IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERITAGE ACTION FOR AMERICA,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civil Action No. 1:22-cv-01422 (CJN)

PLAINTIFF'S COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Heritage Action challenges the Federal Election Commission's (FEC or Commission) failure to timely disclose its voting records and statements of reasons in eight terminated enforcement matters thus far, including the matter in which Heritage Action is a respondent. The purpose of this concealment policy is to convey to litigants and the courts the misimpression that the FEC has failed to act on these enforcement matters—when in fact the agency has already dismissed the administrative complaints and terminated the matters because fewer than four Commissioners voted to initiate enforcement actions based on the complaints.

Heritage Action and at least seven other administrative respondents have been the victims of this unlawful concealment thus far. As a result, Campaign Legal Center (CLC) has now filed a citizen suit against Heritage Action based on the false premise that the FEC never acted on CLC's administrative complaint. *See CLC v. Heritage Action*, No. 1:22-cv-01248-CJN (D.D.C.).

Yet over a year ago, the Commissioners did act on CLC's administrative complaint, with the FEC failing to garner the necessary four votes to find that the complaint raised reason to believe that Heritage Action had violated the Federal Election Campaign Act (FECA). Under FECA, at least four Commissioners must vote to find reason to believe that a violation of law occurred based on the complaint in order to proceed with enforcement and an investigation of the complaint's allegations. Because the Commission split in its vote on the merits of CLC's administrative complaint and did not garner four votes in support of taking the only next step of enforcement, the matter was terminated. Under the APA, FECA, FEC regulations, and D.C. Circuit precedent, the Commission's General Counsel was clearly and indisputably required to notify the parties of this terminating action and to publicly release the voting records and any statement of reasons by the Commissioners.

Instead of following the law, the Commission departed from longstanding policy and practice by refusing to administratively close the file in the matter involving Heritage Action, Matter Under Review (MUR) 7516. The Commission took this action—as it did in at least seven other enforcement matters—to conceal from the public and the courts the fact that the Commission acted on the administrative complaints and to expose the respondents to citizens suits. By refusing to administratively close the file (which the Commission is using as a pretext to block release of its voting records and statements of reasons), the Commission has left the public and courts with the false impression that it has not taken action on these administrative complaints, thus deliberately subjecting respondents such as Heritage Action to citizen suits on false pretenses. "If judicial review is to be more than an empty ritual," the Commission must deal honestly with the courts by "'disclos[ing] the basis' of its action," but it has failed to do so. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573, 2576 (2019).

And that is just the start of the Commission's "bad faith" and "improper behavior." *Id.* at 2574. The Commission has also declined to defend lawsuits brought by administrative complainants alleging that the FEC failed to act on the complaints. So when a complainant files a lawsuit against the FEC for allegedly failing to act on an administrative complaint—made possible because the Commission has blocked release of voting records by not administratively closing the file—the FEC has ensured that the court will enter a default judgment against the FEC as well, allowing the complainant to sue the respondent directly in federal court.

That is precisely what happened to Heritage Action. As a result of the FEC's concealment of its voting records and statements of reasons in MUR 7516, District Judge Kelly authorized CLC to file a citizen suit against Heritage Action based on the false premise that the Commission had failed to act on CLC's administrative complaint. *See CLC v. FEC*, No. 1:21-cv-0406-TJK

(D.D.C.) (*CLC v. FEC*), *appeal filed*, No. 22-5140 (D.C. Cir. May 20, 2022). But the Commission in fact did act on CLC's administrative complaint, because fewer than four Commissioners voted to find reason to believe that Heritage Action had violated the law based on the complaint. This would have been obvious had the FEC merely appeared to disclose its decision.

