IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 1:21-cv-406-TJK

PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT FEDERAL ELECTION COMMISSION

Pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, Plaintiff Campaign Legal Center ("CLC") respectfully moves for the entry of default judgment against Defendant Federal Election Commission ("FEC" or "Commission"). On February 16, 2021, CLC brought this action challenging the FEC's unlawful failure to act on Plaintiff's administrative complaint alleging violations of the Federal Election Campaign Act ("FECA"). CLC effected service on the United States Attorney for the District of Columbia and the Attorney General of the United States on February 22, 2021. The FEC acknowledged receipt of the Complaint and Summons on March 11, 2021. *See* ECF No. 8; Declaration of Mark P. Gaber, Ex. 1, ¶ 6.[1] The FEC's deadline to file a responsive pleading was April 23, 2021. *See* ECF Nos. 7, 8. The FEC has failed to appear, answer, plead, or otherwise defend this action as required by the Federal Rules of Civil Procedure, and the Clerk of Court entered a default against the FEC on May 10, 2021. *See* ECF No. 9.

[1] The FEC's counsel explained that its offices were closed, and thus unable to receive mail. Thus, while CLC satisfied its service obligations, *see* Fed. R. Civ. P. 4(i)(2) (requiring plaintiff to "send a copy of the summons and complaint by registered or certified mail to the agency"), CLC took the additional step of providing electronic copies to the FEC. *See* Deeley Email, Ex. 1-A.

For the reasons described below, entry of default judgment against Defendant FEC is appropriate because the uncontroverted evidence establishes that the FEC has failed to act on CLC's administrative complaint, and that this failure to act is contrary to law. Pursuant to 52 U.S.C. § 30109(a)(8)(C), Plaintiff asks this Court to declare that the FEC's failure to act is contrary to law and to direct the FEC to conform within thirty days. A proposed order is attached.

STATEMENT OF FACTS

I. Plaintiff's Administrative Complaint

1. On October 16, 2018, CLC filed an administrative complaint with the FEC showing that Heritage Action, a tax-exempt 501(c)(4) corporation, had violated FECA by failing to disclose the contributors who paid for its election advertising during the 2018 election cycle. *See* Admin. Compl., ECF No. 1-1, ¶¶ 1, 4; Gaber Decl., Ex. 1, ¶ 3.

2. Relying on publicly available information, including the FEC's own records, Heritage Action's own statements, and press accounts, CLC's administrative complaint establishes that Heritage Action violated 52 U.S.C. § 30104 by failing to disclose the identity of contributors who gave for the purpose of financing Heritage Action's "independent expenditures"—advertising expressly advocating the election or defeat of federal candidates—during the 2018 election cycle. *See* Admin. Compl., ECF No. 1-1, ¶¶ 17, 19, 21–23.

3. As detailed in the administrative complaint, on August 8, 2018, Heritage Action announced in a press release and in an interview with the news publication *McClatchy* that it planned to solicit contributions for and spend $2.5 million on independent expenditures supporting candidates in twelve specified congressional races during the November 2018 general election. *Id.* ¶¶ 5–7, 18; *see also* Heritage Action Press Release, ECF No. 1-5; *McClatchy* Article, ECF No. 1-6.

4. According to FEC records, Heritage Action spent $374,177 on independent expenditures in the form of mailers and digital advertising in mid-September 2018. In reports filed with the FEC, Heritage Action disclosed making $233,585 in independent expenditures on September 17, 2018, and $140,592 in independent expenditures on September 19, 2018. *See* Admin. Compl., ECF No. 1-1, ¶¶ 8–9; *see also* Heritage 48-Hour FEC Report, ECF No. 1-7; Heritage Quarterly FEC Report, ECF No. 1-8.

5. Despite expressly stating that it would solicit contributors for the purpose of paying for these expenditures, *see supra* ¶ 3, Heritage Action did not disclose to the FEC any contributors. *See* Admin. Compl., ECF No. 1-1, ¶¶ 8–9; *see also* Heritage 48 Hour FEC Report, ECF No. 1-7; Heritage Quarterly FEC Report, ECF No. 1-8.

6. Plaintiff's administrative complaint therefore demonstrates that Heritage Action violated Section 30104 of FECA by failing to make these required disclosures to the FEC. *Id.* ¶¶ 1, 11, 16–17, 23.

