(ORAL ARGUMENT NOT YET SCHEDULED)

No. 20-5159

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE GEO CORRECTIONS HOLDINGS, INC. IN SUPPORT OF APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amicus curiae* Geo Corrections Holdings, Inc. hereby certifies as follows:

(A) Parties and Amici

All parties, intervenors, and *amici* appearing before the district court and in this court are listed in Brief for Appellees the Federal Election Commission.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* GEO Corrections Holdings, Inc. makes the following disclosures:

GEO Corrections Holdings is a wholly owned subsidiary of the GEO Group, Inc. The GEO Group, Inc. is a publicly traded corporation and has no parent company. The Vanguard Group and BlackRock Fund Advisors own ten percent (10%) or more of The GEO Group, Inc.'s stock.

(B) Rulings Under Review

References to the ruling at issue appear in the Brief for Appellees the Federal Election Commission.

(C) Related Cases

Amicus is not aware of any related cases at this time.

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CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE

Pursuant to FRAP 29(a)(2), all parties have consented to the filing of this brief. Pursuant to D.C. Circuit Rule 29(d), counsel for *amicus curiae* GEO Corrections Holdings certifies that it is not aware of any other non-government *amicus* briefs addressing the subject matter of this brief. GEO Corrections Holdings is the subject of the underlying administrative complaint filed by the Campaign Legal Center with the Federal Election Commission. As such, *amicus curiae* is particularly well-suited to provide the Court important context and arguments on these subjects, which will assist it in resolving this case.

GLOSSARY

CLC means the Campaign Legal Center.

FEC means the Federal Election Commission.

FECA means Federal Election Campaign Act.

GCH means GEO Corrections Holdings, Inc.

IDENTITY AND INTEREST OF AMICUS CURIAE

GCH submits this brief in support of Appellee the Federal Election Commission.[1]

GCH has a strong interest in this case as it is the subject of the underlying administrative complaint filed with the Federal Election Commission. GCH seeks to ensure that all issues raised in this matter receive a full and fair hearing before this Court.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) & D.C. Circuit R. 29(b), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae* contributed money intended to fund the preparation or submission of this brief.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

Amicus hereby requests leave to be heard at oral argument to protect its interests as the party whom Appellant's underlying complaint falsely accused of FECA violations. A timely motion to this effect will be filed pursuant to Circuit Rule 34(e).

SUMMARY OF ARGUMENT

The statutory provision of the Federal Election Campaign Act ("FECA") at issue in this matter does not automatically confer standing. *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997). Instead, the Campaign Legal Center ("CLC") must, just like all Plaintiffs, demonstrate Article III standing. *Id.* CLC urges this Court to depart from *Common Cause* and declare that CLC has a statutory cause of action under Section 30109(a)(8)(A) because that provision "confer[s] rights the deprivation of which constitute[s] an injury sufficient to satisfy Article III standing requirements." Appellant's Br. at 8. In the alternative, CLC seeks to rewrite this Court's standing jurisprudence by expanding the scope of "informational standing" as previously conceived by the Supreme Court and this Circuit. There is no basis for CLC's proposed wholesale revision to this area of law, and the Court should affirm the District Court's ruling.

ARGUMENT

I. APPELLANT LACKS ARTICLE III STANDING.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)). "Article III standing . . . enforces the Constitution's case-or-controversy

requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). Article III standing "is an essential and unchanging part of the case-or-controversy requirement . . . ." *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Because of this fact, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct [that is] likely to be redressed by the requested relief." *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). As the District Court's ruling affirmed, CLC is unable to show any personal injury that is fairly traceable to the FEC.

A. Overview of FEC Enforcement Process.

The FECA sets forth two limited situations in which administrative complainants may challenge the FEC's handling of their complaints:

> 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 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). This 120-day period for a non-action lawsuit is a jurisdictional threshold before which suit may not be brought, and not a timetable within which the Commission must resolve an administrative complaint. *See FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986) (rejecting contention that FECA requires "the Commission to act within 120 days or within

an election cycle"). After a petition is filed, "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." 52 U.S.C. § 30109(a)(8)(C). If the Commission fails to conform within that time period, "the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id*.

