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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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October 14, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), defendant-appellee Federal Election Commission ("Commission" or "FEC") hereby certifies as follows:

(A) Parties and Amici. Campaign Legal Center is the plaintiff in the district court and the appellant in this Court. The FEC is the defendant in the district court and the appellee in this Court. There were no *amici curiae* in the district court. GEO Corrections Holdings has informed the FEC that it intends to participate as *amicus* in this Court.

(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 the FEC's motion to dismiss. The Memorandum Opinion is available at *Campaign Legal Center v. FEC*, Civ. No. 18-0053, 2020 WL 2735590 (D.D.C. May 26, 2020).

(C) Related Cases. The FEC is not aware of any related cases at this time.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations

Miscellaneous

GLOSSARY

APA	Administrative Procedure Act
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
J.A.	Joint Appendix

INTRODUCTION

The Federal Election Campaign Act ("FECA") provides that "any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . or by a failure of the Commission to act on such complaint" within 120 days of filing "may file a petition with the United States District Court for the District of Columbia." 52 U.S.C. § 30109(a)(8)(A).[1] In *Common Cause v. FEC*, this Court concluded that provision "does not confer standing" under Article III, but rather "confers a right to sue upon parties who otherwise already have standing." 108 F.3d 413, 419 (D.C. Cir. 1997) (per curiam). Therefore, "absent the ability to demonstrate a 'discrete injury' flowing from the alleged violation of FECA," administrative complainants "cannot establish standing merely by asserting that the FEC failed to process its complaint in accordance with law." *Id.*

Despite this precedent, Appellant Campaign Legal Center ("Complainant") argues that section 30109(a)(8) creates a "substantive right" to "timely FEC action" on its administrative complaint, the purported violation of which confers Article III standing. (Br. at 23.) But that argument closely parallels the one *Common Cause* rejected: that section 30109(a)(8) "embod[ies] 'a statutory promise

[1] In 2014, FECA was moved from Title 2 to Title 52 of the United States Code. *See Editorial Reclassification Table*, http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html. Cases decided before that recodification cite section 30109(a)(8)(A) as 2 U.S.C. § 437g(a)(8)(A).

to the complainant that the FEC [will] act on a complaint in a reasonable period of time.'" 108 F.3d at 418.

Nor do Complainant's allegations that it has suffered informational injury suffice under Article III. Any information regarding the conduct underlying Complainant's administrative complaint is already in its possession, and administrative complainants suffer no informational injury under Article III when the only purported information that has not been disclosed is merely the Commission's legal determinations based on known facts.

Complainant's true goal is to prompt the Commission to undertake enforcement action against an administrative respondent. But Article III does not grant standing to sue to prompt an Executive agency to "get the bad guys." *Common Cause*, 108 F.3d at 418. The district court correctly concluded that Complainant lacked standing. Accordingly, this Court should affirm.

COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court correctly held that Complainant lacked Article III standing to sue the Commission for failing to act on its administrative complaint.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addendum to the Brief of the Appellant.

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The FEC is a six-member, independent agency responsible for the administration and interpretation of FECA. 52 U.S.C. §§ 30106-07. Congress authorized the FEC to investigate possible FECA violations and gave the FEC "exclusive jurisdiction" to initiate civil enforcement actions for those violations. 52 U.S.C. §§ 30106(b)(1), 30109(a)(1)-(2), (6).

FECA establishes disclosure and reporting requirements related to federal campaign expenditures and contributions. 52 U.S.C. § 30104. FECA also limits the amounts and permissible sources of campaign contributions that candidates, political parties, and political committees may receive. 52 U.S.C. §§ 30116(a), 30118-19, 30121. One such limit is the prohibition on contributions from federal contractors. 52 U.S.C. § 30119(a); *see generally Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (*en banc*) (upholding the constitutionality of FECA's ban on federal contractor contributions).

FECA permits "any person" to file an administrative complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). After considering these allegations and any response, the Commission determines whether there is "reason to believe" that the respondent violated FECA. *Id.* § 30109(a)(2). If the Commission so finds, then it conducts "an investigation of

such alleged violation" to determine whether there is "probable cause to believe" that a FECA violation has occurred. *Id.* § 30109(a)(2), (4). If the Commissioners find that there is probable cause, the Commission must first attempt to remedy the violation informally and enter a conciliation agreement with any persons involved. *Id*. § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, the Commission may institute a civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). Each of these stages requires the affirmative vote of at least four Commissioners for the agency to proceed. *Id.* §§ 30106(c), 30109(a)(2), (a)(4)(A)(i), (a)(6)(A).