7. On October 22, 2018, the FEC sent CLC a letter acknowledging receipt of the Complaint and designating it Matter Under Review 7516 ("MUR 7516"). *See* FEC Admin. Compl. Acknowledgment Letter for MUR 7516, ECF No. 1-9; *See* Gaber Decl., Ex. 1, ¶ 4.

8. CLC has not received any further communication from the FEC regarding MUR 7516. *See* Gaber Decl., Ex. 1, ¶ 5.

9. CLC allowed the FEC more than 850 days to take action on its administrative complaint before filing this action on February 16, 2021. *See* Compl., ECF No. 1.

II. The FEC's Failure to Act

10. During recent years, the FEC has repeatedly declined to actively enforce campaign finance laws. As Commissioner Ellen Weintraub summarized in 2019, the FEC has "frequently

closed matters without so much as making a phone call to investigate potential wrongdoing" and "[e]nforcement actions pending before the Commission languished for months or years . . . causing some to near the end of their statutory limitations," only for "Commissioners to then decline to investigate at all," or for the Commission "to end up with inadequate outcomes years too late to make a meaningful difference to the public." Office of Comm'r Ellen L. Weintraub, *The State of the Federal Election Comm'n: 2019 End of Year Report* at 2 (Dec. 20, 2019), Ex. 2.

11. Between 2006 and 2016, for example, the rate at which the FEC deadlocked on substantive votes regarding enforcement matters grew from 2.6% to 30%. *See* Office of Comm'r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Comm'n Reveals the Unlikelihood of Draining the Swamp* at 1 (Feb. 2017), Ex. 3. As a result of deadlocks, the FEC has routinely failed to investigate serious allegations of campaign finance violations and has closed matters without resolution. *Id*.

12. Indeed, as the FEC itself admitted to the Committee on House Administration in 2019, the FEC has had at least one deadlocked vote in the majority (50.6%) of the enforcement matters it has considered in executive sessions since 2012. *See* FEC, *Responses to Questions from the Committee on House Administration* at 20 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf; *see also* FEC, *Chair Ellen L. Weintraub's Supplementary Responses to Questions from the Committee on House Administration* at 4 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin_Attachment_A_Weintraub.pdf (noting that "a slim majority of 51% have at least one split vote along the way").

13. At the end of 2020, Commissioner Weintraub summarized that the FEC had 466 unresolved pending matters before the agency—a "backlog" that leaves campaign finance laws

unenforced and threatens to do so permanently for "matters imperiled by the statute of limitations." FEC, *Statement of Commissioner Ellen L. Weintraub On the Senate's Votes to Restore the Federal Election Commission to Full Strength* at 1 (Dec. 9, 2020), Ex. 4.

III. The FEC's Lack of Quorum

14. Over 950 days have elapsed since Plaintiff filed its administrative complaint, with no action or further correspondence from the Commission concerning MUR 7516. *See* FEC, Enforcement Query System, https://eqs.fec.gov/eqs/searcheqs (search for "MUR 7516" yields the response "No Matches Found").

15. During this period, the FEC was temporarily without a quorum of commissioners on two separate occasions. Specifically, the FEC was without a quorum from Sept. 1, 2019 to June 5, 2020, and from July 3, 2020 to December 18, 2020. *See* Press Release, FEC, FEC remains open for business, despite lack of quorum (Sept. 11, 2019), Ex. 5; Press Release, FEC, James E. Trainor III sworn in as Commissioner (June 5, 2020), Ex. 6; Press Release, FEC, Caroline C. Hunter to depart Federal Election Commission (June 26, 2020), Ex. 7; Press Release, FEC, Shana Broussard, Sean Cooksey, Allen Dickerson sworn in as Commissioners (Dec. 18, 2020), Ex. 8.

16. Without a quorum of Commissioners, the FEC was unable to "launch any new investigations, issue any advisory opinions, promulgate any rules, or render any decisions in pending enforcement actions." Ex. 2 at 1 n.1; *see also* 52 U.S.C. § 30106(c).

