IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 20-cv-1778-RCL

REPLY IN SUPPORT OF STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ERIC WOMACK
Assistant Branch Director

ZACHARY A. AVALLONE
Trial Attorney

United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 514-2705

Pursuant to the Court's December 21, 2020 Order, ECF No. 19, the Department of Justice ("Department") respectfully files this Reply in support of its Statement of Interest ("Reply") on behalf of the United States.

As the Court noted in its Order, three more Commissioners were confirmed to the Federal Election Commission ("the Commission"), bringing the total to six.[1] The Commission now has enough Commissioners to authorize its General Counsel to appear and defend this case or to ask the Department of Justice to appear and defend this case on the Commission's behalf. *See* 52 U.S.C. § 30107(a)(6) & (a)(8). Should the Commission seek to appear in this case, the Department would defer to the arguments and positions taken by the Commission.

However, because the Court has directed the United States to reply to Plaintiff's Response to the Statement of Interest of the United States of America ("Response"), ECF No. 18, the Department respectfully submits this reply in support of its Statement of Interest on behalf of the United States.

ARGUMENT

Plaintiff Campaign Legal Center ("CLC") has failed to show that it has suffered a concrete and particularized injury traceable to the Commission's alleged delay in acting on its administrative complaint. This is, after all, a case solely about that delay. *See* Compl. at 2, ECF No. 1 . CLC seeks a declaration that the Commission's delay was unlawful and an order requiring the Commission to act on CLC's administrative complaint. *Id.* at 14. CLC does not ask the Court to rule on the legal arguments of its administrative complaint, does not ask the Court to rule that any third party violated the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.* ("FECA"),

[1] FEC Press Release "Shana Broussard, Sean Cooksey, Allen Dickerson sworn in as Commissioners" (Dec. 18, 2020) *available at* https://www.fec.gov/updates/shana-broussard-sean-cooksey-allen-dickerson-sworn-commissioners/.

and does not seek relief requiring the disclosure of any information. *Id.* To show standing, CLC must therefore demonstrate how the additional time it has taken the Commission to consider its administrative complaint has caused it to suffer a concrete and particularized injury. And it must show how any alleged harm caused by the purported delay will be remedied by a court ordering the Commission to act on CLC's administrative complaint. Thus, the important question here is whether CLC has articulated harm *arising from the delay* itself.

CLC's Response ignores that question entirely. Instead, CLC acts as though the Commission has already denied its administrative complaint. As a result, CLC's Response focuses on inapposite authority from cases where the Commission had already dismissed plaintiffs' administrative complaints, where plaintiffs subsequently challenged those dismissals in federal court, and where the requested remedy would require disclosure of the sought-after information.

The difficulty with ignoring the nature of this case as one of delay, rather than denial, is that it sheds no light of CLC's assertion of standing in this specific context. Indeed, CLC seems not to contest the fact that the Commission's delay in taking action on Plaintiff's administrative complaint is insufficient alone to confer standing. Plaintiff does not dispute that under binding Circuit precedent, Section 30109(a)(8)(A) "does not confer standing; it confers a right to sue upon parties who otherwise *already have standing*." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (emphasis added). Thus, as courts in this Circuit have held, the "FEC's failure [to] act within the 120-day period of [§ 30109(a)(8)(A)] . . . did not . . . confer standing." *Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 48 (D.D.C. 2003) (citation omitted).

Since delay alone is not enough to demonstrate standing, a plaintiff must plead an actual harm from the delay that will be remedied by an order forcing the Commission to act on its administrative complaint. The "irreducible constitutional minimum of standing" requires a

"concrete and particularized" injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Thus, in the present context, to assert an injury from delay sufficient for standing, Plaintiff must show concrete and particularized harm arising from an inability to access the sought-after information while the Commission considers the administrative complaint. CLC must also show how forcing the Commission to consider its complaint is "'likely,' as opposed to merely 'speculative,'" to redress any harm from the delay. *Id.* at 561.

CLC does not plead any harm arising from the Commission's delay. While it describes its work at a high level, Compl. ¶¶ 8–12, nothing in the complaint describes the harm it has suffered from waiting for the Commission to act on its administrative complaint. CLC also makes no effort to explain how the requested relief of ordering the Commission to act on its administrative complaint without knowing how the Commission will ultimately rule would be "likely" to remedy any alleged harms—as opposed to "merely 'speculative[.]'" *Lujan*, 504 U.S. at 561.[2]

In another recent case, CLC's failure to plead harm from delay resulted in dismissal. *Campaign Legal Ctr. v. FEC*, No. 18-CV-0053 (TSC), 2020 WL 2735590, at *2 (D.D.C. May 26, 2020) *appeal docketed*, No. 20-5159 (D.C. Cir. June 9, 2020). CLC surprisingly does not attempt to distinguish that case in its Response even though the parallels are striking. After waiting a year for the FEC to act on its administrative complaint, CLC sued the FEC "arguing that the delay violated [§ 30109(a)(8)(A)'s] 120-day rule[.]" *Id*. at *1. The court dismissed the case for lack of standing because the delay alone was not sufficient for standing and CLC did not plead any injury from the delay. *Id.* at *2.

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[2] While the Statement discussed potential arguments that CLC could have raised about an informational injury arising from the delay, Statement at 7, ECF No. 16, CLC's complaint alleges the fact of delay—but no harm—and CLC's Response does not ask the court to infer any harm specifically arising from the alleged delay. If CLC had alleged any harm arising from the delay, it must satisfy standing standards described in the Statement. *See id.*

CLC does not explain how this current case is any different or requires a different result. Instead, CLC argues that it "is injured by a *denial* of its statutory right to information." Response at 6 (emphasis added). But, of course, CLC has not been denied any information—it submitted an administrative complaint to the Commission and is waiting for the Commission to act. The Commission has not denied or dismissed the administrative complaint. As such, rather than "ignor[ing] . . . binding Supreme Court and D.C. Circuit decisions" like *FEC v. Akins*, 524 U.S. 11, 21 (1998) and *Campaign Legal Center and Democracy 21 v. FEC*, 952 F.3d 352, 354 (D.C. Cir. 2020), the United States did not address them because they do not control the outcome here. Response at 6. The courts in those cases analyzed standing after the Commission *denied* an administrative complaint—not where a party filed a lawsuit to spur the Commission into action. *Akins*, 524 U.S. at 18 ("The FEC consequently dismissed respondents' complaint."); *Campaign Legal Center and Democracy 21*, 952 F.3d at 354 ("The Federal Election Commission dismissed three administrative complaints alleging violations of the Federal Election Campaign Act's disclosure requirements.").

Finally, Plaintiff does not dispute that if it lacks standing, the Court did not have jurisdiction to enter judgment against the Commission. Plaintiff here suffered no cognizable injury, lacks Article III standing, and is thus not entitled to default judgment. The Court should vacate the default judgment and dismiss the case.

CONCLUSION

For the foregoing reasons and those in the Statement of Interest, the Department respectfully suggests that plaintiff has failed to establish standing to sue and that the Court should vacate its default judgment, dismissing this case in its entirety.

Dated: January 4, 2021

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ERIC WOMACK
Assistant Branch Director

/s/ Zachary A. Avallone
ZACHARY A. AVALLONE
(D.C. Bar No. 1023361)
Trial Attorney

United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 514-2705
Email: zachary.a.avallone@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to attorneys who have appeared in this case.

/s/ Zachary A. Avallone
Zachary A. Avallone