Disclosure of information relating to Commission consideration of an administrative complaint is governed by FECA and Commission regulations. While the matter is pending with the Commission, FECA generally requires that any investigation must not be made public. 52 U.S.C. § 30109(a)(12); *see AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003). Upon the closing of a matter, however, FECA requires the Commission to make public any conciliation agreement or "determination that a person has not violated the act." 52 U.S.C. § 30109(a)(4)(B). The Commission also places on the public record specified categories of documents integral to its decision-making in the matter, including the Office of General Counsel's analysis of the administrative complaint. Disclosure

of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016); *see Doe, 1 v. FEC*, 920 F.3d 866, 869-70 (D.C. Cir. 2019).

FECA provides a cause of action for administrative complainants to seek to challenge the Commission's handling of their complaints in two limited circumstances. *See* 52 U.S.C. § 30109(a)(8)(A). First, a party who has filed an administrative complaint may sue the Commission in the event of "a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed." *Id.* Second, an administrative complainant may seek judicial review of "an order of the Commission dismissing a complaint filed by such party." *Id.*

If the court finds a reviewable dismissal decision or failure to act to be "contrary to law," the court may order the Commission to conform to the court's decision within 30 days. 52 U.S.C. § 30109(a)(8)(C). If the Commission fails to conform within the time period, the administrative complainant may bring a civil action to remedy the violation alleged in the administrative complaint. *Id.*

II. FACTUAL BACKGROUND

In its litigation complaint, Complainant alleged that it and another individual jointly filed an administrative complaint against GEO Corrections Holdings, Inc. and Rebuilding America Now (collectively, "Administrative Respondents") on November 1, 2016. (J.A. 10.) According to Complainant, that administrative

complaint alleged that GEO Corrections Holdings, Inc. was a federal contractor that violated FECA's prohibition on contributions by federal contractors when it donated $225,000 to Rebuilding America Now, an independent-expenditure-only political committee or "super PAC" supporting Donald Trump's 2016 presidential campaign. (J.A. 5, 10-11.) Complainant alleged that the Commission acknowledged receipt of the administrative complaint on November 4, 2016. (J.A. 10.) Complainant further alleged that it supplemented its complaint on December 20, 2016, with additional purported evidence of FECA violations. (J.A. 11.) Finally, Complainant pleads on "information and belief" that the Commission has "failed to act on [its] administrative complaint to date." (J.A. 11.)

III. PROCEDURAL HISTORY

On January 10, 2018, just over a year later, Complainant filed suit in the United States District Court for the District of Columbia claiming that the FEC's "failure to act on" Complainant's "administrative complaint within 120 days" of its filing was contrary to law under 52 U.S.C. § 30109(a)(8)(A). (J.A. 11.) Complainant also claimed that the Commission violated the Administrative Procedure Act ("APA") by unlawfully withholding and unreasonably delaying agency action on its complaint. (J.A. 12.) For relief from these alleged violations, Complainant requested that the district court order the FEC to act on its complaint within 30 days. (J.A. 12.)

The district court granted the Commission's motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted. (J.A. 13-16.) First, the district court concluded that Complainant lacked standing to sue under Article III because it had not alleged a sufficiently concrete and particularized injury. Relying on this Court's decision in *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997), the district court rejected Complainant's argument that FECA "creates a substantive right to FEC action within 120 days" of the filing of an administrative complaint, the violation of which confers standing. (J.A. 14-15.) Instead, the district court concluded that section 30109(a)(8)(A) "does not confer standing; it confers a right to sue upon parties who otherwise already have standing." (J.A. 15 (quoting *Common Cause*, 108 F.3d at 419) (internal quotation marks omitted).) Second, the district court dismissed Complainant's APA claim for failure to state a claim, holding that FECA provided "an adequate mechanism for judicial review" and precluded APA review. (J.A. 15-16.) Complainant has abandoned this latter claim on appeal.

SUMMARY OF THE ARGUMENT

Complainant does not have a justiciable interest in the enforcement of FECA against third parties. Nor does it have a substantive right to agency action on its administrative complaint within 120 days of it being filed. This Court's opinion in *Common Cause v. FEC* is controlling here. In *Common Cause*, the Court found

that section 30109(a)(8)(A) creates a procedural right to sue the FEC for either dismissal or failure to act on a complaint. The statute did not create a substantive right; plaintiffs must still demonstrate that they have suffered a discrete, underlying injury separate and apart from any mere procedural violation stemming from a dismissal or failure to act. The fact that the Commission did not pursue enforcement against a third party within a specified time period does not itself constitute an injury in fact.