17. But the FEC has had a quorum, and thus has been able to act on Plaintiff's administrative complaint, for nearly sixteen of the thirty months that it has been pending. *See supra* ¶ 15. This includes the ten-and-a-half months that the complaint was pending before the Commission initially lost its quorum in 2019, and the five months during which the Commission has failed to take any public action since it regained its quorum in December 2020. *Id.*

18. Nonetheless, the FEC has taken no known action on CLC's administrative complaint against Heritage Action. *See* Gaber Decl., Ex. 1, ¶¶ 5, 10.

IV. The FEC's Default

19. For the FEC to defend against a lawsuit alleging unlawful delay of an enforcement matter, four Commissioners must vote affirmatively to authorize the defense. *See* 52 U.S.C. § 30106(c); 30107(a)(6).

20. It is apparent that some number of Commissioners have grown reluctant to defend agency inaction. Indeed, this is one of several unlawful delay lawsuits in which the FEC has failed to appear in Court and mount a defense. *See, e.g.*, *Campaign Legal Ctr. v. FEC* (Iowa Values), No. 1:20-cv-01778-RCL (D.D.C.) (filed June 30, 2020); *Campaign Legal Ctr. v. FEC* (45Committee, Inc.), No. 1:20-cv-00809-ABJ (D.D.C.) (filed Mar. 24, 2020); *Campaign Legal Ctr. v. FEC* (Right to Rise Super PAC), No. 1:20-cv-00730-CRC (D.D.C.) (filed Mar. 13, 2020); *CREW v. FEC* (SEALs for Truth), No. 1:19-cv-02753-RCL (D.D.C.) (filed Sept. 16, 2019).

21. The FEC has not appeared, filed an answer, or otherwise defended in this action to date. *See* Gaber Decl., Ex. 1, ¶ 10.

22. Plaintiff CLC has incurred $400 in costs, as defined under 28 U.S.C. § 1920, in seeking this default judgment. *See* Gaber Decl., Ex. 1, ¶ 11; ECF No. 1 (docket text showing receipt of payment for filing fee).

LEGAL STANDARD

I. Default by the Government under Rule 55

A plaintiff may seek default judgment in a suit where the defendant fails "to plead or otherwise defend." Fed. R. Civ. P. 55(a)-(b). But "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief

by evidence that satisfies the court." Fed. R. Civ. P. 55(d). Although default against the government is disfavored, Rule 55(d) does not "'relieve the government from the duty to defend cases or obey the court's orders.'" *Payne v. Barnhart*, 725 F. Supp. 2d 113, 119 (D.D.C. 2010) (quoting *Alameda v. Sec'y of Health, Ed. and Welfare*, 622 F. 2d 1044, 1048 (1st Cir. 1980)). "In determining whether default judgment against the government is proper, a court may accept as true the plaintiff's uncontroverted evidence," *Payne*, 725 F. Supp. 2d at 116, including public record evidence, *see Doe v. Democratic People's Republic of Korea Ministry of Foreign Affairs Jungsong-Dong*, 414 F. Supp. 3d 109, 120 (D.D.C. 2019); *see also, e.g.*, Order, *Citizens for Responsibility and Ethics in Washington v. FEC*, Case No. 1:19-cv-02753-RCL (D.D.C. Apr. 9, 2020) (ECF No. 9) (granting motion for default judgment against FEC where plaintiff demonstrated, "by evidence that satisfies the Court, that the FEC's failure to act on the administrative complaints . . . is contrary to law"). Where, as here, default has been entered against the government, "the quantum and quality of evidence that might satisfy a court can be less than that normally required." *Alameda*, 622 F.2d at 1048.

II. Contrary to Law Standard

A plaintiff is entitled to relief where the undisputed facts show that the FEC has acted "contrary to law" by unreasonably delaying action on the underlying administrative complaint. 52 U.S.C. § 30109(a)(8)(c). While FECA "does not require that an [enforcement action] be completed within a specific time period," *DSCC v. FEC*, No. 95-cv-0349-JHG, 1996 WL 34301203, at *1 (D.D.C. Apr. 17, 1996), it does impose "an obligation to investigate complaints expeditiously," *id.* at *4; *see also Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980) ("Where the issue

before the Court is whether the agency's failure to act is contrary to law, the Court must determine whether the Commission has acted 'expeditiously.'").