B. Any Action Brought Under Section 30109(a)(8)(A) Requires a Showing of Constitutional Standing.

CLC contends that Section 30109(a)(8)(A) contains two distinct "causes of action," one to challenge agency dismissals and one to challenge agency inaction, and that this Court should limit its holding in *Common Cause* to dismissal actions and declare that agency inaction suits are subject to entirely different standards. *See generally* Appellant's Br. As the district court recognized, however, there is no basis for applying two separate standing rules to Section 30109(a)(8)(A), depending on the type of challenge brought: "*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." *Campaign Legal Ctr. v. FEC*, 2020 U.S. Dist. LEXIS 92402, *3 (D.D.C. May 26, 2020) (App. at A15). At least two other district court judges in this Circuit have reached the same conclusion, and a third assumed that separate Article III standing must be demonstrated. *See Alliance for Democracy v. FEC*,

335 F. Supp. 2d 39 (D.D.C. 2004); *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41 (D.D.C. 2003); *Free Speech for People v. FEC*, 442 F. Supp. 3d 335 (D.D.C. 2020).

That Appellant has a *procedural* right to sue under 52 U.S.C. § 30109(a)(8)(A) does *not* mean that Appellant has Article III standing to sue. This Court previously held that a party filing suit under Section 30109(a)(8)(A) must make a separate showing of Article III standing:

> **Section [30109](a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing.** As in *Lujan,* absent the ability to demonstrate a "discrete injury" flowing from the alleged violation of FECA, Common Cause cannot establish standing merely by asserting that the FEC failed to process its complaint in accordance with law. To hold otherwise would be to recognize a justiciable interest in having the Executive Branch act in a lawful manner. This, the Supreme Court held in *Lujan*, is not a legally cognizable interest for purposes of standing.

Common Cause, 108 F.3d at 419 (emphasis added); *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 799 F. Supp. 2d 78, 85 (D.D.C. 2011) ("Having the right to file an administrative complaint with the FEC does not necessarily give Plaintiffs standing to seek judicial review of the disposition of that complaint in this Court.").

CLC, however, argues that it has suffered an "injury in fact" because "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." Appellant's Br. at 9-10. No court has ever held that an FEC administrative complainant has an individualized "right to have the FEC act on their complaint," and in fact, CLC's position has been repeatedly rejected. *See*, *e.g.*, *Judicial Watch*, 293 F. Supp. 2d at 48 (Plaintiff "believes that the Commission's delay in acting on his administrative complaint is also an injury in fact, separate from informational injury. The Court finds no basis in the law for this position."). This Court has long held that a plaintiff who sues under Section 30109(a)(8)(A) must demonstrate an "injury in fact" separate and distinct from the statutory "procedural" injury that CLC describes. *Common Cause*, 108 F.3d at 419; *see also Judicial Watch, Inc.*, 293 F. Supp. 2d at 48. In fact, CLC's substantive statutory right to sue theory would run afoul of *Lujan* by permitting any administrative complainant to claim standing to see that "the Laws be faithfully executed." *See Lujan*, 504 U.S. at 557; *see also Massachusetts v. EPA*, 549 U.S. 497, 516-517 (2007) (courts will not "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws") (quoting *Lujan*, 504 U.S. at 581 (1992) (Kennedy, J., concurring)). CLC's alleged basis for Article III standing has been roundly rejected by both this Court, *Common Cause*, 108 F.3d at 419, and the Supreme Court, *Lujan*, 504 U.S. at 573.

Therefore, the District Court properly applied binding precedent when holding that CLC lacked a "concrete or particularized" injury and therefore lacked Article III standing. App. A14-15.

1. *Common Cause* Controls This Matter.

CLC seeks to relitigate *Common Cause* and makes exactly the same arguments that this Court previously rejected. In *Common Cause*, plaintiff-appellant argued that Section 30109(a)(8)(A) contained:

> [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. 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.

Common Cause, 108 F.3d at 418 (internal quotations omitted). This Court rejected this argument and concluded that "Appellant's asserted injury parallels the 'procedural injury' the Supreme Court held insufficient in *Lujan*," and "[a]s in *Lujan*, absent the ability to demonstrate a 'discrete injury' flowing from the alleged violation of FECA, Common Cause cannot establish standing merely by asserting that the FEC failed to process its complaint in accordance with law." *Id.* at 418-19.