Nor does Complainant's argument that it has been deprived of information to which it is entitled suffice to establish injury in fact for Article III. The information over which it claims a right to receive — which includes information regarding possible agency findings and staff analysis — is not the type of information that courts have held may form the basis for Article III injury in fact. Rather, what Complainant seeks is the Commission's legal conclusions about the factual allegations alleged in its administrative complaint; it seeks no new factual information related to its underlying FECA allegations. The matter documents are also prohibited from disclosure until the administrative proceedings end and, even assuming it did prevail in this case, Complainant can only speculate that it would receive them soon after a remand.

Complainant lacks Article III standing and this Court need not consider its improper requests to consider the merits, belatedly expedite this appeal, or override

the district court's right to manage its own docket. The district court did not consider the merits of Complainant's delay claim, and the merits are not before this Court in this appeal regarding standing. Moreover, Complainant's argument regarding likelihood of success is based solely on its own, untested allegations and without the benefit of a chronology of any events before the agency. To achieve expedition of the question that is before the Court, Complainant was required to file a procedural motion within 30 days of docketing and it failed to do so. And even if this Court did consider the request to direct the district court to expedite, Complainant has not presented any basis to believe that court could not adequately handle scheduling in the normal course.

Because Complainant failed to demonstrate injury in fact, this Court should affirm.

STANDARD OF REVIEW

The Court reviews the grant of a motion to dismiss for lack of standing *de novo*. *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015). The Court "accepts facts alleged in the complaint as true," but plaintiffs "must state a plausible claim that [they have] suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits." *Id*.

ARGUMENT

This Court should affirm the district court's dismissal of Complainant's complaint for lack of Article III standing. Accordingly, the Court need not consider Complainant's subsequent request for this Court to intervene in the district court's management of its own docket.

I. THE DISTRICT COURT CORRECTLY HELD THAT COMPLAINANT LACKED ARTICLE III STANDING.

A federal court's jurisdiction is limited to cases and controversies, and "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs bear the burden of establishing "the 'irreducible constitutional minimum' of standing [which] consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560-61). Plaintiffs 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." *Id*. Here, Complainant bore the burden of establishing that it has standing, but it failed to demonstrate that it suffered injury in fact.

A plaintiff is injured for standing purposes if it has suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting

Lujan, 504 U.S. at 560). A concrete injury is one that "actually exist[s]" and is "not abstract." *Id.* (internal quotation marks omitted). An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.*

Complainant argues that the FEC's inaction injured it in two respects: (1) section 30109(a)(8)(A) creates a substantive right to FEC action, which Complainant was denied when the FEC did not act on its administrative complaint within 120 days; and (2) the delay in FEC action deprived Complainant of information to which it is entitled when the Commission closes a matter. Neither of these theories, however, is sufficient to establish injury in fact under Article III.

A. The Commission's Mere Failure to Act on an Administrative Complaint within 120 Days is Not a Sufficient Injury under Article III.

Section 30109(a)(8)(A), (C) allows "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . 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" to file a lawsuit arguing that the Commission's dismissal or delay is "contrary to law." Complainant argues that this language grants administrative complainants a "substantive statutory right" to "a 120-day timeframe for agency action," and that the violation of that "right" creates standing. (Br. at 17, 24.) But Complainant is wrong on both counts: section 30109(a)(8)(A) creates a procedural right the violation of which does not satisfy

the injury-in-fact requirement absent some concrete injury, *Common Cause*, 108 F.3d at 419, and section 30109(a)(8)(A) does not set a timeframe for FEC action, *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986).

1. Section 30109(a)(8)(A) Does Not Create a Substantive Right to Commission Action within 120 Days.

"Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549. Although 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," that power "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* (internal quotation marks omitted). Rather, a plaintiff seeking to enforce a procedural right must demonstrate "a separate concrete interest" that will be impaired by "the disregard of" that requirement. *Lujan*, 504 U.S. at 572; *see also Spokeo*, 136 S. Ct. at 1549 (finding that plaintiffs cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III"); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing.").

Applying these principles, this Circuit has held that FECA's provision for judicial review of the Commission's handling of administrative complaints "does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause*, 108 F.3d at 419. Just as Complainant argues here (Br. at 17-25), Common Cause argued that section 30109(a)(8)(A) created "a statutory promise to the complainant that the FEC will act on a complaint in a reasonable period of time and will do so in a manner not contrary to law." 108 F.3d at 418 (internal quotation marks and alterations omitted). Common Cause similarly argued that "when the FEC violates the complainant's right to a prompt and lawful resolution of the complaint, the Commission deprives the complainant of a statutorily promised benefit that is personal to the complainant." *Id*. (internal quotation marks omitted).

