

Release, Shana Broussard, Sean Cooksey, Allen Dickerson sworn in as Commissioners (Dec. 18, 2020), <https://bit.ly/3nDIhwY> (confirming FEC’s return to quorum). A new fact or a change in circumstance that occurs after judgment does not impact a plaintiff’s standing in a case that has already reached final judgment. In *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 904 F.3d 1014, 1018 (D.C. Cir. 2018), the D.C. Circuit rejected the argument that a FEC dismissal of a complaint on remand after a district court’s judgment impacted the plaintiffs’ standing to obtain that judgment. Rather, it stated that such an argument “is wrong chronologically since [the FEC action] post-dates the decision under review” *Id.* If post-judgment FEC *action* does not affect pre-judgment standing, then the resumption of a quorum alone, *without action* on the underlying administrative complaint, likewise cannot disturb the judgment or Plaintiffs standing to seek the already finalized judgment in this matter.

Second, the propriety of a failure to act suit under the FECA does not turn on the FEC’s quorum, nor does this Court’s jurisdiction to hear such a claim. As an initial matter, the statute that gives rise to this cause of action makes no distinction between suits that arise when the FEC has quorum versus those that arise when it lacks quorum. *See* 52 U.S.C. § 30109(a)(8)(A), (C) (“Any party aggrieved 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.”). Courts have heard numerous cases involving the FEC’s failure to act, even when it had a quorum, and the FEC has not objected to the jurisdiction of the Court to hear such claims.¹ *See, e.g.,* Complaint, *CREW and Noah*

¹ In recent years, the FEC operated without quorum from September 1, 2019 to December 18, 2020, with a brief period of quorum in the summer of 2020. *See* FEC Press Release, FEC remains open for business, despite lack of quorum (Sept. 11, 2019), <https://bit.ly/3i8unBT>; FEC Press Release (Dec. 18, 2020), *supra*; Kate Ackley, FEC set to lose its quorum again, *Roll Call*, June 26, 2020, <https://bit.ly/3qcmuy9>.

Bookbinder v. FEC, Doc. 1, Case No. 1:18-cv-493 (D.D.C. Mar. 1, 2018) [*Conservative Solutions*]; Complaint, *CREW and Noah Bookbinder v. FEC*, Doc. 1, Case No. 1:18-cv-1060 (D.D.C. May 4, 2018) [*TH Holdings*]; Complaint, *CREW and Noah Bookbinder v. FEC*, Doc. 1, Case No. 1:19-cv-1650 (D.D.C. June 5, 2019) [*Freedom Vote*].² Congress permitted plaintiffs to sue for a failure to act under the FECA because the FEC’s unique bipartisan structure raised real risks of gridlock: risks that have proven true. Even prior to the loss of quorum, administrative complaints frequently languish for years on end. “Pervasive delays” undermine the FEC’s ability to enforce campaign finance laws. Doc. 1, ¶ 48 (citing *In the Matter of American Conservative Union, et al.*, Statement of Reasons of Comm’r Ellen L. Weintraub, MUR 6920 (Dec. 19, 2017), <http://bit.ly/2CDnumJ>); see generally *id.* ¶ 49-57 (detailing extensive and widespread delays at the FEC, including dozens of cases where activity at issue is beyond the statute of limitations and one case which, as of May 1, 2019, had an FEC Office of General Counsel’s report pending for over 1,665 days). Indeed, the very complaint that was at issue before this Court was first filed in 2018, more than a year before the FEC lost quorum, yet the FEC still did not act on it and there is no indication the FEC’s restored quorum intends to act promptly now.

For its part, DOJ does not contend that the restoration of quorum has any impact on this Court’s prior judgment. Rather, DOJ confines its Reply to arguing that Plaintiffs always lacked standing because their informational injury arose from the FEC’s failure to act rather than outright dismissal of their administrative complaint.

² In *Conservative Solutions* and *TH Holdings*, FEC mooted the case by acting while the lawsuit was pending, and in *Freedom Vote*, the parties settled. In none of the cases did the FEC dispute standing.

Contrary to the DOJ's assertion, and in line with FEC's prior practice in defending failure to act cases, whether a suit arises due to the FEC's failure to act or dismissal of a complaint is a distinction without a difference for purposes of Plaintiffs' Article III injury. Either way, as detailed in Plaintiffs' Response, Doc. 13 at 9, the injury occurred because Plaintiffs "did not get [the information] the statute entitled [them] to receive." *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617–18 (D.C. Cir. 2006.) Whether through dismissal of a complaint or prolonged failure to act on a complaint, the FEC deprived Plaintiffs of the information to which they are entitled, causing injury.³ The FEC's restoration of quorum has not remedied Plaintiffs' injury.

Furthermore, CREW has an independent basis for standing due to the injury to its programmatic activities. *Common Cause v FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); see Doc. 13 at 11-13 (detailing programmatic standing argument). These injuries are clearly plead in the Complaint. Doc. 1 at ¶¶ 5-10 (discussing CREW's programmatic activities).

Accordingly, should the Court consider DOJ's statement despite its severe untimeliness, Plaintiffs respectfully request that the Court find that Plaintiffs had standing, rendering the Court within its jurisdiction to enter the final judgment that issued more than nine months ago.

³ Without explicitly stating as such, DOJ appears to be attempting to make a causation argument: the "important question here is whether Plaintiffs have articulated harm *arising from the delay* itself." Doc. 15 at 2 (emphasis in original). This argument, made for the first time in Reply, does not withstand logical scrutiny. Plaintiffs' informational injury is caused by the continuing failure to receive the information that they are entitled to have, due to the FEC's failure to take action on the pending administrative complaint. Doc. 1, ¶ 57 (detailing impact on CREW of FEC's continued delay). Informational injury is caused by the FEC's failure to act just as assuredly as a FOIA plaintiff's informational injury is caused by an agency's failure to respond to a FOIA request. See *CREW v. FEC*, 711 F.3d 180, 182 (D.C. Cir. 2013) ("[I]f the agency has not issued its 'determination'" on plaintiff's FOIA request "within the required time period, the requester may bring suit directly in federal district court without exhausting administrative appeal remedies."); *Payne Enter., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("[S]tale information is of little value."); Doc. 13 at 9.

Respectfully submitted,

/s/ Laura C. Beckerman

Laura C. Beckerman

(D.C. Bar No. 1008120)

Stuart McPhail

(D.C. Bar No. 1032529)

Citizens for Responsibility and Ethics
in Washington

1101 K Street, N.W., Suite 201

Washington, DC 20005

Phone: (202) 408-5565

Fax: (202) 588-5020

lbeckerman@citizensforethics.org