UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERITAGE ACTION FOR AMERICA, Plaintiff, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 22-1422 (CJN) REPLY IN SUPPORT OF SECOND MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS SECOND MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff Heritage Action for America ("Heritage Action") has failed to fully address, much less refute, the Federal Election Commission's ("Commission" or "FEC") showing that this matter is moot. (*See* FEC's Second Mot. to Dismiss (Docket No. 39) ("Motion" or "Mot.").) In its attempt to show that there is a live "case or controversy" sufficient to vest this Court with jurisdiction, plaintiff makes broad claims about a need to investigate alleged agency misconduct. But it still points to only eight FEC administrative enforcement proceedings, out of hundreds closed during the relevant time period, in an effort to establish that there was a Commission "policy" to conceal records. These matters themselves provide no evidence of an agency policy. Yet even if they could demonstrate that such a policy once existed, this case is moot because all of the matters have been closed since mid-2022 (the only one of the eight matters involving plaintiff had already closed), and the allegedly "concealed" records have long been available to the public and to this Court. Plaintiff speculates that what happened with those matters could theoretically happen in the future, citing exceptions to the mootness doctrine, but it offers no evidence to suggest that *any* future respondent, let alone plaintiff itself, will actually be subjected to the unlawful concealment it alleges. Plaintiff faults the Commission even for making this motion, claiming it is a waste of resources, but the agency has a duty to explain when, as here, a court has come to lack jurisdiction to proceed with a case for a significant additional reason.

In any event, as the Commission has shown, the intervening closures of the small number of files that were ever at issue means that a decision of this Court will now have no effect on plaintiff's rights. This Court should correspondingly reject its call for what amounts to an advisory opinion, and for an intrusive, open-ended fishing expedition into agency operations, which would be likely to waste considerable resources of the parties and the Court. This case should be dismissed for lack of jurisdiction.

II. THE COMMISSION HAS ESTABLISHED THAT THIS MATTER IS MOOT

"Even where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Clark v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (quotation marks and citations omitted). In its Motion the Commission comprehensively explained why the plaintiff has received all of the relief it sought in this matter, and thus there is no basis for further litigation over the Commission's alleged failure to disclose records, nor would declaratory judgment have any impact on plaintiff's alleged rights. (Mot. at 20-27.) The Commission further detailed why plaintiff's attempt to demonstrate the possibility of future harm relies on pure speculation, and there is no sufficient reason to believe that the alleged wrongs of which plaintiff complains will be repeated. (Mot. at 28-35.)

Plaintiff's brief rebuttal largely fails to respond to that showing, and instead it primarily reiterates arguments the Commission has already refuted, while attempting to distinguish a small number of the cases cited in the Commission's Motion. Yet no matter how broad and sweeping the relief plaintiff says it wants or needs, such claims do not obviate the requirement that it show that a ruling would affect its rights for this Court to have jurisdiction to hear its claims. Here, plaintiff has failed to establish that the voluntary cessation exception to mootness saves it claims. Nor can plaintiff's belated attempt to fit within the exception for claims "capable of repetition yet evading review" revive its moot claims in this case.

A. The Commission's Mootness Challenge Is Well Supported by Apposite Case Law

Plaintiff begins its rebuttal by declaring that "the Commission was wrong to conflate mootness with standing" and that "the Commission misleadingly invokes cases that exclusively

address *standing* when purporting to describe the standard for *mootness*[.]" (Pl's Opp. to FEC's Sec. Mot. to Dismiss (Docket No. 41) ("Response" or "Resp.") at 2.)

On the contrary, the Commission has made a clear mootness challenge principally relying on mootness case law, and plaintiff does not show otherwise. (*See* Mot. at 19-34 (citing 18 cases discussing mootness).) Moreover, the cases cited in the Commission's Motion that do address Article III standing are highly relevant to the issues before this Court. The concepts of standing and mootness are "inter-related judicial doctrines" that "ensure that federal courts assert jurisdiction only over 'Cases' and 'Controversies.'" *Garcia v. U.S. Citizenship & Immigr. Servs.*, 168 F. Supp. 3d 50, 64 (D.D.C. 2016) (quoting *Worth v. Jackson*, 451 F.3d 854, 855 (D.C. Cir. 2006)). Indeed, "both doctrines implicate the need for a plaintiff to demonstrate he has standing[.]" *Id.* Yet while "a standing inquiry is concerned with the presence of injury, causation, and redressability at the time a complaint is filed, a mootness inquiry scrutinizes the presence of these elements after filing — *i.e.*, at the time of a court's decision." *Id.* at 65 (citing *La Botz v. FEC*, 61 F. Supp. 3d 21, 28 (D.D.C. 2014)). "[T]he mootness doctrine is a logical corollary to the case-or-controversy requirement: if subsequent events have made it impossible for the court to grant effectual relief to the complaining party, any opinion as to the legality of the challenged action would be advisory." *La Botz*, 61 F. Supp. 3d at 30 (internal quotations omitted). Thus, caselaw addressing injury, causation, and redressability at all stages of litigation, in contexts comparable to the circumstances here, illuminates the mootness question of whether a decision could affect a party's rights.[1]