This Court squarely rejected these arguments, holding that such allegations merely amounted to a "procedural injury" insufficient to support Article III standing. *Id.* (quoting *Lujan*, 504 U.S. at 571-72). "[A]bsent the ability to demonstrate a discrete injury flowing from the alleged violation of FECA, Common Cause [could not] establish standing merely by asserting that the FEC failed to process its complaint in accordance with law." *Id*. at 419 (internal quotation marks omitted). Thus, contrary to Complainant's argument, the mere assertion "that the FEC failed to process [a] complaint in accordance with law" is

insufficient. *Common Cause*, 108 F.3d at 419. "To hold otherwise," this Court has found, "would be to recognize a justiciable interest in having the Executive Branch act in a lawful manner . . . [which] is not a legally cognizable interest for purposes of standing." *Id*. (citing *Lujan*, 504 U.S. at 573).

Furthermore, this Court has "unequivocally rejected" Complainant's contention that section 30109(a)(8)(A) creates a substantive entitlement to Commission action on an administrative complaint within a specified period of time. *Rose*, 806 F.2d at 1092; *see also In re Nat'l Cong. Club*, No. 84-5701, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984) (summarily reversing the district court's ruling that the FEC was required to resolve an administrative complaint within two years); *Stockman v. FEC*, 138 F.3d 144, 152 (5th Cir. 1998) ("While the Campaign Act grants the FEC power to conduct investigations and hearings expeditiously, the Act does not create a deadline in which the FEC must act or create a private cause of action to enforce this provision." (internal quotation marks omitted)).

Every district court agrees. *E.g.*, *Democratic Senatorial Campaign Comm. v. FEC*, No. CIV. A. 95-0349 (JHG), 1996 WL 34301203, at *7 (D.D.C. Apr. 17, 1996) ("Congress did not provide the FEC with a specific statutory timetable within which it must act on administrative complaints . . . [and] [c]ourts have construed the 120-day period of [section 30109(a)(8)(A)] as jurisdictional in nature and not as a time period in which the FEC is required to complete final action.");

Citizens for Percy '84 v. FEC, No. CIV. A. 84-2653, 1984 WL 6601, at *2 (D.D.C. Nov. 19, 1984) (holding "the 120 day period is jurisdictional and does not impose a deadline for final action"). FECA's legislative history is consistent with these cases. Complainant noted Senator Claiborne Pell's statement that section 30109(a)(8)(A) provides for a court action after 120 days to ensure "that the Commission does not shirk its responsibility" to act on administrative complaints. (Br. at 21 n. 6) (quoting 125 Cong. Rec. S19099 (daily ed. Dec. 18, 1979) (statement of Sen. Pell)). But this comment merely confirms that an administrative complainant has a cause of action after 120 days. It does not suggest that a complainant has a substantive right to action within that timeframe. The 120-day time period is simply a limitation on the cause of action Congress provided to administrative complainants that otherwise have standing to sue.

Indeed, Complainant's brief undermines its own argument. Complainant admits that "Congress did not impose specific time constraints upon the Commission to complete final action." (Br. at 39.) But if Congress did not impose a time constraint on the Commission to complete final action, then Complainant does not have a substantive right to agency action within 120 days of filing its administrative complaint. Because Complainant failed to allege a discrete injury flowing from the Commission's inaction, the district court correctly concluded that Complainant failed to satisfy the injury in fact requirement for Article III standing.

2. Neither *Common Cause* nor Section 30109(a)(8)(A) Creates Different Rights for Dismissal and Failure to Act Claims.

Complainant's attempt to distinguish *Common Cause* falls short. Complainant endeavors to differentiate between the Commission's action dismissing the administrative complaint in *Common Cause* from the Commission's inaction on Complainant's administrative complaint here. But neither *Common Cause* nor the statute support separate treatment of dismissal and failure to act claims under Article III.