As *Common Cause* makes clear, Section 30109(a)(8)(A) does not confer standing for *either* a dismissal or an inaction claim. The *Common Cause* Court applied the Supreme Court's decision in *Lujan* to find the provision did not, in and of itself, confer standing. *Id*. There have been no subsequent developments that

suggest the outcome should be different now. *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340-341 (D.C. Cir. 2007) ("Given the precedent established in *Common Cause* and the lack of any meaningful distinction between that case and this one, we must hold that CREW lacks standing."); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."). This Court should decline CLC's invitation to overrule or distinguish *Common Cause*.

While arising less frequently than dismissal lawsuits brought under Section 30109(a)(8)(A), district courts have applied this Court's *Common Cause* holding in at least four matters involving an administrative complainant's "inaction" or "delay" claim.[2] First, in *Judicial Watch,* the district court specifically rejected plaintiff's argument "that the Commission's delay in responding to his claim is, in and of itself, an injury in fact," and required the showing of a separate informational injury sufficient for Article III standing purposes. *Judicial Watch*, 293 F. Supp. 2d at 48. The court found "that plaintiffs have suffered only procedural injury as a result of the Commission's failure to meet the 120-day

[22] In a fifth case, the Fifth Circuit considered an "inaction" or "unreasonable delay" claim brought by the subject of an administrative complaint (i.e., the administrative respondent). *See Stockman v. FEC*, 138 F.3d 144 (5th Cir. 1998) (dismissed for lack of jurisdiction). The Fifth Circuit noted that "we have considerable doubt that Stockman has satisfied his burden of demonstrating standing to challenge the FEC's delay" and cited this Court's decision in *Common Cause*. *Id.* at 150-151.

deadline" and that plaintiff "has not demonstrated informational injury," meaning the plaintiff "failed to satisfy the Article III standing requirement." *Id*.

Second, in *Alliance for Democracy v. FEC*, the district court explained that "under Article III, it is not enough for Alliance to allege that it was injured because the Commission unlawfully delayed the investigation; plaintiffs must show a 'discrete injury flowing from' such alleged delay." 335 F. Supp. 2d at 48 (quoting *Common Cause*, 108 F.3d at 418).

Third, in *Free Speech for People v. FEC*, the district court required the plaintiffs to demonstrate Article III standing and found that "[p]laintiff does not seek any presently unknown information that is otherwise subject to disclosure under FECA," and plaintiff "therefore lacks standing to sue." 442 F. Supp. 3d. at 345. And finally, in the present matter, the district court concluded that *Common Cause* controlled and found that Plaintiffs lacked standing.

In order to reach the outcome urged by CLC, this Court would not only have to overrule its decision in *Common Cause*, but it would also have to disregard the Supreme Court's decision in *FEC v. Akins*. *Akins* was decided one year after *Common Cause* and the Supreme Court's decision affirmed that Section 30109(a)(8)(A) lawsuits require the plaintiff to demonstrate Article III standing. *See FEC v. Akins*, 524 U.S. 11, 21 (1998) (finding that the Article III "'injury in

fact' that respondents have suffered consists of their inability to obtain information").

2. *American Rivers* Did Not Overrule *Common Cause* and the Agency Petition Cases Cited by CLC Are Irrelevant Here.

Common Cause has not been overruled. Before the District Court, CLC argued that *Common Cause* no longer controls because it was effectively overruled or superseded by this Court's decision in *In re American Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004). The District Court rejected this argument, noting that "*American Rivers*, in which Article III standing was uncontested, provides no basis for such a departure" from *Common Cause* and *Judicial Watch*. 2020 U.S. Dist. LEXIS 92402 at *4 n.1 (App. A15). Indeed, this Court relied upon and applied *Common Cause*'s holding in Section 30109(a)(8)(A) cases that arose well after *American Rivers*. *See, e.g.*, *Nader v. FEC*, 725 F.3d 226, 228 (D.C. Cir. 2013).