[1] The Commission's challenge at the outset of this litigation to plaintiff's standing to seek relief as to third-party administrative proceedings where it is not a respondent also remains pending. (*See* FEC's Mem. of P. & A. in Supp. of Its Mot. to Dismiss ("First MTD") at 18-19 (Docket No. 17).) This is one among several independent grounds sufficient to dismiss plaintiff's complaint, apart from mootness, which have been fully briefed to this Court. As the

In any event, plaintiff does not even explain why distinctions between doctrine in the cases the Commission cited mean that its claims should fare any better under a standing analysis, and these abstract assertions appear to be diversions from the main issue. *Cf. Pub. Emps. for Env't Resp. v. U.S. Dep't of Agric.*, Civ. No. 15-2023, 2016 WL 10957246, at *2 (D.D.C. Dec. 6, 2016) (rejecting motion for reconsideration "[b]ecause an analysis based on mootness and not standing cannot compel a change in the Court's decision to grant [defendant's] Motion to Dismiss").

B. A Challenge to Agency Policy, Even If Plaintiff Had Made One, Would Not Be Exempt from the Requirements of Article III Standing, and Plaintiff Has Failed to Show That Its Rights Are at Stake Now

Plaintiff's attempt to establish an ongoing live claim or controversy relies entirely on its erroneous contention that it has challenged a Commission "policy," and that only the agency's disavowal of that supposed policy, or a Court order setting it aside, constitute adequate relief. (*See* Resp. at 3 (in addition to the release of records "Heritage Action has *also* sought both: (1) a declaratory judgment that Defendants acted unlawfully by concealing its terminating action; and (2) an order setting aside the concealment policy.").)

First, despite frequent references to a "concealment policy" that seem to suggest the matter is undisputed, plaintiff has offered no probative evidence that such a policy has ever existed at the Commission. As the FEC has explained, plaintiff's evidence of such a policy is based almost entirely on eight enforcement matters in which certain Commissioners exercised their lawful discretion in a manner with which plaintiff disagrees. (*See* First MTD at 23-25.) In

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Commission has explained, the judicial review provision of the Federal Election Campaign Act, 52 U.S.C. § 30109(a)(8), is the exclusive means of challenging the FEC's handling of administrative enforcement matters, and plaintiff fails even to state a claim under the Administrative Procedure Act ("APA"), because the actions it challenges are committed to the FEC's discretion by law and there is no reviewable "final agency action." (First MTD at 19-31.)

the roughly four years since the administrative complaint was filed in Matter Under Review ("MUR") 7516 — the only FEC matter at issue in which plaintiff itself was actually involved — the agency has closed at least 692 MURs.[2] Even if plaintiff was correct that the matters it identified had been wrongly held open, eight isolated matters out of 692 is far short of the threshold necessary to establish that the Commission ever adopted a "policy." (*See* First MTD at 20-26; FEC's Reply in Supp. of Its Mot. to Dismiss at 17-20 (Docket No. 23); FEC's Opp'n to Pl's Mot. for Summ. J. ("Opp. to MSJ") at 34-37.) Indeed, plaintiff has not even alleged that a majority of FEC Commissioners ever favored the course of action about which it complains, and three Commissioners cannot establish any policy on behalf of the agency. *See* 52 U.S.C. § 30106(c).[3] And even assuming a policy once existed for the handling of a tiny fraction of the agency's docket, there is no reason to suspect plaintiff would be subject to it in the future.

Second, even assuming (despite all evidence) that the Commission had such a policy, this does not override the requirement that a decision of this Court must presently affect Heritage Action's rights. *Clark*, 915 F.2d at 701. In *Entergy Services, Inc. v. Federal Energy Regulatory Commission*, this Circuit rejected a highly similar effort by plaintiffs to preserve their moot individual claims by asserting standing to challenge a broader ongoing agency policy. *Entergy*

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[2] FEC, Enforcement Statistics for Fiscal Years 1977-2023 (including data through December 31, 2022), https://www.fec.gov/resources/cms-content/documents/enforcementstats1977to2023.pdf (sum of Total Matter Under Review (MUR) Cases Closed for Fiscal Years 2019-23).

[3] The fact that the FEC never had the policy of which plaintiff complains is sufficient to distinguish the D.C. Circuit's opinion in *Reid v. Hurwitz*, 920 F.3d 828 (D.C. Cir. 2019). (*See* Resp. at 2.) There, the government repeatedly invoked a nationwide prison policy as the basis for its actions against the defendant, an inmate. *Id.* at 831. In addition, plaintiff in that matter remained in custody, making it likely that he would be subjected to the policy again. *Id.* Here, there is no evidence of an agency policy, rather than a handful of enforcement proceedings in which plaintiff has criticized discretionary Commissioner votes.