Section 30109(a)(8)(A) provides a cause of action against the Commission for two categories of potential plaintiffs: (1) a party aggrieved by the Commission's dismissal of their administrative complaint; and (2) a party aggrieved by the "failure of the Commission to act on such [a] complaint" after 120 days have elapsed. As the district court recognized, *Common Cause* did not distinguish between these two classes of plaintiffs. (J.A. 15.) Rather, the *Common Cause* court directly addressed the argument that section 30109(a)(8)(A) creates a right to a "*prompt* and lawful resolution" of its administrative complaint. 108 F.3d at 418 (emphasis added). In rejecting that argument, the Court referred to section 30109(a)(8)(A) as a whole. *Id.* at 419. As the Court explained, an administrative complainant "cannot establish standing merely by asserting that the FEC failed to *process its complaint* in accordance with law." *Id.* (emphasis added). Complainant is simply incorrect to assert that *Common Cause* did not

have occasion to address a claim asserting that the Commission's delay in acting on an administrative complaint was sufficient to satisfy Article III. *See Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39, 48 (D.D.C. 2004) ("[U]nder Article III, it is not enough for [a plaintiff] to allege that it was injured because the Commission unlawfully delayed the investigation; plaintiffs must show a discrete injury flowing from such alleged delay." (internal quotation marks omitted)); *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 48 (D.D.C. 2003) ("The [D.C. Circuit] made clear that while the FEC's failure [to] act within the 120-day period of [section 30109(a)(8)(A)] conferred *a right to sue*, it did not also confer standing.").

The plain language of the statute also does not support the strict parsing Complainant suggests. It argues that Congress specifically determined that an administrative complainant is "aggrieved" by a failure to act within 120 days because "that is the point at which the complainant did not get what the statute entitled [it] to receive." (Br. at 33.(internal citation and quotation marks omitted)) The statute, however, uses the same statutory language to define both classes of plaintiffs that may sue to challenge the Commission's handling of their administrative complaint.

Section 30109(a)(8)(A) begins with the subject "[a]ny party" and the verb "aggrieved," a term historically associated "with a congressional intent to cast the

[prudential] standing net broadly." *FEC v. Akins*, 524 U.S. 11, 19 (1998). Following "aggrieved" are two adverbial phrases separated by the coordinating conjunction "or": (1) "by an order of the Commission dismissing a complaint," and (2) "by a failure of the Commission to act on such complaint." 52 U.S.C. § 30109(a)(8)(A). These equal phrases modify the verb "aggrieved" and identify two types of parties that may file suit. Contrary to Complainant's argument, both phrases define how a plaintiff *may* be "aggrieved." *See* § 30109(a)(8)(A), (C). The statute does not say a party *may* be aggrieved by a dismissal of their complaint, but a party *is* aggrieved if the Commission does not act on their complaint within 120 days. Because these are two equal phrases creating, in the same manner, causes of action related to processing administrative complaints, it would be inconsistent to find that one cause of action confers a procedural right while the other confers a substantive right.

FECA's text otherwise treats delay and dismissal claims identically in all relevant respects. Both delay and dismissal claims must be filed in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). Both are subject to the same "contrary to law" standard of review. *Id.* § 30109(a)(8)(C). And the only statutory remedy available for either claim is an order "direct[ing] the Commission to conform . . . within 30 days." *Id.* Given this statutory similarity, it would be odd for Congress to have intended one statutory

clause to confer a substantive right when the immediately preceding clause was a merely procedural requirement. *Cf. Jareki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("[A] word is known by the company it keeps . . . .").

Because neither the statute nor case law can be read as creating different rights for dismissal and failure to act, the Court should find that *Common Cause* is controlling. Accordingly, Complainant's mere allegation "that the FEC failed to process its complaint in accordance with [the] law," without "demonstrat[ing] a 'discrete injury' flowing from the alleged violation of FECA," is insufficient for standing. *See Common Cause*, 108 F.3d at 419.

3. The Cases Complainant Relies on are Inapposite.

None of the cases Complainant cites suggests that FECA creates a substantive right to action within a set time period, the violation of which may support injury in fact. Complainant first points to cases in which plaintiffs that filed rulemaking petitions had standing to sue administrative agencies when the agencies failed to respond to the petitions within a certain time period. (*See* Br. at 15-16.) In such a case, however, a plaintiff may demonstrate injury in fact by asserting a "substantial probability" that an agency's rules, or an agency's refusal to promulgate rules, will cause them discrete harm. *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000); *see also Massachusetts v. EPA*, 549 U.S. 497, 522-26 (2007) (finding that Massachusetts had standing to sue the EPA for

denying a rulemaking petition). In the context of a request for an administrative agency to enforce the law against a third-party, however, parties have no "justiciable interest in having the Executive Branch act in a lawful manner" for purposes of standing. *Common Cause*, 108 F.3d at 419.