The FEC's bad faith and improper behavior is even more apparent because the FEC has appeared to selectively defend this APA lawsuit. The inescapable conclusion is that the FEC has acted to favor administrative complainants by opening a pathway to enforce FECA in federal court while prejudicing administrative respondents like Heritage Action by concealing the agency's dismissal of administrative complaints. The Commission's conduct in these matters has shattered any suggestion that the Commission is "entitled to a presumption of regularity." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

This Court should finally put an end to the FEC's concealment policy. The FEC's failure to notify the parties and disclose its voting records and statements of reasons in enforcement matters is arbitrary and capricious and "not in accordance with law" in violation of 5 U.S.C. § 706(2). Moreover, the Commission has "unlawfully withheld" and "unreasonably delayed" the release of the enforcement matter records under 5 U.S.C. § 706(1). The FEC's attempt to shield its concealment policy from judicial review fails because federal law imposes clear and indisputable duties on the agency to disclose its actions. Despite the FEC's obvious attempt to moot this case with its post-litigation conduct, this remains a live dispute because Heritage Action is suffering ongoing Article III injuries; the FEC has not acknowledged—much less—abandoned the concealment policy; a declaratory judgment would provide effectual relief; and in all events the FEC cannot carry its heavy burden to show that it is absolutely clear that Heritage Action will not fall victim to the concealment policy again in the future.

BACKGROUND

A. The FEC's Bipartisan Structure.

The FEC is an independent federal agency composed of six members appointed by the President by and with the advice and consent of the Senate. 52 U.S.C. § 30106(a). Congress "vested the Commission with 'primary and substantial responsibility for administering and enforcing [FECA],' providing the agency with 'extensive rulemaking and adjudicative powers.'" *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (*DSCC*) (citation omitted). To prevent any one political party from changing the regulatory regime or using the FEC's enforcement process for partisan gain, Congress structured the Commission to consist of no more than three members affiliated with the same political party. 52 U.S.C. § 30106(c); *see DSCC*, 454 U.S. at 37 ("[T]he Commission is inherently bipartisan in that no more than three of its six voting members may be of the same political party."). And "[a]ll decisions of the Commission with respect to the exercise of its duties and powers" must be made "by a majority vote of the members of the Commission." 52 U.S.C. § 30106(c).

B. The FEC's Review Of Administrative Complaints.

The FEC has "exclusive jurisdiction with respect to the civil enforcement" of FECA, 52 U.S.C. § 30106(b)(1), but there are no real limits on who may lodge an administrative complaint with the Commission. "Any person who believes a violation of [the] Act … has occurred, may file a complaint with the Commission." *Id.* § 30109(a)(1). Accordingly, before initiating an enforcement action and investigation of allegations in a complaint, the Commission must first "determine[], by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed" a violation of the Act based on the complaint. *Id.* § 30109(a)(2); *see also id.* § 30106(c) ("[T]he affirmative vote of 4 members of the Commission shall be required in order

for the Commission to take any action in accordance with paragraph … (9) of section 30107(a)"). This vote is the only action Congress authorized the Commission to take in the initial phase of a complaint-generated matter. Absent "an affirmative vote of 4" Commissioners finding "reason to believe," the FEC cannot proceed with an enforcement investigation based on a complaint, *id.* § 30109(a)(2); *see id.* §§ 30106(c), 30107(a)(9), and thus it "dismisses the administrative complaint," *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015); *see CLC v. FEC*, 31 F.4th 781, 785 (D.C. Cir. 2022) ("If at least four Commissioners vote yes, the Commission will investigate; otherwise, the complaint is dismissed.").