Servs., Inc. v. FERC, 391 F.3d 1240, 1246 (D.C. Cir. 2004). In rejecting the attempt, the court noted that the rule plaintiffs challenged

> does not affect [plaintiffs] until they are confronted with it in a matter before the Commission regarding a "live" interconnection agreement. Until then, they are in a position identical to that of any other utility company whose hypothetical future interconnection agreements may be evaluated according to the rule. To open the courthouse doors to [plaintiffs] for the purposes of their policy challenge disembodied from the original Commission orders would open the door to every other utility company's challenges to Commission policies. Federal courts do not have the jurisdiction to render advisory opinions on such matters, with respect to FERC or any other administrative agency.

Id.; *see also S. Co. Servs., Inc. v. FERC*, No. 03-1106, 2003 WL 22669559, at *1 (D.C. Cir. Nov. 7, 2003) (per curiam) (plaintiff's challenge to ongoing agency requirements was moot because plaintiff's agreement had expired, and plaintiff lacked standing to challenge the ongoing requirement itself because it had "not shown that it faces the kind of actual or imminent injury required for Article III standing to pursue such a challenge") (internal quotation marks omitted). There as here, plaintiffs could not sustain a broad challenge to agency policy "disembodied from the original Commission orders" that might have arguably impacted plaintiffs' rights. *Entergy Servs.,* 391 F.3d at 1246.

Plaintiff's request for a declaratory judgment is likewise moot, both because it is subject to the same principles of mootness that govern all claims, and because plaintiff has not shown that a declaratory judgment in this proceeding would have *any* effect on the proceedings in *Campaign Legal Center v. Heritage Action*, Civ. No. 22-1248 (D.D.C.), as the FEC has explained. (*See* Mot. at 24-27.) In response, plaintiff merely reiterates its unsupported contentions that "the prospect that a declaratory judgment in [plaintiff's] favor will affect future litigation typically defeats mootness[,]" and that here, "if this Court confirms that the FEC unlawfully concealed action on CLC's administrative complaint, then Heritage Action can more effectively demonstrate the reasons it could not have intervened sooner and therefore why its

intervention motion was in fact timely." (Resp. at 5.) The Commission has already explained why plaintiff's assertion misstates the law of mootness, and that in any case a declaration that the Commission acted unlawfully in failing to release MUR information would have no bearing on the modes of analysis courts employ in reviewing whether the agency has unduly delayed in the MUR itself. (*See* Mot. at 24-27.) These arguments remain unrebutted.

C. The Voluntary Cessation Exception to Mootness Does Not Apply, and This Case Would Be Moot Even If the Exception Did Apply

Plaintiff fails to show that any exception to the mootness doctrine overcomes the Commission's showing that this case is now moot. In its Response, plaintiff at times distorts the standards for evaluating mootness. It cites cases that apply the heightened standard applicable only when a defendant's voluntary conduct in response to a lawsuit moots the case, without making clear when this standard applies. (*See, e.g.*, Resp. at 1, 2 (describing the "heavy burden" of the party arguing mootness without reference to the voluntary cessation exception).) Plaintiff at times also seems to suggest that the Commission must prove that the challenged conduct will not recur, when the proper standard in reviewing a voluntary cessation of conduct, as plaintiff concedes, is whether it "could not reasonably be expected to recur." (Resp. at 6 (citing *Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)).) Such suggestions are particularly inappropriate here because this exception does not in fact apply. That is so because the Commission never adhered to any "policy" such as plaintiff alleges, and the Commission cannot voluntarily terminate a policy that was never in place. (*See* Mot. at 31.) Furthermore, even assuming arguendo that plaintiff had identified a "practice" or "policy" by the FEC, it was not ended in response to this lawsuit or any other. (*See id.* at 31-34.)

Plaintiff does not meaningfully engage with the Commission's arguments in this respect. Instead, plaintiff seems to offer the FEC's consistent position that the "policy" plaintiff alleges

did not exist as evidence that the "policy" will recur. (Resp. at 7 ("Even now, the Commission refuses to admit the concealment policy ever existed, and its silence on whether the concealment policy could be applied again in the future is deafening.").) Plaintiff offers no support for the remarkable contention that the Commission's denial of its claims is evidence of their validity.