Complainant's reference (Br. at 16-17) to other statutes through which Congress has created a substantive right to certain government action is similarly misplaced because, as explained above, FECA creates no such substantive right, *see, e.g.*, *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006) (concluding that a plaintiff had standing to sue because he had a colorable claim that a federal statute entitled him to have Jerusalem listed as his birthplace). Complainant cites this Court's decisions in *In re American Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004) and *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C. Cir. 1985) to support its standing claim. (Br. at 18-19.) But standing was uncontested in those cases, and neither court addressed it. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (internal citation and quotation marks omitted).

In any event, *Rushforth* involved a claim that an agency had failed to promulgate Sunshine Act regulations within a 180-day deadline set by statute, 762

F.2d at 1038-39; in other words, the Sunshine Act created a right to agency action and a specific deadline for that action. *See* 5 U.S.C. § 552b(g). FECA does not. *Stockman*, 138 F.3d at 152 (FECA "does not create a deadline in which the FEC must act or create a private cause of action to enforce this provision").

As the Supreme Court noted in *Lujan*, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan v.*, 504 U.S. at 562 (internal quotation marks omitted). Complainant attempts to argue that it is the object of government inaction because the FEC failed to act on its complaint within 120 days. (Br. at 22-23.) But unlike the plaintiffs in the cases cited in its brief, Complainant is not the object of government action or inaction because it does not have a substantive right for the FEC to act on its administrative complaint within that timeframe. The real interest Complainant seeks to advance lies in the FEC's inaction with regard to enforcing FECA against the Administrative Respondents. Complainant's administrative complaint, litigation complaint, and appellate brief all underscore that Complainant's goal is enforcement. Given that Complainant is not the object of government inaction and that it does not have a cognizable interest in law enforcement, the Court should find that Complainant lacks standing.

B. Complainant Does Not Have Informational Standing Because the Commission Has Not Deprived It of Any Information to Which It Is Entitled.

Complainant alternatively argues that it has informational standing because FECA and the Commission's regulations require the FEC to disclose certain information upon the closing of an enforcement matter. It is true that a plaintiff's failure "to obtain information which must be publicly disclosed pursuant to" FECA may constitute injury in fact. *Akins*, 524 U.S. at 20-21. Here, however, Complainant already has in its possession all of the factual information it seeks, and the additional information it identifies merely reflects the Commission's legal determinations regarding facts known to Complainant. Neither approach establishes injury in fact.

1. Complainant Already Has in Its Possession All Facts FECA Requires to be Disclosed.

A plaintiff has no injury in fact when it has the information it seeks in its possession and merely desires to obtain "the same information from a different source." *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001); *see also Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 343 (D.D.C. 2020). Furthermore, plaintiffs lack standing when the information at issue "would add only a trifle to the store of information about the transaction already publicly available." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). Here, Complainant cannot establish that it has been deprived of information related

to the transaction underlying its administrative complaint because it already possesses that information.

As described in its litigation complaint, Complainant's administrative complaint alleged only that the Administrative Respondents violated the federal ban on contractor contributions. (J.A. 7-10 (citing 52 U.S.C. § 30119(a)(1).) It made no allegation that the Administrative Respondents violated FECA's separate provisions requiring disclosure. *See generally* 52 U.S.C. § 30104. That was because all of the allegedly unlawful contributions were fully disclosed pursuant to FECA's requirements. (*See* J.A. 8 (citing disclosure reports filed by Rebuilding America Now with the FEC).) Complainant's allegations thus reveal that it is already aware of all the information that must be disclosed under FECA: the identity of the contributor; the amount of those contributions; the purpose of the contributions; and the dates of the contributions. (*Id.*) Complainant can, like anyone else, "learn the details of the transaction" by visiting the Commission's website. *See Citizens for Responsibility & Ethics in Wash.*, 475 F.3d at 339.

A violation of FECA's ban on federal contractors does not result in the public being deprived of information that must be disclosed under FECA unless the recipient fails to disclose it. That provision merely prohibits federal contractors from making contributions; it does not itself mandate disclosure. 52 U.S.C. § 30119(a)(1). "Nothing in the FECA requires that information concerning a

violation of the Act as such be disclosed to the public." *Common Cause*, 108 F.3d at 418. As a result, Complainant cannot use it to prove informational injury.