Unsurprisingly, in exercising this congressionally mandated gatekeeping function, the bipartisan FEC frequently splits on its "reason to believe" vote—typically by a 3-3 breakdown—thus failing to garner the four votes necessary to proceed to enforce the complaint under the statute. *See CLC v. FEC*, 312 F. Supp. 3d 153, 164 n.6 (D.D.C. 2018) (*Democracy 21*) ("The fact that these deadlocks occur is evidence of the Congressional scheme working"), *aff'd sub nom.*, *CLC & Democracy 21 v. FEC*, 952 F.3d 352 (D.C. Cir. 2020). Under the controlling statute, such a split constitutes the FEC's ***decision*** of the case, mandating dismissal of the complaint. As former FEC Chairman Brad Smith put it: "If the FEC votes 3-3 not to find a violation, that means the FEC has determined that the conduct does not violate the law." Brad Smith, *What Does It Mean When the Federal Election Commission "Deadlocks,"* Institute for Free Speech (Apr. 14, 2009), https://bit.ly/3RhwhkR. "It HAS applied the law to the facts, and it HAS reached a result," dismissing the matter. *Id.* Thus, the D.C. Circuit has deemed this common scenario to result in so-called "deadlock dismissals." *E.g.*, *Common Cause v. FEC*, 842 F.2d 436, 448–49 (D.C. Cir. 1988); *CREW v. FEC*, 993 F.3d 880, 882–83 (D.C. Cir. 2021) (*New Models*).

On May 13, 2022, the FEC's Chairman Allen Dickerson and Commissioners Sean Cooksey and Trey Trainor issued a statement explaining further that the FEC has "concluded" its "work" if it has voted on the merits of the complaint and failed to garner the four votes FECA requires to proceed with enforcement. *See Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters* 3 (May 13, 2022) (Exhibit A, attached) (Statement Regarding Concluded Enforcement Matters). As they explained, "the Commission has already passed judgment on the entirety of the merits in these matters." *Id*. at 4–5. This situation, the Commissioners noted, is very different from "a matter that the Commission is considering piecemeal over the course of several [meetings] but where it has yet to vote on all the enforcement questions presented." *Id*. at 5. By deadlocking, the Commission has "finished" its work and, "in fact, acted." *Id*. at 2, 5.

C. Mandatory Disclosure Of The FEC's Decisions In Enforcement Matters.

Federal laws compel the FEC to notify the parties and disclose a decision to dismiss an administrative complaint. As a general matter, the APA requires that "[p]rompt notice shall be given of the denial … of a written application, petition, or other request of an interested person made in connection with any agency proceeding," and "the notice shall be accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e). And under FECA specifically, "[i]f the Commission makes a determination that a person has not violated [FECA], the Commission shall make public such determination." 52 U.S.C. § 30109(a)(4)(B)(ii). The FEC must first "advise both complainant and respondent by letter" "[i]f the Commission finds no reason to believe, or otherwise terminates its proceedings." 11 C.F.R. § 111.9(b). Then, "[i]f the Commission makes a finding of no reason to believe … or otherwise terminates its proceedings, it shall make public

such action and the basis therefor no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent." *Id.* § 111.20(a).

In cases where the "the Commission lacks four votes to proceed" with enforcement—including in deadlock dismissals—"the [C]ommissioners who voted against enforcement must state their reasons why," and "[t]he reasons offered by these so-called controlling Commissioners are then treated as if they were expressing the Commission's rationale for dismissal." *New Models*, 993 F.3d at 883 n.3 (cleaned up); *see also DCCC v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (R.B. Ginsburg, J.); *Common Cause*, 842 F.2d at 448. "In the event of a deadlock, the 'declining-to-go-ahead' Commissioners must issue a Statement of Reasons to serve as the basis for judicial review." *CLC*, 31 F.4th at 785 (citing *Common Cause*, 842 F.2d at 449).

D. The FEC's Longstanding Policy Of Closing The File In Enforcement Matters.

In every terminated enforcement matter, the FEC holds a vote to "[c]lose the file" on the administrative matter. *See, e.g.*, Matter Under Review (MUR) 7137, Certification (July 22, 2021) (voting to "[c]lose the file" in a matter resulting in a signed conciliation agreement, which must be publicly released under 52 U.S.C. § 30109(a)(4)(B)). Unlike the "reason to believe" vote, this vote to close the file is not congressionally mandated under FECA. Rather, it is an administrative creation of the Commission that merely serves as the FEC's authorization to the Office of General Counsel to fulfill the non-discretionary notification requirements under FECA and FEC regulations. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a).