American Rivers was not a standing case; it involved an agency petition, a motion for a writ of mandamus — "an extraordinary remedy reserved for extraordinary circumstances" — and the reviewability of agency action under the APA. 372 F.3d at 418. Specifically, the Federal Energy Regulatory Commission ("FERC") failed to act on a petition for more than six years and then argued "that it is not obligated to address a petition filed under one of its own regulations allowing requests for discretionary action." *Id*. This Court found FERC's

argument to be "without merit" and determined that "FERC is obligated *under the APA* to respond to the 1997 petition," and made clear that "we are reviewing [FERC's] failure to give [petitioners] *any* answer for more than six years." *Id*. at 418, 419. The present matter does not involve a petition for rulemaking, nor is it governed by the APA's review provisions. The district court correctly found that "52 U.S.C. § 30109(a)(8)(A) provides the exclusive mechanism for judicial review, thus precluding review under the APA." A15-16. Whether the APA obligates FERC to respond to a petition within six years is of no relevance to the question of standing under Section 30109(a)(8)(A).

Now, CLC seeks to analogize FECA's administrative complainant provisions to the Freedom of Information Act (FOIA) whereby any person "whose request for specific information has been denied has standing to bring an action." Appellant's Br. at 14 (quoting *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006)). CLC claims that the Supreme Court and this Court have held that both FECA and FOIA "grant[] an entitlement to information the deprivation of which constitutes an injury sufficient to satisfy Article III standing." *Id*. According to CLC, the "information" that the FEC produces in the course of considering an administrative complaint (*i.e*., the materials that document the FEC's process of enforcing the law) is no different than the information sought by FOIA requestors. *Id*. at 9. CLC's analogy is inapt.

As this Court described FOIA in *Zivotofsky*, "[a]nyone whose request for specific information has been denied has standing to bring an action." *Zivotofsky*, 444 F.3d at 617. An administrative complainant under FECA does not file a "request for specific information." *See id.* Rather, under Section 30109(a)(8)(A), a complainant urges the FEC to exercise its enforcement powers. This Court recognized in *Zivotofsky* that *Lujan* held that citizen-suit provisions "could not bestow standing on plaintiffs who claimed no 'particularized' injury, but only a generalized interest shared by all citizens in the proper administration of the law." *Id.* at 618.

The *Zivotofsky* matter, as cited by CLC in support of its position, involved a question of whether an individual born in the city of Jerusalem had a right to have "Israel" printed as their place of birth on a passport. *Id.* at 615. This Court held that Congress had created an "individual right" to have Israel listed on a personal passport and that standing existed because the violation of that individual right affected the plaintiff in a personal and individual way. *Id.* at 618-19. Here, however, the FEC's consideration of CLC's administrative complaint does not affect CLC in an individualized manner; the timely enforcement of the law by the FEC is a generalized interest that everyone shares. CLC is in no way uniquely positioned. As this Court has previously held, CLC may bring suit under Section 30109(a)(8)(A) *if* it has suffered an actual injury sufficient to establish Article III

standing. No such injury exists here, and *Zivotofsky* does nothing to change that fact.

This Court has held that "[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements. Mere interest as an advocacy group is not enough. The fact that Congress may have given all interested parties the right to petition the agency does not in turn 'automatically' confer Article III standing when that right is deprived." *Gettman v. DEA*, 290 F.3d 430, 433 (D.C. Cir. 2002) (internal citations omitted). Furthermore, "it is not at all anomalous that Congress could permit them as 'interested parties' . . . to participate in agency proceedings, and yet they be unable to seek review in the federal courts." *Id*. at 434. For example, this Court held that "interested person" plaintiffs lack informational standing where they seek to enforce "deadline requirements," but may demonstrate standing to enforce "disclosure requirements." *Friends of Animals v. Jewell*, 828 F.3d 989, 994 (D.C. Cir. 2016); *see also Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.").

Therefore, because *Common Cause*—as well as general standing principles—still control, this Court should dismiss CLC's suit for lack of standing.

C. CLC Has Not Alleged an Informational Injury Sufficient to Establish Standing.

In *Akins*, the Supreme Court explained that, in a suit under Section 30109(a)(8)(A), "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; *see also Nader*, 725 F.3d at 230 ("*Akins* … establish[es] that litigants who claim a right to information allege the type of concrete injury needed for standing to bring a FECA claim if the disclosure they seek is related to their informed participation in the political process"). For two distinct reasons, CLC has not been deprived of any such information.

1. CLC Does Not Seek Campaign Finance "Information" Described in *Akins*.

CLC claims that it has been deprived of "information" about the FEC's enforcement process. In *Akins*, however, the "information" to which the Supreme Court referred was campaign finance related information that FECA requires campaign and election participants to disclose. The Supreme Court explained:

> The "injury in fact" that respondents have suffered consists of their inability to obtain information – lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures – that, on respondents' view of the law, *the statute requires that AIPAC make public*.

