18 n.3.

Taken together, the cases relied upon by the FEC and its amicus make clear that the information released by the FEC at the conclusion of a matter goes beyond the "mere[] legal determinations that the Commission and staff have made regarding facts that have otherwise been disclosed." FEC Br. at 25. Rather, it extends to the factual materials disclosed by respondents or otherwise uncovered by the FEC during the course of its investigation, and which form the basis of its ultimate decision. *See*, *e.g.*, *Doe*, 920 F.3d at 868 (walking through the factual evidence revealed by the Commission's investigation of the matter at issue, and explaining how it formed the basis of the Commission's determination that a violation had occurred.). This information is precisely what CLC seeks and cannot otherwise obtain due to the Commission's failure to act. *See* 52 U.S.C. § 30109(a)(12) (prohibiting the Commission from releasing information about investigative matters until the administrative process is complete).

As such, the Commission's failure to act deprives CLC of more than simply "the knowledge as to whether a violation of law has occurred." FEC Br. at 25. It deprives CLC of information critical to its mission, including not only factual evidence related to the matter at hand, *see supra* at 14-17, but also information about how the Commission conducts enforcement with respect to the contractor contribution ban, what evidence it finds compelling, and how it prioritizes its enforcement docket at large. Importantly, the FEC does not assert—and thus

waives—any argument that obtaining this information will not further CLC's mission by assisting CLC in effectively engaging in advocacy, rulemaking, or advisory proceedings before the FEC; providing informed policy analysis to the public and partner organizations; and identifying and prioritizing necessary reforms to the campaign finance laws.

Two final arguments advanced by the FEC and by GEO also fail. First, GEO's contention that the Commission is not obligated to release information sought by CLC is foreclosed by precedent. GEO does not dispute that the FEC has an obligation to disclose the basis of its decisions once a file is closed.[3] In *Doe* this Court explicitly held that this obligation extends to factual evidence, including reports by the Commission's General Counsel, which "reveal the 'basis' for the Commission's actions." 920 F.3d at 871 n.9. Thus, GEO's argument that the information sought by CLC is subject to disclosure only as a matter of nonbinding agency policy fails. By withholding final action on the complaint, the Commission shirks its statutory and regulatory obligations to reveal its decision-making to complainants and the public.

[3] Indeed, CLC is entitled to the disclosure of this information regarding the FEC's investigation and decision-making process *regardless* of whether the FEC determines GEO's contributions were illegal. *See supra* at 11-12 (citing 52 U.S.C. § 30109(a)(4)(B)(ii); 5 U.S.C. § 552(a)(2)(A), (a)(5); 11 C.F.R. § 111.20(a)).

Second, the FEC's argument that CLC's injury is not redressable is unavailing. CLC must only show "there is some possibility" that an order to conform to the law "will prompt [the agency]" to act on CLC's complaint. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007). The FEC does not dispute that it will release the information CLC seeks upon completion of the underlying proceeding, nor that an order to conform will prompt it to act. *See* FEC Br. at 27. Instead, the Commission merely contends that the timing of any release is "speculative." *Id*. (characterizing as "speculative" whether "a release would occur *soon* after the conclusion of the litigation") (emphasis added). But absent an order under section 30109(a)(8) requiring the FEC to take some action, the agency could hold this matter open in perpetuity, and never release the information to which CLC is entitled. Regardless of the precise date upon which the FEC will complete its work and release the information to which CLC is entitled, a court order will compel it to complete its work in a reasonable time—an apparently unachievable outcome absent such an order. CLC's injury is thus redressable.

III. Time Is of the Essence.

CLC has noted repeatedly in this matter the significant prejudice inherent in the Commission's ongoing failure to act, which appears to have continued unabated notwithstanding the pendency of this action. CLC's underlying complaint has been pending for over four years, yet the agency has failed to act. This civil action has

been pending for nearly three years, yet it has failed to advance beyond the motion to dismiss stage. In all this time, it appears the Commission has yet to determine whether to even proceed on CLC's complaint. FEC Br. at 27 (noting that "*should* [the agency] determine to proceed with the complaint," it could be years before the matter winds its way through the investigative process (emphasis added)). If this is true, CLC is almost certain to prevail on remand. Nonetheless, the Commission appears committed to drawing things out. *Id*. at 28 (noting that "the matter [will] be closed at a later point irrespective of a remand, and the proximity to remand would be dependent on the manner in which post-remand events unfold"). As such, although CLC does not formally seek expedited review within the meaning of this Court's procedures, CLC renews its request that this Court direct the district court to ensure that post-remand events unfold expeditiously, as justice demands.

CONCLUSION

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

November 4, 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 5,132 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.

November 4, 2020

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(c), that on November 4, 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.

November 4, 2020

/s/ Mark P. Gaber
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