The only potentially undisclosed fact Complainant identified was its suggestion that the Commission may have uncovered 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." (Br. at 28-29.) But that speculative suggestion appears nowhere in Complainant's litigation complaint. (*See* J.A. 7-12.) Nor does Complainant claim to have alleged any violations of FECA's separate provision prohibiting contributions in the name of another by serving as a conduit for a corporate parent. J.A. 5-12; *see* 52 U.S.C. § 30122. If the Commission had acted on the only allegation that Complainant did make — that the Administrative Respondents violated the federal contractor ban — FECA would not have required any additional information to be disclosed. The Commission's lack of final action on Complainant's enforcement complaint has, therefore, not deprived it of any information that FECA would require to be disclosed. *See Wertheimer*, 268 F.3d at 1075; *see also Free Speech for People*, 442 F. Supp. 3d at 343.

2. FECA and the Commission's Policy of Disclosing Decision-Making Documents Do Not Support Informational Injury.

Complainant also argues that the FEC's failure to act has deprived it of certain information that the Commission releases at the conclusion of its

enforcement process, including the staff report analyzing the allegations and the result of any Commissioner votes related to the matter. (Br. at 26-27.) The nature of the information Complainant argues it has been deprived of, however, merely reflects the legal determinations that the Commission and staff have made regarding facts that have otherwise been disclosed.

Complainant specifically argues that the Commission must release the results of any Commission votes, as well as its legal determinations as to whether it found "reason to believe" or "probable cause to believe" that FECA had been violated or alternatively whether it had made the "determination that a person has not violated" FECA. (Br. at 26-27.) A plaintiff, however, cannot "establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of law has occurred." *Wertheimer*, 268 F.3d at 1074 (internal quotation marks omitted); *see also Common Cause*, 108 F.3d at 417 (holding that "[i]f the information withheld is simply the fact that a violation of FECA has occurred," then the plaintiffs have not suffered injury in fact).

Complainant may be curious to learn how the Commission would vote on its administrative complaint, but a party suffers no informational injury when it "do[es] not really seek additional facts but only [a] legal determination" regarding known facts. *Wertheimer*, 268 F.3d at 1075. To allow a plaintiff to "establish injury in fact merely by alleging that he has been deprived of the knowledge as to

whether a violation of the law has occurred would be tantamount to recognizing a justiciable interest in the enforcement of the law," which this Court has said it cannot do. *Common Cause*, 108 F.3d at 418-19. These allegations more properly reflect a plaintiff's "desire[] for the Commission to 'get the bad guys,' rather than disclose information. [Plaintiffs have] no standing to sue for such relief." *Id.* Simply put, Complainant suffers no informational injury when the only information withheld is the Commission's legal determination regarding known facts.

That Complainant's true interest is in compelling the Commission to pursue enforcement action, and not additional information, is underscored by its request for expedition in the district court. (Br. at 35-41.) There, Complainant argues that the matter must be expedited because of the "rapidly approaching statute of limitations." (Br. at 40.) The expiration of any statute of limitations, however, would not affect Complainant's interest in obtaining the information the Commission releases at the termination of an enforcement matter. That information would be disclosed in the normal course regardless of any limitations period. Complainant also contends that it is entitled to receive "investigative" materials (Br. at 9-10), but those are not disclosed. 81 Fed. Reg. at 50,703. The only possible impact the expiration of a statute of limitations could have would be on the *Commission's* ability to pursue civil enforcement against the Administrative

Respondents. Complainant has no justiciable interest in the enforcement of FECA against others. *See Common Cause*, 108 F.3d at 418-19.

Moreover, even assuming Complainant has a concrete and particularized interest in the file released when the administrative matter concludes, it is only speculative that a release would occur soon after the conclusion of the litigation. The Commission's disclosure regulations and policies related to its enforcement matters trigger only upon the closure of a matter. *See* 11 C.F.R. § 111.20(a) (requiring the FEC to "make public" findings of no reason to believe or no probable cause to believe or when it otherwise terminates its proceedings "no later than thirty (30) days" after closure); 81 Fed. Reg. at 50,703 (setting policy of disclosure of reports from the Office of General Counsel and other enforcement documents "as soon as practical" after closure). Following a remand, the agency would still be required to "follow the statutorily-required process in dealing with administrative complaints" and, should it determine to proceed with the matter, mandatory time periods would in most cases make complete resolution of a matter within 30 days impossible. *See Hagelin v. FEC*, 332 F. Supp. 2d 71, 82 (D.D.C. 2004). If an investigation, briefing, and/or conciliation were involved, there would be no immediate case closure and file release would not follow a remand. *E.g.*, *Americans for Job Sec.*, Matter Under Review 6538R at 1 n.1 (signed Aug. 28, 2019 & Sept. 9, 2019), https://www.fec.gov/files/legal/murs/6538R/

19044477418.pdf (conciliating matter three years after a remand). The matter would be closed at a later point irrespective of a remand, and the proximity to the remand would be dependent on the manner in which post-remand events unfolded.