Akins, 524 U.S. at 21 (emphasis added). An "injury in fact" exists only when the complainant is unable to obtain information that FECA requires be disclosed *by the target of the administrative complaint* (*i.e.*, the administrative respondent), not documents produced by the FEC in the course of enforcing the law. *See Judicial Watch*, 180 F.3d at 278 (finding lack of standing when "[n]owhere in its administrative or civil complaint did Judicial Watch mention disclosure requirements or suggest that it desired *documents that the alleged violators were required to disclose*") (emphasis added); *Campaign Legal Ctr. v. FEC*, 2020 U.S. Dist. LEXIS 98646, *16 (D.D.C. June 4, 2020) (considering what additional campaign finance disclosures the administrative respondent would have to make if the complainant were successful).

In cases following *Akins*, courts have recognized that the plaintiff in a Section 30109(a)(8)(A) lawsuit may have standing if the underlying matter is one in which FEC action may lead to new public disclosures that FECA requires the administrative respondent to make. *See, e.g.*, *Citizens for Responsibility & Ethics v. Am. Action Network*, 410 F. Supp. 3d 1, 12 (D.D.C. 2019) ("The Supreme Court has long recognized that FECA creates an informational right—the right to know who is spending money to influence elections, how much they are spending, and when they are spending it."). However, no court has ever construed the "information" referred to in *Akins* to include the FEC's internal process

documents. Here, CLC contends that it is deprived of "information" such as "the results of any votes taken by the Commissioners," "portions of Commission's investigative and enforcement materials," "reports by the Office of General Counsel," "the analysis and conclusions of the Commission's enforcement staff," and "information discovered by the FEC through its investigation of the matter." Appellant's Br. at 10, 28-29. These documents and materials are the byproduct of the FEC's internal enforcement process, and they memorialize the agency's determination whether a person's conduct violates the FECA and warrants penalty. This Court has already held that "the government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury." *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001).

In the present matter, "under the *Akins* test, [A]ppellants have failed to show either that they are directly being deprived of any information or that the legal ruling they seek might lead to additional factual information." *Id.*; *see also Free Speech for People*, 442 F. Supp. 3d at 345 ("Plaintiff does not seek any presently unknown information that is otherwise subject to disclosure under FECA" and "therefore lacks standing to sue"). In its administrative complaint, CLC alleged that (i) GCH was a federal contractor, as defined in FECA, and (ii) GCH made four contributions to independent expenditure-only committees (*i.e.*, Super PACs) during 2015-2016. CLC has knowledge of these four contributions because they

were disclosed on publicly available financial disclosure reports filed with the FEC by the recipient political committees. CLC contends that FECA prohibits a federal contractor from making contributions to federal political committees that make only independent expenditures and asks the FEC to find that GCH violated FECA's contribution restrictions, impose sanctions, enjoin GCH from future violations, and otherwise ensure compliance with FECA.[3]

Even if the FEC were to fully agree with CLC's contentions and enforce the law exactly as CLC asks, no additional contribution, spending, or donor disclosures would result. The allegedly impermissible contributions at issue have been publicly reported in full, and CLC does not allege any "disclosure" violation. There is no additional information to which CLC is entitled under FECA that is required to be disclosed by GCH or the recipients of its contributions, no matter the outcome. Accordingly, CLC suffers no informational injury under *Akins*.

In cases involving administrative complaints that make allegations of prohibited contribution, courts have repeatedly emphasized that plaintiffs seeking mere determinations of legality lack standing to maintain their claims. *See, e.g.*, *Wertheimer,* 268 F.3d at 1075 (holding that plaintiffs lacked standing to seek a legal determination that certain transactions constitute coordinated expenditures);

[3] In responses filed with the FEC, GCH demonstrates that it is not a federal contractor and has not violated FECA. The merits of the administrative complaint, however, have no bearing on the question of whether CLC has standing to sue in this matter.

Citizens for Responsibility & Ethics v. FEC, 267 F. Supp. 3d 50, 54 (D.D.C. 2017) (holding that an advocacy group lacked standing to challenge FEC dismissal of alleged violation of FECA's "prohibition on pass-through contributions" because "nothing in the statute or regulatory regime" would have required the alleged violator to disclose information); *Vroom v. FEC*, 951 F. Supp. 2d 175, 178-79 (D.D.C. 2013) (holding that plaintiff lacked standing to seek a legal determination that certain political committees were affiliated).