For decades, the Commission consistently adhered to a policy and practice of administratively closing an enforcement matter file after fewer than four Commissioners voted to find reason to believe a violation had occurred and initiate an enforcement action based on the complaint. *See, e.g.*, MUR 5024, Certification (Nov. 4, 2003) (voting 6-0 to close the file and send

the appropriate notices after splitting 3-3 on whether there was reason to believe a violation had occurred); FEC's Partial Mot. to Dismiss at 12, *CREW v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017) (No. 16-cv-259), Dkt. No. 12 (explaining that "[a]s a result of" a "three-to-three" "split vote, the Commission closed the file"); FEC's Motion to Dismiss at 11, *CREW v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015) (No. 14-cv-1419), Dkt. No. 5 ("If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint."). After closing the file, the General Counsel would then notify the parties of the Commission's terminating action on the merits of the complaint and release the voting records and any statements of reasons, as required by FECA and the FEC's regulations.

E. The Administrative Complaint Against Heritage Action In MUR 7516.

On October 16, 2018, CLC and an individual filed an administrative complaint with the FEC against Heritage Action, which the FEC designated as MUR 7516. Compl. (Oct. 16, 2018); Notification of Compl. to Heritage Action for Am. (Oct. 22, 2018), *available at* https://www.fec.gov/data/legal/matter-under-review/7516/. On April 6, 2021, the Commission took "action[]" on CLC's complaint against Heritage Action. *See* Exhibit B, attached (April 2021 Certification). In that meeting, the Commission voted on whether there was reason to believe that Heritage Action had violated FECA based on the allegations in the complaint, but there were not four votes to enforce the complaint. *Id.* The three Commissioners who voted against enforcement—Commissioners Cooksey, Dickerson, and Trainer—supported dismissal as a matter of agency enforcement discretion "under *Heckler v. Chaney*." *Id.* These Commissioners wrote a "controlling" Statement of Reasons explaining their votes, including that their decision was based on "prosecutorial discretion." *Statement of Reasons of Chairman Allen J. Dickerson and*

Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III (May 13, 2022) (Exhibit C, attached) (Controlling Statement of Reasons).

F. The FEC's Failure To Disclose Its Terminating Action In MUR 7516.

Although the FEC dismissed the complaint by failing to garner the requisite four votes to proceed with enforcement, the FEC concealed its terminating action in MUR 7516 for over a year. The Commissioners took a vote on April 6, 2021, whether to close the administrative file so that CLC and Heritage Action could be notified of the FEC's action. *See* April 2021 Certification; Controlling Statement of Reasons at 4 n.9. Commissioners Broussard, Walther, and Weintraub, however, took the unprecedented step of voting not to close the file, thereby concealing the FEC's action from the parties and the courts. *See* Statement Regarding Concluded Enforcement Matters 2. The FEC took another vote to close the administrative file on January 11, 2022, but the same three Commissioners voted against closing the administrative file. Exhibit D, attached (January 2022 Certification). Because the Commission did not vote to close the file after these meetings, the General Counsel did not notify CLC or Heritage Action of the FEC's dismissal of the complaint for over a year.

G. Three Commissioners Criticize The Commission's New Concealment Policy.

In this case and in seven other enforcement matters, the Commission—at the behest of Commissioners Walther, Broussard, and Weintraub—departed from its longstanding policy and practice of closing the file after the Commission has failed to initiate an enforcement action on a complaint. As the *New York Times* reported in June 2021, based in part on interviews with Commissioner Weintraub, these three Commissioners "are declining to formally close some cases after the Republicans vote against enforcement" in order to "leave[] investigations officially sealed in secrecy and legal limbo"—primarily in protest to the D.C. Circuit's interpretation of *Chaney*.

Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. Times (June 8, 2021), https://nyti.ms/3ynO2qb. The same three Commissioners are then "blocking the F.E.C. from defending itself in court when advocates sue the commission for failing to do its job." *Id.* By making federal courts "believe" that "deadlocked cases are unresolved," these three Commissioners are trying to "open the door for outside advocacy groups to directly sue … in federal court." *Id.*

This was further confirmed in the Statement Regarding Concluded Enforcement Matters issued by Chairman Dickerson and Commissioners Cooksey and Trainor. According to that statement, Commissioners Walther, Broussard, and Weintraub have refused to vote to administratively close the files in eight enforcement matters before the Commission thus far, even though the Commission took final votes on the merits of these complaints more than a year ago. Ex. A at 2. In each of these matters, the statement explains, "votes have been taken as to all parties and statements of reasons have been included in the file by the commissioners declining to move forward," and "there is no basis for claiming that the Commission is continuing to deliberate." *Id.* at 2–3. In other words, acting with a lawful quorum, the Commission considered each of those matters and took votes fully resolving their substance. Yet, because the Commission does not notify the complainant or respondent of the results of any votes taken in an enforcement matter or publish the relevant materials until the matter file has been closed, the Commission created the false impression that the FEC had not taken action on these eight administrative complaints. *Id.* at 4.

H. The Citizen Suit Against Heritage Action Triggered By The FEC's Failure To Disclose Its Terminating Action In MUR 7516.

On February 16, 2021, CLC sued the FEC in this District under 52 U.S.C. § 30109(a)(8)(A), alleging that the Commission had failed to act on CLC's administrative

complaint in MUR 7516 and that the FEC's inaction was contrary to law under § 30109(a)(8). *See CLC v. FEC*. The FEC did not enter an appearance or otherwise defend the action. *See id.* Judge Kelly subsequently held that the "FEC's failure to act on CLC's administrative complaint is contrary to law," Order, *CLC v. FEC*, Dkt. No. 16 at 2, and authorized CLC to "bring 'a civil action to remedy the violations involved in the original complaint'" against Heritage Action, Order, *CLC v. FEC*, Dkt. No. 23 at 2. On May 5, 2022, CLC filed its citizen suit against Heritage Action in No. 1:22-cv-01248-CJN (D.D.C.).

I. The FEC's Subsequent Disclosure Of Its Voting Records And Statement Of Reasons In MUR 7516.

Heritage Action filed the Complaint in this case on May 20, 2022. Dkt. No. 1. A few weeks later, on June 2, 2022, the FEC finally disclosed unredacted copies of its voting records and statement of reasons in MUR 7516. Exhibit E, attached. The FEC waited until June 7, 2022—two days after CLC had filed the citizen suit—to close the administrative file. Exhibit F, attached. The General Counsel then notified Heritage Action of the FEC's dismissal of the administrative complaint in MUR 7516 on June 9. *Id.* The administrative file in MUR 7516 became public on July 13, 2022. FEC, *MUR #7516: Summary*, https://www.fec.gov/data/legal/matter-under-review/7516/ (last visited Aug. 5, 2022).

LEGAL STANDARDS

When analyzing a Rule 12(b)(1) motion, a court must treat the plaintiff's factual allegations as true and afford the plaintiff the benefit of all inferences that can be derived from the facts alleged. *See Delta Air Lines, Inc. v. Export–Import Bank of U.S.*, 85 F. Supp. 3d 250, 259 (D.D.C. 2015). The court may also "consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice," *Stewart v. NEA*, 471

F.3d 169, 173 (D.C. Cir. 2006)—including certain "governmental agency actions," *D.C. Pro. Taxicab Drivers Ass'n v. District of Columbia*, 880 F. Supp. 2d 67, 72 (D.D.C. 2012).

Under the APA, a court "shall … hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The entire case ... is a question of law," and the district court "sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (cleaned up). Summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action" comports with the APA. *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006).

Additionally, a court "shall … compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This provision authorizes courts to compel an agency "to perform a ministerial or non-discretionary act." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). "This standard reflects the common law writ of mandamus." *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016). "To show entitlement to mandamus, plaintiffs must demonstrate (1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016).