In determining whether the FEC has acted "expeditiously," the Court may look to the factors listed in *Common Cause v. FEC* concerning "the credibility of the allegation, the nature of the threat posed, the resources available to the agency, and the information available to it, as well as the novelty of the issues involved." 489 F. Supp. at 744. In addition, the Court may consider the so-called "*TRAC* factors" outlined in *Telecomm. Research & Action Ctr. v. F.C.C.*:

> (1) the time agencies take to make decisions must be governed by a rule of reason[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*") (internal quotation marks omitted).

Although the FEC's decision whether or not to investigate "is entitled to considerable deference, the failure to act in making such a determination is not." *DSCC*, 1996 WL 34301203, at *4.

ARGUMENT

Under this Court's test for evaluating agency inaction, the undisputed evidence demonstrates that the Commission has unlawfully failed to act on CLC's administrative complaint. In light of the Commission's default, Plaintiff is therefore entitled to a judgment against the Commission pursuant to Rule 55 of the Federal Rules of Civil Procedure.

I. Plaintiff's Administrative Complaint States Credible Allegations that Heritage Action Violated FECA.

Plaintiff's administrative complaint provides substantial evidence that Heritage Action violated its FECA disclosure obligations. Under *Common Cause v. FEC*, the Court first considers "the credibility of the allegation" at issue in the underlying administrative complaint. *See* 489 F. Supp. at 744. FEC administrative complaints are credible when they contain "specific documentation of the amounts spent and the purposes of the spending," along with specific evidence as to the violations alleged. *Citizens for Percy '84 v. FEC*, No. 84-cv-2653, 1984 WL 6601, at *3 (D.D.C. Nov. 19, 1984). Plaintiff has provided specific documentation concerning the amounts Heritage Action spent, the purposes of its spending, and specific evidence of the FECA violations at issue here.

FECA requires that persons other than political committees, including 501(c) organizations like Heritage Action, disclose to the FEC certain information about contributions made to support independent expenditures. Specifically, an entity that makes independent expenditures in excess of $250 in a calendar year must report to the FEC, among other things, the identity of each person "who makes a contribution . . . in excess of $200 within the calendar year," 52 U.S.C. § 30104(b)(3)(A) (cross-referenced in *id.* § 30104(c)(1)), and "each person who made a contribution in excess of $200 . . . for the purpose of furthering an independent expenditure," *id.* § 30104(c)(2)(C). These provisions "require[] the identification of such donors contributing for the purpose of furthering the not-political committee's own express advocacy for or against the election of a federal candidate, even when the donor has not expressly directed that the funds be used in the precise manner reported." *Citizens for Responsibility and Ethics in Washington ("CREW") v. FEC*, 316 F. Supp. 3d 349, 423 (D.D.C. 2018), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020). Indeed, the FEC issued guidance on October 4, 2018 confirming that "for independent

expenditures made on or after Sept. 18, 2018," entities must disclose the identity of contributors for "*all* contributions received by [the] reporting non-political committee" from August 4 to September 30, 2018 if the contributor gave more than $200 within the calendar year. *See* FEC October 4, 2018 Press Release, ECF No. 1-3 at 3 (emphasis in original).

Plaintiff's administrative complaint provides specific evidence that Heritage Action is a covered entity that failed to make required disclosures of donors who contributed more than $200 to fund its independent expenditures in mid-September 2018. *See supra* Statement of Facts ¶¶ 1–6. Heritage Action is a 501(c)(4) corporation, an entity other than a political committee that is covered by the relevant Section 30104 disclosure requirements. *See id.* ¶ 2. Based on public information from Heritage Action's press releases and interview with *McClatchy*, CLC established that Heritage Action solicited contributions to fund its plans to spend $2.5 million on express advocacy during the November 2018 general election. *See id.* ¶¶ 2–3. Heritage Action received contributions from donors in excess of $200 within the calendar year for its independent expenditures and reported that it spent $374,177 of independent expenditures in mid-September 2018 on twelve specified congressional candidates in the form of mailers and digital advertising. *See id.* ¶¶ 3–4. On two of its fall 2018 FEC reports, however, Heritage Action failed to make required disclosures identifying donors who contributed more than $200 to fund its independent expenditures. *See id.* ¶¶ 4–5. This failure to disclose violated 52 U.S.C. §§ 30104(c)(1), (c)(2)(C). Plaintiff's administrative complaint therefore credibly alleges, and presents substantial evidence, that Heritage Action violated FECA's donor disclosure requirements for entities other than political committees making independent expenditures.

