IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 19-cv-2753-RCL

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

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Pursuant to the Court's December 21, 2020 Order, ECF No. 14, 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.

Since the Court has directed the United States to reply to Plaintiffs' Response to Department of Justice's Statement of Interest ("Response"), ECF No. 13, the Department respectfully submits this reply to explain why Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Noah Bookbinder lack standing.

ARGUMENT

I. PLAINTIFFS LACK STANDING BASED ON THE ALLEGED DELAY IN THE FEC'S CONSIDERATION OF THEIR PETITION

Plaintiffs have failed to show that they have suffered a concrete and particularized injury caused by the Commission's purported delay in acting on their administrative complaint. This is, after all, a case solely about that delay. *See* Compl. ¶ 1, ECF No. 1. Plaintiffs seek a declaration that the Commission's delay was unlawful and an order requiring the Commission "to act on the Complaint within 30 days," *id.* at 19. Plaintiffs do not ask the Court to rule on the legal arguments

[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/.

of its administrative complaint, do not ask the Court to rule that any third party violated the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq.* ("FECA"), and do not seek relief requiring the disclosure of any information. *Id.* To show standing, Plaintiffs must therefore demonstrate how the additional time it has taken the Commission to consider their administrative complaint has caused them to suffer a concrete and particularized injury. And they must show how any alleged harm caused by the purported delay will be remedied by a court ordering the Commission to act on their administrative complaint. Thus, the important question here is whether Plaintiffs have articulated harm *arising from the delay* itself.

Plaintiffs' Response largely ignores that question. Instead, Plaintiffs act as though the Commission has already denied their administrative complaint. The 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 on Plaintiffs' assertion of standing in this specific context. Indeed, Plaintiffs seem not to contest the fact that the Commission's delay in taking action on their administrative complaint is insufficient alone to confer standing. Response at 7. Plaintiffs also do 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, Plaintiffs must show concrete and particularized harm arising from an inability to access the sought-after information while the Commission considers the administrative complaint. Plaintiffs 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.

In another recent case, a similar 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). Plaintiffs do not attempt to distinguish that case in their Response even though the parallels are striking. After waiting a year for the FEC to act on their administrative complaint, the plaintiff, 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.

Plaintiffs do not explain how this current case is any different or requires a different result. Instead, they argue that "plaintiffs can establish Article III injury-in-fact based on the *denial* of information to which they are entitled." Response at 7. But, of course, Plaintiffs have not been denied any information—they submitted an administrative complaint to the Commission and are waiting for the Commission to act. The Commission has not denied or dismissed the administrative complaint. As such, rather than "ignor[ing] the binding case law of informational

injury" 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 7. 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.").

Plaintiffs are incorrect to suggest that they do not need to show an injury arising from the delay itself. Response at 9. The cases they cite for that proposition either do not involve delay, *see Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 615–16 (D.C. Cir. 2006) (plaintiff suffered cognizable injury when issued a passport that listed place of birth as "Jerusalem" instead of "Jerusalem, Israel"); *Common Cause*, 108 F.3d at 415 (FEC dismissed administrative complaints), found a lack of standing on other grounds, *see Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 343–45 (D.D.C. 2020) (no standing); *Judicial Watch*, 293 F. Supp. 2d at 45–48 (no standing), or involved cases where the plaintiff actually alleged harm arising from the delay itself, *see Air Alliance Houston v. U.S. Chemical and Safety Hazard Investigation Board*, 365 F. Supp. 3d 118, 122 (D.D.C. 2019) (finding standing in case alleging delay when plaintiffs alleged "exposure to 'high levels of toxic air,' due to delays in the release of chemical accident information"). No cases cited by plaintiffs contradict the requirement that in a case alleging delay, plaintiffs must allege an injury arising from that delay in order to have standing in cases such as the present.

Plaintiffs here allege only speculative harms arising from the Commission's alleged delay. Plaintiffs allege that waiting for the Commission's final determination might "hamper [CREW's] ability to access [third-party] information that it is entitled to under the statute" because, in the meantime, third-party "documents *may* be destroyed or lost and witness memories *may* fade" or "the organization at issue *may* shut down or cease operations making it more difficult to access documents and witnesses." Compl. ¶¶ 56–57 (emphasis added). Plaintiffs do not dispute the argument that such speculative fears of injury cannot establish standing. *See* Response at 8.