ARGUMENT

The FEC's concealment policy violates the agency's clear and indisputable duty to disclose its voting records and statements of reasons in terminated enforcement matters. It is also a textbook example of "bad faith or improper behavior," *Dep't of Com.*, 139 S. Ct. at 2574, because its avowed purpose is to trigger citizen suits to enforce FECA by concealing from litigants and the courts that the agency decided *not* to enforce FECA. Unsurprisingly, the FEC does not defend the

concealment policy on the merits in its motion, and the agency even tried to moot this lawsuit with the kind of post-litigation tactic that the Judiciary has repeatedly rejected. The FEC offers a host of threshold defenses, none of which shield the concealment policy from judicial review.

I. The Court Has Jurisdiction.

To start, the FEC argues that Heritage Action lacks standing and that its claims are moot, but the FEC conflates standing and mootness. FEC Mem. of P&A in Supp. of Its Mot. to Dismiss, Dkt. No. 17 (Mot.). Although Heritage Action has the burden of establishing standing, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000), the FEC has the "heavy burden" of proving mootness, *id.* at 189. It is beyond dispute that Heritage Action had standing at the time the Complaint was filed, and those injuries continue today. And the FEC cannot carry its heavy burden of demonstrating that this case is moot—despite its best attempt to gin up a mootness defense in response to the Complaint—because the FEC is still concealing information that must be disclosed; it has neither acknowledged nor abandoned its concealment policy; its voluntary disclosure of some records does not moot this case challenging the FEC's concealment policy; and declaring the concealment policy unlawful would provide Heritage Action with effective relief to defend against the citizen suit.

A. Heritage Action Has Standing.

The FEC does not dispute that Heritage Action had standing at the time it filed the Complaint, nor could it. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992). In the Complaint, Heritage Action pleaded two forms of injury: informational injury, *e.g.*, Compl. ¶ 74, and exposure to civil suit, *e.g.*, *id.* ¶ 73. Both are well-established harms under Article III. *FEC v. Akins*, 524 U.S. 11, 21 (1998) ("a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"); *CLC*, 31 F.4th at 783

(holding that CLC had informational injury to sue the FEC); *Crossroads Grassroots Pol'y Strategies*, 788 F.3d at 318 (being "exposed to civil liability via private lawsuit … would be a significant injury in fact"). The FEC appears to concede that Heritage Action was suffering informational injury at the time the Complaint was filed, Mot. 20, 22, and it does not dispute that the FEC's concealment policy has exposed Heritage Action to a citizen suit, Compl. ¶ 70. Heritage Action also pleaded that these injuries are fairly traceable to the Commission's concealment policy and likely redressable by the Court. *Id.* ¶¶ 73–75. No more was required to establish standing to sue.

B. This Case Is Not Moot.

Instead, the FEC contends that this case is moot because it conveniently disclosed the voting records and statement of reasons in MUR 7516 after Heritage Action filed the Complaint. Mot. 24–25. But this remains a live controversy for multiple reasons, notwithstanding the FEC's obvious attempt to moot this case to avoid defending its concealment policy on the merits.

1. Heritage Action is suffering ongoing informational injury because the FEC is *still* concealing its voting records in (at least) seven other enforcement matters beyond MUR 7516. *See* Statement Regarding Concluded Enforcement Matters 2; Compl. ¶¶ 32, 40, 74; *see also Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Freedom of Information Act Litigation* (Exhibit G, attached) (FOIA Statement) (identifying three of those matters where the respondent has filed a FOIA lawsuit to obtain the concealed records). Under FECA, the FEC "shall make public" its votes and statements of reasons in all seven remaining enforcement matters because the agency dismissed the administrative complaints. 52 U.S.C. § 30109(a)(4)(B)(ii); *see* 11 C.F.R. §§ 111.9(b), 111.20(a); *see also Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C.