Thus, rather than seeking campaign finance information that has not been disclosed, CLC seeks only agency-generated enforcement materials that document "a legal conclusion that carries certain law enforcement consequences" for others, which this Court has already held does not create standing. *Wertheimer,* 268 F.3d at 1075; *see also Common Cause*, 108 F.3d at 418 ("Nothing in FECA requires that information concerning a violation of the Act as such be disclosed to the public."). As was the case in *Common Cause*, what CLC "desires is for the Commission to 'get the bad guys,' rather than disclose information," and CLC "has no standing to sue for such relief." *Common Cause*, 108 F.3d at 418; *see also Nader*, 725 F.3d at 230 ("Nader does not seek information to facilitate his informed participation in the political process. Instead, he seeks to force the FEC to 'get the bad guys'"); *Wertheimer,* 268 F.3d at 1074 ("[T]he government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give

rise to a constitutionally cognizable injury."); *CREW*, 267 F. Supp. 3d at 55 ("[A]n interest in knowing or publicizing that the law was violated is akin to claiming injury to the interest in seeing the law obeyed, which simply does not present an Article III case or controversy"). As this Court and district courts in this Circuit have repeatedly held, CLC's interest in the FEC enforcing the law against another party is insufficient to establish standing.

2. The FEC's Enforcement Process Documents Described by CLC Are Not Required to Be Disclosed by Statute.

CLC is also incorrect in claiming that "Congress, by statute, and the FEC, by regulation, have granted administrative complainants a right to receive" these enforcement process materials "upon resolution of an administrative complaint." Appellant's Br. at 13; *see also id.* at 26. The provisions CLC cites establish *only* that the FEC, upon closing the matter, must make public conciliation agreements entered into with administrative respondents, and, in cases where the agency finds the respondent has not violated the law, its "determination" or "action and the basis therefor." 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20. The enforcement process documents which CLC claims it is entitled to receive are *not* required to be disclosed by statute or FEC regulation. Rather, nearly all of the enforcement process material placed on the public record by the FEC is done so voluntarily as a matter of agency policy.

Since this Court's invalidation of the FEC's main enforcement process disclosure regulation in 2003, the agency's enforcement process disclosure practice has been governed by policy statements. *See AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) ("[T]he Commission could tailor its disclosure policy to avoid unnecessary First Amendment infringements, or, as the concurrence maintains, it could decline to release any materials other than those expressly required by section [30109](a)"); FEC Statement of Policy, Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

The categories of materials that the FEC makes public after an enforcement matter is closed are limited by statute and have changed over the years. Current public disclosure policy goes well beyond what FECA mandates. For example, the FEC has not always made public all briefs prepared by agency attorneys in the General Counsel's Office. *See* FEC Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009) ("In the interest of promoting transparency, the Commission is resuming the practice of placing all First General Counsel's Reports on the public record, whether or not the recommendations in these First General Counsel's Reports are adopted by the Commission."). The agency documents known as "First General Counsel's Reports" contain "the analysis and conclusions of the Commission's

enforcement staff" and "staff recommendations" to which CLC claims it is entitled. Appellant's Br. at 28-29. However, neither FECA nor FOIA require enforcement staff analysis, recommendations, and legal advice to the Commissioners be made public. CLC cannot claim a statutory right to "information" that is not required to be disclosed by a statute.

The FEC's policy of disclosing more than FECA requires "does not establish a 'binding norm'" and is "not finally determinative of the issues or rights to which it is addressed." *Pacific Gas & Elec. Co. v. Federal Power. Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). Rather, a statement of policy merely "allow[s] agencies to announce their 'tentative intentions for the future' … without binding themselves." *American Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987). The enforcement process materials that CLC describes are not "information" "which must be publicly disclosed *pursuant to a statute*." *Akins*, 524 U.S. at 21 (emphasis added).

CONCLUSION

For the aforementioned reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

/s/Jason Torchinsky

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CERTIFICATE OF COMPLIANCE WITH WORD LENGTH AND TYPEFACE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 4,923 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Date: October 21, 2020

/s/Jason Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below the foregoing was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Date: October 21, 2020

/s/Jason Torchinsky