II. The FEC's Delay in Acting on Plaintiff's Allegations Poses a Substantial and Ongoing Threat to the Electoral System.

The conduct alleged in Plaintiff's administrative complaint constitutes a substantial and ongoing threat to the integrity of the election system. In the FEC delay context, "the nature of the threat posed," *Common Cause*, 489 F. Supp. at 744, is considered substantial where, as here, the underlying matter "involve[s] allegations" of conduct that undercuts a "principal purpose[] of FECA," *see DSCC*, 1996 WL 34301203, at *5. "[T]he significance of the threat to the integrity of [an] . . . election" is "obvious" where there is a "likelihood" that the illegal activity will continue. *Percy*, 1984 WL 6601, at *3; *see also DSCC*, 1996 WL 34301203, at *5 ("The threat to the electoral system is highlighted not only by the amounts of money involved and the impact upon close elections, but by the serious threat of recurrence."). Absent any prospect of enforcement for the disclosure violations at issue here, there is a substantial likelihood that this type of illegal activity will continue or even grow to further threaten the electoral system.

Unreported contributions by undisclosed persons threaten the fundamental fairness of American elections and undermine the core purpose of FECA because they deny the electorate necessary information about precisely who is funding the advocacy for and against candidates for federal office. A principal purpose of campaign finance law is to ensure voters know "who is speaking about a candidate shortly before an election." *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). Disclosure laws provide crucial "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages," *id*. at 371, and are key to prevent "corruption and avoid the appearance of corruption," *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976). Thus, the disclosure requirements relevant here both enable voters to evaluate the nature and agenda behind political spending, see *Citizens United*, 558 U.S. at 369–70, and are critical to enforce other aspects of FECA, such as the prohibition of foreign national spending in

U.S. elections and its restrictions on coordination between candidate campaigns and outside groups. *See Buckley*, 424 U.S. at 66–67; *see also CREW v. FEC*, 316 F. Supp. 3d at 423 (ruling that the benefits of disclosure under Section 30104 "includ[e] informing the electorate, deterring corruption, and enforcing bans on foreign contributions being used to buy access and influence to American political officials"). For these reasons, the "[Supreme] Court has endorsed disclosure as 'a particularly effective means of arming the voting public with information.'" *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 17 (D.C. Cir. 2014) (quoting *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014)).

The FEC's failure to take action against the manifest violations alleged in CLC's administrative complaint "not only makes it eminently possible" that Heritage Action and other entities will conceal the source of their independent expenditures to skirt FECA's requirements, "but also provides a clear roadmap for doing so." *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (citing *McConnell v. FEC*, 540 U.S. 93, 177 n.69 (2003)). Heritage Action's failure to disclose the identity of its contributors wholly disregards Chief Judge Howell's 2018 opinion in *CREW v. FEC*, 316 F. Supp. 3d at 387. There, the Court explicitly ruled that 501(c)(4) entities such as Heritage Action must disclose "the identification of . . . donors contributing for the purpose of furthering the not-political committee's own express advocacy for or against the election of a federal candidate, even when the donor has not expressly directed that the funds be used in the precise manner reported." *Id.* at 423. The FEC promulgated guidance putting these reporting obligations beyond doubt. *See* ECF No. 1-3. Heritage Action failed to comply with the law as articulated by the Court in *CREW v. FEC* and implemented by the FEC. Allowing the FEC to remain indefinitely idle on CLC's complaint enables Heritage Action to continue violating the law, disregards the directives of this Court in *CREW v. FEC*, and demonstrates to other violators that

they can flout Section 30104's reporting requirements without the threat of enforcement consequences.

Heritage Action's undisclosed contributions keep the public in the dark about who is funding election advertising, depriving voters of information necessary to discern and informatively act upon political messages. Allowing these violations to go uncorrected opens "an immense loophole that would facilitate the circumvention of the Act's" disclosure framework and creates "'the potential for gross abuse.'" *See Shays v. FEC*, 414 F.3d 76, 98 (D.C. Cir. 2005) (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986)). Thus, permitting such blatant evasion of FECA's requirements is plainly "inconsistent with the statutory mandate," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981), and the FEC's extensive delay in acting on CLC's administrative complaint poses a substantial and ongoing threat to the electoral system.