Cir. 2017) (explaining that a plaintiff must show that "it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it"); *Cutler v. HHS*, 797 F.3d 1173, 1179–80 (D.C. Cir. 2015) (holding that a court "must assume that the party asserting federal jurisdiction is correct on the legal merits of his claim," including "that the requested relief would be granted").

Heritage Action is suffering precisely the type of injury meant to be prevented by the disclosure of information pursuant to FECA and the FEC's implementing regulations—*i.e.*, lack of transparency. *See Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 449 (1989); *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 309 (D.D.C.), *aff'd*, 878 F.3d 371 (D.C. Cir. 2017). Because the FEC is concealing its records in seven enforcement matters, Heritage Action is unable to understand how the Commission is enforcing FECA in these matters, the reasons for its actions, and indeed what actions the Commission has even taken in many instances. Such information is vital to a party like Heritage Action that, while not a political committee, regularly engages in the public debate on important issues and policy makers that could expose it to FEC complaints or disclosure obligations and is currently defending a citizen suit alleging a violation of FECA. Indeed, such information may help Heritage Action defend against that citizen suit by providing further evidence showing why that action was improperly authorized—*i.e.*, by offering further proof that the citizen suit here was the product of a larger scheme to deceive the courts.

The Court can redress Heritage Action's informational injury by ordering the FEC "to publicly release [the] Commission's voting records and statements of reasons *in any enforcement matter* after the Commission fails to garner four votes to initiate an enforcement action based on

the complaint." Compl. at 28 ¶ d (emphasis added).[1] Contrary to the FEC's claim, Mot. 27, the fact that Heritage Action has no *direct* stake in the seven other enforcement matters makes no difference because "the identity of the requester is irrelevant to whether disclosure is required." *Stonehill v. IRS*, 558 F.3d 534, 538–39 (D.C. Cir. 2009) (FOIA).

2. It is not "impossible" for the Court to "grant any effectual relief" to Heritage Action, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), because a declaratory judgment that the FEC unlawfully concealed its voting records in MUR 7516, *see* Compl. at 28, would help Heritage Action obtain dismissal of CLC's citizen suit. Under the "collateral consequences doctrine," "the prospect that a judgment" in a party's favor "will affect future litigation" typically defeats mootness. *See* 13C Fed. Prac. & Proc. Juris. § 3533.3.1 (3d ed. Apr. 2022 update); *see, e.g.*, *Bank of Marin v. England*, 385 U.S. 99, 100–01 (1966) (applying collateral-consequences doctrine when the petitioner was "subject to" another "suit because of the original judgment as to its liability"); *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008) (appeal not moot when "district court's decision to dismiss the original action for want of subject matter jurisdiction has a concrete (and potentially devastating) impact on the second action"); *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153, 1158 n.2 (D.C. Cir. 1981) (explaining that "the remaining consequences of the litigation … prevent [the court] from holding that this case is moot"); *cf. Gordon v. Lynch*, 817

[1] The FEC primarily relies on *CREW v. FEC*, 799 F. Supp. 2d 78 (D.D.C. 2011), to argue that Heritage Action lacks informational injury because the voting records and Statement of Reasons in MUR 7516 have been released. Mot. 25. But, pursuant to the concealment policy, the FEC has *not* released those materials for at least seven other MURs. Compl. ¶¶ 32–36, 40–43; Statement Regarding Concluded Enforcement Matters 2. Although the FEC purports to challenge Heritage Action's standing to sue on behalf of third parties, Mot. 26–29, Heritage Action is not attempting to sue *on behalf of third parties*. It is seeking the information in the other MURs to redress *its own* informational injuries. To the extent that the FEC challenges the Court's authority to award relief to non-parties, the D.C. Circuit has squarely foreclosed that argument. *See infra* Part IV.

F.3d 804 (D.C. Cir. 2016) (noting that if a plaintiff faces a genuine risk of enforcement in the same district, the prospect of a decision with "binding precedential effect" could be sufficient to defeat mootness).