To the extent Plaintiffs now assert additional informational[2] or programmatic injuries, Plaintiffs fail to cite allegations in their complaint linking those purported injuries to the Commission's delay in acting on their administrative complaint. Even cases cited by Plaintiffs underscore that Plaintiffs' purported harm must be linked to the delay. In the key case they rely on for organizational injury, the court held PETA had standing because it alleged specific organizational harm *arising from the delay*: PETA had "adequately shown that the USDA's inaction injured its interests and, consequently, PETA has expended resources to counteract those injuries." *See People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015). There are no similar allegations in this case—CREW has not linked its purported organizational harm to the delay and has not identified any resources that it has expended to counteract those supposed injuries from delay. Other cited cases involved denial or dismissal,

[2] While the Statement discussed potential arguments that Plaintiffs could have raised about an informational injury arising from the delay, Statement at 8–9, ECF No. 11, Plaintiffs' complaint alleges no harm from delay other than speculative harm discussed above. Plaintiffs' Response does not ask the court to infer any other informational harm specifically arising from the alleged delay. If Plaintiffs had alleged informational harm arising from the delay, they must satisfy the jurisdictional standards described in the Statement. *See id.*

and thus do not support CREW's argument that it can show standing without a specific harm arising from the Commission's purported delay. *See CREW v. FEC*, 243 F. Supp. 3d 91, 93 (D.D.C. 2017) (an action "challenging the FEC's dismissal of the plaintiffs' administrative complaint"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982) (discussing "the denial of the tester's own statutory right to truthful housing information caused by misrepresentations to the tester").

Finally, Plaintiffs do not dispute that if they lack standing, the Court did not have jurisdiction to enter judgment against the Commission. Plaintiffs here suffered no cognizable injury, lack Article III standing, and are thus not entitled to default judgment. The Court should vacate the default judgment and dismiss the case.

II. THE COURT SHOULD CONSIDER THE STATEMENT

The Department has statutory authority to submit a statement of interest in this case. Congress in 28 U.S.C. § 517 granted the Department broad authority to "attend to the interests of the United States." The plain text of the statute provides three separate grants of authority: 1) "to attend to the interests of the United States in a suit pending in a court of the United States," 2) "to attend to the interests of the United States in a suit pending . . . in a court of a State," and 3) "to attend to *any other* interest of the United States." *Id.* (emphasis added). Even if the plaintiffs are correct that the term "pending" in the statute applies to proceedings before a court issues default judgment, which they are not, Congress still authorized the Department "to attend to *any other* interest of the United States" without limitation to the forum or status of the dispute. *See, e.g.*, 3 Op. O.L.C. 226 (1979) (concluding that the statute authorized the Department to participate in arbitrations even though "[a]n arbitration proceeding is not, strictly, a suit pending in any court"); Response at 5 n.2 (citing Statement of Interest, *Media Gen. Operations, Inc. v. Schurz Comm. Inc.*, No. 116-CV-26-JRH-BKE, 2016 WL 930580 (FCC Rcd. Mar. 9, 2016)).

Plaintiffs' suggestion that this Court's consideration of the Statement would lead to a parade of horribles is also misguided. The Statement does not seek to reopen any close cased. Instead, the Statement raises important threshold issues that have not been raised by any party and asks *this Court* to revisit its own entry of default judgment based on jurisdictional concerns that no party has raised and this Court has an independent obligation to address. *See* Statement at 12 ("*th[is] Court* should vacate its judgment and dismiss this case") (emphasis added). As this Court is well aware, asking a court to revisit its own judgment is explicitly permitted under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 60.

The plaintiffs have also not demonstrated United States' Statement of Interest was untimely. Plaintiffs do not dispute that there is "no time limit on an attack upon a void judgment." *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962); *see also* Fed. R. Civ. P. 60 (no time limit on motion for relief from a void judgment). This Court can, of course, choose not to consider the Statement in its discretion to control its own docket, *U.S. ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007), but the timing of the Statement does not render it invalid.

Plaintiffs also do not articulate any prejudice from the Court considering the Statement or the important questions about its jurisdiction over this case. For example, CREW alleges that it "ha[d] the right to bring a civil action in its own name to remedy the violations alleged in [its administrative] complaint" after this court issued its judgment. Compl. ¶ 68. But despite the time that has passed since the default judgment was entered, CREW never claims it initiated any other civil action based the allegations from its administrative complaint. In fact, Plaintiffs have not identified *any action* that they have undertaken in reliance on the default judgment. The time that

has passed since the default judgment has not prejudiced plaintiffs and is no reason to ignore the important jurisdictional questions raised by the Statement.

CONCLUSION

For the foregoing reasons and those in the Statement of Interest, the Department respectfully suggests that plaintiffs have 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,

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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