III. The Commission's Failure to Act on Plaintiff's Administrative Complaint Is Not Excused by Lack of Resources, Competing Priorities, or Lack of Information.

Because the FEC has failed to appear in this case, it has put forward no evidence that its delay is caused by lack of resources, competing priorities, or lack of information. *Cf. Common Cause*, 489 F. Supp. at 744; *TRAC*, 750 F.2d at 80. Indeed, the evidence provided in CLC's administrative complaint, including evidence of the Commission's own records and publicly available information from Heritage Action's statements and press accounts, is more than sufficient to allow the Commission to proceed expeditiously to investigate and resolve this matter. *See Percy*, 1984 WL 6601, at *4 (finding agency's delay unreasonable where "[m]uch of the information in the complaint could be verified from the FEC's own records"). The FEC has failed to carry its burden of showing that its delay is reasonable. *See id.* (placing the burden of showing

lack of resources on the agency because "[k]nowledge as to the limits of [agency] resources is exclusively within control of the Commission").

Moreover, lack of resources also does not justify the FEC's substantial delay in this matter. "Whatever deference an agency is due in resource allocation decisions, it is entitled to substantially less deference when it fails to take any meaningful action within a reasonable time period." *DSCC*, 1996 WL 34301203, at *5–6. This is because "threats to the health of our electoral processes . . . require timely attention." *Id.* at *8. Here, the FEC has failed to take any official action on Plaintiff's complaint for over thirty months, nearly sixteen of which the Commission had a quorum and ample time to act on the alleged FECA violations. *See supra* Statement of Facts ¶¶ 14–18. Such a delay is unreasonable by any measure and represents the habitual problems of FEC underenforcement and dilatory administration of campaign finance laws in recent years. *See id.* ¶¶ 10–13. By comparison, Judge Lamberth recently entered a default judgment against the FEC in a case involving a much shorter eight-month delay, ruling that the one-month stretch the FEC had a quorum in summer 2020 indicated it "was statutorily capable of acting on the complaint during that period." *See* Order at 1 n.1, *Campaign Legal Ctr. v. FEC* (Iowa Values), No. 1:20-cv-01778-RCL (D.D.C. Oct. 14, 2020) (ECF No. 14); *see also* Order at 1, *CREW v. FEC* (SEALs for Truth), (D.D.C. Apr. 4, 2020) (ECF No. 9) (entering default judgment in case involving an approximately fourteen-month delay).

Moreover, the chronology of this case suggests that the FEC's inaction is not simply a matter of competing priorities or scarce resources. The Commission cannot appear in federal court to defend against a lawsuit unless four Commissioners affirmatively vote to do so. See 52 U.S.C. §§ 30106(c); 30107(a)(6). As such, the Commission's failure to appear in this action almost certainly reflects an affirmative determination by a controlling bloc of Commissioners that the

Commission's more than 950-day delay in acting on Plaintiff's underlying complaint is indefensible, and thus a defense has not been authorized by the requisite four Commissioners.

Finally, even if the FEC's failure to act were due to the press of other business, a ruling for Plaintiff will provide the Commission an opportunity to relieve its burden rather than add to it. Congress included an alternative enforcement mechanism in FECA, authorizing private actions against administrative respondents when the FEC does not or cannot act. See 52 U.S.C. § 30109(a)(8)(C) (authorizing private right of action in federal court against administrative respondent should the FEC fail to conform to the court's judgment within thirty days). As this Court recently recognized, Congress "legislated a fix" by providing a citizen suit provision to ensure the law could still be enforced when the FEC's abdication of its duties is "contrary to law" and is in default. *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 6 (D.D.C. 2019).

If the FEC fails to conform due to its prioritization of other matters, or for any other reason, FECA authorizes Plaintiff to file suit directly against Heritage Action. *See id.* That outcome would ease the Commission's enforcement burden and would avoid any concern about "the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80; *see also Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001) (emphasizing that citizen suit provisions exist to "enforce compliance without federal expense"). Judge Lamberth took precisely this path in the same case referenced above, entering a default judgment against the FEC and, after the FEC failed to conform with the Court's order requiring it to take action, authorized CLC to pursue a citizen suit action to enforce compliance with FECA. *See Campaign Legal Ctr. v. Iowa Values*, No. 1:21-cv-00389-RCL (D.D.C.) (filed Feb. 12, 2021) (citizen suit related to FEC delay action in Case No. 1:20-cv-01778). This path shows that entering a default judgment and

allowing for a private right of action effectuates Congress's intent that campaign finance laws remain enforced despite the FEC's failure to act.