Plaintiff also asserts repeatedly that the Commission's longstanding practice regarding MUR closure hangs by a thread, with the alleged "concealment policy" ready to spring back into operation at any time. (Resp. at 7 ("the Commission's voluntary-cessation argument hangs on the 'commit[ment]' of just one of six Commissioners 'to advocat[e]' for 'clos[ing] files'") (alterations in original); *id.* ("the loss of a single other Commissioner opposing the concealment policy would rejuvenate [the policy] immediately").) But actual policymaking, of course, does not work this way. The Commission has previously explained that only the affirmative votes of four Commissioners can make agency policy, and in any case the Commissioners cannot create a policy in the context of an individual enforcement proceeding. *See* First MTD at 23-24; *see also* 52 U.S.C. § 30106(c). By arguing that a switch in votes in some undefined number of enforcement matters could reinstate a "concealment policy," plaintiff makes clear that what it challenges is not a "policy" at all, but rather the votes in a small number of enforcement proceedings in which Commissioners have exercised their discretion on when to close enforcement files.

Finally, plaintiff's narrow focus on the public statements of FEC Commissioner Weintraub is similarly misplaced.[4] As the Commission has noted, Commissioner Weintraub is

[4] Plaintiff claims that, because the decision to defend the FEC against this lawsuit brought pursuant to statutes other than the Federal Election Campaign Act is not subject to a Commission vote, "the arguments made by the FEC in this case do not represent the views of *any*… Commissioners." (Resp. at 9 n.7) However, the General Counsel acts on behalf of the Commissioners whenever "the Commission . . . "appear[s] in and defend[s] against any action"

entitled to exercise her discretion in individual enforcement proceedings, as are all Commissioners. (*See, e.g.*, Opp. to MSJ at 31-34.) Moreover, even assuming arguendo that public statements by groups of three or fewer Commissioners could be taken as evidence of agency policy, Commissioner Weintraub's position must be weighed against the public statements of *three* sitting Commissioners (Vice Chairman Cooksey and Commissioners Trainor and Dickerson) who have expressed opposing views, and a *fourth* (Chair Lindenbaum) who committed to the course of action plaintiff favors during her confirmation hearing before the United States Senate and indeed has acted in a manner consistent with that commitment. (Mot. at 10-11, n.11.) Plaintiff's apparent view that *all* sitting Commissioners must publicly commit to exercising their discretion in a certain way in all future enforcement proceedings is wholly unsupported.

D. The "Capable of Repetition Yet Evading Review" Exception to Mootness Does Not Apply

Finally, plaintiff's brief attempt to fit its claims within the "capable of repetition, yet evading review" exception to mootness fails. First, plaintiff cannot invoke the "capable of repetition, yet evading review" exception because it must make "the requisite showing of 'a reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Sibley v. Alexander*, 916 F. Supp. 2d 58, 62–63 (D.D.C. 2013) (quoting *Herron for Congress v. FEC*, 903 F. Supp. 2d 9, 14 (D.D.C. 2012) and noting that it in turn cites and quotes *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam)). However, as articulated previously, plaintiff cannot show that the alleged "policy" it challenges

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through "attorneys employed in its office," 52 U.S.C. § 30106(f)(4), namely the "general counsel" and "additional personnel" working for her, 52 U.S.C. § 30106(f)(1). This is true no matter whether the defense is an enumerated one requiring four votes under 52 U.S.C. § 30106(c).

will be repeated *at all*, let alone with respect to plaintiff itself. (Mot. at 28-35.) "When a claim rests entirely on an unlikely chain of hypothetical occurrences, the court must conclude that the controversy is not likely to reappear." *Sibley*, 916 F. Supp. 2d at 62-63 (quoting *Herron*, 903 F. Supp. 2d at 15).

In addition, plaintiff has not shown that the harm alleged here would evade review. Assuming arguendo that plaintiff is in fact harmed by the Commission's alleged concealment of records, there is simply no natural time limit upon this conduct, and thus no reason for this Court to presume it will evade review, as would be the case with clearly time-limited events like those tied to an election cycle or a pregnancy. *See Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (doctrine is appropriately applied where the state statute or policy in question will be applied in future elections and thus cause a comparable limited-time harm to candidates in the future). Here, several of the MURs subject to plaintiff's challenge were pending for years before file closure, and they were not ended through any regular operation of the calendar or other inevitable events, but by the discretionary decisions of Commissioners. (*See* Mot. at 10-14 (summarizing file closures for matters that had been open as long as ten years).) Plaintiff cannot show, as it must, that a challenge to the FEC's handling of such matters like the one it has made here would be subject to a fixed time period that would typically be too short for judicial review. *See Storer*, 415 U.S. at 737 n.8. Thus, although plaintiff's claims here have now become moot, it cannot show that any similar claims in the future would necessarily evade review, and it cannot demonstrate that the "capable of repetition" exception to mootness applies.

III. CONCLUSION

For the foregoing reasons, the Commission's second motion to dismiss should be granted, and plaintiff's complaint should be dismissed.

Respectfully submitted,

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January 25, 2023

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2023, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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