Because the FEC has not deprived Complainant of any information to which it is entitled, and because Complainant does not have a cognizable interest in seeing the law enforced, the Court should find that Complainant has not demonstrated an informational injury.

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Complainant's ultimate interest is in seeing the FEC "get the bad guys." *See Common Cause* 108 F.3d at 418. None of Complainant's allegations establish that the FEC deprived Complainant of any information to which it is entitled. Rather, Complainant merely sought enforcement of FECA against the Administrative Respondents.

In its brief, Complainant attempts to argue that it has suffered injury in fact because the Commission failed to act on its complaint within 120 days and because it has been deprived of information to which it is entitled. But at no point did Complainant demonstrate a concrete injury to its activities "with [a] consequent drain on [its] resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests." *See Common Cause*, 108 F.3d at 417 (internal quotations omitted) (second alteration added). First, Complainant simply

does not have a substantive right to FEC action on its complaint within 120 days. Second, Complainant is not entitled to the information that it seeks because: (1) it is not seeking information to facilitate its participation in the political process but rather a legal determination that the Administrative Respondents violated FECA; and (2) even after a remand it is speculative that the release of information would follow. It is apparent that Complainant's aim is still enforcement. Neither of these alleged injuries are sufficient for standing. *See Akins*, 524 U.S. at 24; *Common Cause*, 108 F.3d at 418. Therefore, this Court should affirm the district court's dismissal of Complainant's complaint for lack of standing.

II. COMPLAINANT'S REQUESTS FOR EXPEDITION, MERITS CONSIDERATION, AND ORDERING THE DISTRICT COURT'S DOCKET ARE IMPROPER.

Complainant lacks Article III standing, and its requests for this Court to consider the merits of the delay claim and order expedition here and at the district court are inappropriate at this time. The only issue on appeal is Complainant's standing, a determination courts must make first and without regard to merits considerations. To seek expedition in this Court, Complainant was required to do so by motion, but did not. And even if the Court were inclined to entertain Complainant's request to order expedition at the district court, there is no need to override that court's "inherent authority to manage [its own] docket[]." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892-93 (2016).

As an initial matter, Complainant's arguments regarding its chances of success on the merits have no place in this appeal. "It is well established . . . that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990). The Court's "threshold inquiry into standing in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal." *Id*. at 155 (alteration in original) (internal citation and quotation marks omitted). The only issue before the Court is standing. Because the merits of Complainant's claim do not factor into the Court's standing analysis, it would be inappropriate to analyze the merits at this stage.

Furthermore, the district court dismissed Complainant's complaint on a preliminary standing motion. (J.A. 13-16.) As such, no chronology of events has been compiled that would bear on that claim or the Commission's defenses, and the district court has had no occasion to consider the merits of Complainant's delay claim.

Complainant also requests in its brief that the Court expedite its appeal (Br. at 40), but "counsel seeking expedited review must file a motion" and such motions "must be filed within 30 days of the date the case is docketed." D.C. Circuit, Handbook of Practice and Internal Procedures at 34 (Dec. 1, 2019). Complainant failed to file a motion to expedite and thus may not obtain expedition

at this juncture in contravention of this Court's procedures. Even if it had filed such a motion, Complainant would have been required to "demonstrate that the delay will cause irreparable injury and the decision under review is subject to substantial challenge," which it would have been unable to do. *Id.* As explained above, the expiration of the statute of limitations affects the Commission's ability to seek civil penalties and does not irreparably injure Complainant; and the district court's decision comported with directly controlling precedent.

For similar reasons, Complainant does not establish that its purported likelihood of success warrants ordering the district court to expedite proceedings in this matter. The district court is best positioned to assess the needs of the many cases on its docket and to schedule its proceedings accordingly in order "to achieve the orderly and expeditious disposition of cases." *Dietz*, 136 S. Ct. at 1891 (internal citation and quotation marks omitted). There is no need for this Court to override the district court's discretion in ordering its docket.

CONCLUSION

For the reasons above, the Commission respectfully requests that the Court affirm the District Court's dismissal of Complainant's complaint due to a lack of standing.

Respectfully submitted,

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October 14, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2020, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *M. Elise Holman*
M. Elise Holman

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I hereby certify, on this 14th day of October 2020, that:

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/s/ *M. Elise Holman*
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