IV. Plaintiff's Administrative Complaint Does Not Raise Novel Issues.

Plaintiff's administrative complaint does not involve novel issues. The FEC's delay may be contextualized by "the novelty of the issues involved." *See Common Cause*, 489 F. Supp. at 744. Far from novel, the disclosure requirements at issue here are a core part of FECA's statutory framework. Because the FEC has recently investigated the very same types of violations that CLC raises here, novelty does not warrant the FEC's two-and-a-half years of inaction.

As stated *supra* Part I, CLC's administrative complaint makes credible allegations that Heritage Action violated FECA's requirements for not-political committees to disclose the identity of donors supporting their independent expenditure disbursements. These disclosure issues are not novel for at least three reasons. First, the Commission has promulgated guidance on this exact topic, putting its familiarity with the Section 30104 disclosure requirements beyond doubt. *See* ECF No. 1-3; *see also* Admin. Compl., ECF No. 1-1, ¶¶ 14–16. Second, in 2018 this Court detailed the issues involved in the relevant FECA donor disclosure requirements, providing a clear explication of the statutory scheme for the FEC to follow and apply. *See CREW v. FEC*, 316 F. Supp. 3d at 387–411. Third, the FEC is routinely asked to analyze whether 501(c) organizations have properly disclosed their independent expenditure donors. *See Percy*, 1984 WL 6601, at *4 (finding that issues that make up a substantial amount of the Commission's workload are not "novel"). Since 2018, for example, the FEC has analyzed the legal and factual matters involved in administrative complaints alleging Section 30104 disclosure violations on multiple occasions. *See, e.g.*, First General Counsel's Report at 10–12 & n.43, *American Progress Now*, FEC MUR 7643 (May 4, 2020), www.fec.gov/files/legal/murs/7643/7643_05.pdf (last visited May 21, 2021);

Second General Counsel's Report at 2–3 & n.9, *Indivisible Kentucky, Inc.*, FEC MUR 7286 (May 10, 2019), www.fec.gov/files/legal/murs/7286/19044473205.pdf (last visited May 21, 2021); *accord* First General Counsel's Report at 5–6 & n.18, *Nat'l Rifle Assoc.*, FEC MUR 7314 (May 28, 2019), www.fec.gov/files/legal/murs/7314/19044473629.pdf (last visited May 21, 2021) (noting the disclosure requirements for 501(c)(4) organizations).

In short, the underlying violations at issue here are not novel. The Commission is accustomed to applying the relevant law to Section 30104 disclosure violations like those demonstrated in Plaintiff's administrative complaint.

V. The FEC's Delay Violates the "Rule of Reason" and Runs Contrary to Congressional Intent that the Commission Act Expeditiously.

The FEC's delay in acting on Plaintiff's administrative complaint is unreasonable. Although courts have declined to find that the FEC must act on every complaint within 120 days or within an election cycle, *see FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986), this "is not the equivalent of unfettered FEC discretion to determine its own time line," *DSCC*, 1996 WL 34301203, at *7–8. Rather, Congress "expect[ed] that the Commission would fulfill its statutory obligations so that [FECA] would not become a dead letter." *Id.* And, the multitude of "short deadlines governing the speed with which such complaints must be handled" demonstrates that Congress expected FEC enforcement actions to advance expeditiously. *Rose v. FEC*, 608 F. Supp. 1, 11 (D.D.C. 1984). This is because "[t]he deterrent value of the Act's enforcement provisions are substantially undermined, if not completely eviscerated, by the FEC's failure to process administrative complaints in a meaningful time frame." *DSCC*, 1996 WL 34301203, at *8; *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (finding that an agency's unreasonable delay "signals the breakdown of regulatory processes") (internal quotation marks omitted).

The FEC's failure to take any known action on CLC's administrative complaint for over thirty months signals a regulatory breakdown. And the Commission's lack of a quorum during certain periods since Plaintiff filed its administrative complaint does not justify its extensive delay. To begin with, CLC's administrative complaint was pending with the FEC for over ten months before the Commission lost its quorum on September 1, 2019. *See supra* Statement of Facts ¶¶ 15, 17. The FEC also regained a quorum for over a month during summer 2020, but did not act. *See id.*; *see also* Order at 1 n.1, *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-01778 (D.D.C. Oct. 14, 2020) (ECF No. 14) (finding this one month period to be sufficient time for the FEC to act). Finally, the FEC has had a quorum for the last five months, *see supra* Statement of Facts ¶ 17, during which nothing prevented the Commission from acting on CLC's administrative complaint. In total the FEC has maintained a quorum for sixteen of the last thirty months since Plaintiff filed its administrative complaint. *See id*.

The FEC's continued inaction makes clear that its poor record of stalled enforcement in recent election cycles due to deadlock among the Commissioners is by no means a thing of the past. *See id.* ¶¶ 10–13, 20. The only mechanism for ensuring the allegations in Plaintiff's administrative complaint will be investigated and adjudicated in a reasonable time frame is an order from this Court requiring the FEC to conform, the failure of which will allow Plaintiff to avail itself of FECA's private right of action. *See* 52 U.S.C. § 30109(a)(8)(C); *see also* Order at 1, *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-01778-RCL (D.D.C. Feb. 11, 2021) (ECF No. 24); *Campaign Legal Ctr. v. Iowa Values*, No. 1:21-cv-00389-RCL (D.D.C.) (filed Feb. 12, 2021).

VI. The FEC's Delay Prejudices Plaintiff and the Public.

The FEC's failure to take action on CLC's administrative complaint prejudices Plaintiff and the public. The thirty-month delay at issue here damages the public's confidence in our

election system by allowing apparent violations of FECA to go uninvestigated and unredressed. Likewise, the lack of enforcement and corresponding lack of any legal consequences for breaking federal campaign finance law emboldens Heritage Action, and others who might seek to emulate that organization's activities, to continue to flout FECA's requirements. See *DSCC*, 1996 WL 34301203, at *8 ("[T]hreats to the health of our electoral processes [] require timely attention . . . [and] should not be encouraged by FEC lethargy"). Because the FEC has failed to act, CLC and the voting public will continue to be prejudiced because they will be denied the information to which they are statutorily entitled about precisely who is advocating for and against candidates for federal office through 501(c) organizations.

This delay also prejudices Plaintiff by withholding information about how the FEC is interpreting key FECA provisions. If the FEC is permitted to withhold a decision on this matter indefinitely, plaintiffs will never learn "the basis" of its inaction, *see* 11 C.F.R. § 111.20(a), and accordingly have no way to ensure that their administrative complaints are being processed even-handedly and consistent with the law, *see, e.g.*, *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (holding the FEC must "explain coherently the path [it is] taking" when it resolves an enforcement matter).

The Commission's failure to act undermines public confidence in our elections by allowing apparent violations of the law to go uninvestigated and unredressed.[2] So too, the lack of enforcement and corresponding lack of any consequence for illegal behavior necessarily encourages Heritage Action and others who seek to emulate its activities to continue to violate

[2] Although evidence of impropriety may buttress a plaintiff's claim that the Commission has acted contrary to law, "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *TRAC*, 750 F.2d at 80; *see also Rose*, 209 F. Supp. at 12 ("[T]he Court need not and does not make such findings.").

campaign finance law. *See DSCC*, 1996 WL 34301203, at *8. As such, CLC and the voting public will continue to be harmed because they will be denied necessary information about precisely who is advocating for and against candidates for federal office.

CONCLUSION

Plaintiff's uncontested evidence establishes that Defendant FEC has acted contrary to law in failing to take action on the underlying administrative complaint. Plaintiff is entitled to an entry of default judgment against the Defendant. Thus, Plaintiff respectfully requests that the Court:

(1) Enter judgment that the FEC's failure to act on Plaintiff's administrative complaint is contrary to law under 52 U.S.C. § 30109(a)(8)(A);

(2) Order the FEC to conform to the judgment within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C); and

(3) Award Plaintiff its costs of $400 incurred in this action pursuant to 28 U.S.C. § 1920. See Gaber Decl., Ex. 1, ¶ 11; ECF No. 1.

Dated: May 24, 2021

Respectfully submitted,

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