The FEC does not dispute that its concealment policy is the but-for cause of CLC's citizen suit against Heritage Action, which remains pending before this Court. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) (requiring that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" for mootness to apply). Because Heritage Action is still exposed to liability in the citizen suit, a declaratory judgment in this case would undermine the citizen suit's fictional premise that the FEC failed to act on CLC's administrative complaint by confirming that the agency's concealment of its action on the complaint was unlawful.

Accordingly, this case is not moot because a declaratory judgment would provide effective relief to Heritage Action to defend against the citizen suit. *See Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121 (1974) (holding that the case was not moot because the plaintiffs "have sought, from the very beginning, declaratory relief as well as an injunction" and that district courts have a "'duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of [an] injunction'"); *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494–95 (D.C. Cir. 1988) (finding case was not moot where the court could still afford "declaratory relief"); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 91 & n.23 (D.C. Cir. 1986) (finding waiver of fees did not moot plaintiffs' "facial challenges to the guidelines and regulation"); *Gautreaux v. Romney*, 448 F.2d 731, 736 (7th Cir. 1971) (holding that "entry of a declaratory judgment" with "significant consequences in determining the extent of any 'further relief' deemed necessary" defeated mootness argument).

3. The FEC has not even acknowledged, much less abandoned its concealment policy. *Better Gov't Ass'n*, 780 F.2d at 91 n.23 (case not moot when the "challenged governmental practice continues" (citing *Super Tire Eng'g Co.*, 416 U.S. at 121–22)). Even though the FEC disclosed its voting records and statement of reasons in MUR 7516 after the Complaint was filed, the FEC "has not altered its position on the merits" because the Commission is still concealing its voting records and statements of reasons in seven other enforcement matters "on the same grounds as" MUR 7516. *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1079 (3d Cir. 1989); *see Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989) (explaining that an agency's "very defense of [the policy] makes it more likely that [the plaintiff] will be subject to" it again, thereby defeating mootness). Courts "have never allowed agencies to defeat judicial review of their [policies] by occasionally waiving them in individual cases." *Pub. Citizen v. Dep't of Stat*e, 276 F.3d 634, 641 (D.C. Cir. 2002). So even though Heritage Action "may have obtained relief as to a *specific request*" for voting records in MUR 7516, "this will not moot a claim that an agency *policy or practice* will impair the party's lawful access to information in the future." *Payne Enters.*, 837 F.2d at 491. "The fact that the practice at issue is informal, rather than articulated in regulations or an official statement of policy, is irrelevant to determining whether a challenge to that policy or practice is moot." *Id*. Put simply, the FEC cannot dodge judicial review of its concealment policy by voluntarily disclosing records in MUR 7516 while maintaining the policy in other cases.

4. In all events, the FEC cannot carry its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189–90. The FEC attempts to shift this burden by claiming that Heritage Action has not shown that "future enforcement proceedings" are "certainly impending." Mot. 26.

But again, the FEC incorrectly conflates standing with mootness. *See Laidlaw*, 528 U.S. at 189–90. As the Supreme Court has explained, "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.* For example, the Court, in the course of the same opinion, held both (i) that "a plaintiff lacked initial standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat arising from the policy," and (ii) that "a citywide moratorium on police chokeholds—an action that surely diminished the already slim likelihood that any particular individual would be choked by police—would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent." *Id.* (discussing *City of L.A. v. Lyons*, 461 U.S. 95 (1983)). Thus, even assuming that Heritage Action would not have standing to challenge the concealment policy in the first instance now that the MUR 7516 records are no longer concealed, that does not mean that this challenge is now moot. *See id.*

Under mootness principles, the FEC has not come close to carrying its "heavy burden of making absolutely clear" that Heritage Action will not be a victim of the FEC's concealment policy again in the future. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (cleaned up). For one thing, the FEC has not disavowed its concealment policy, but rather disputes that it even exists. For another, Heritage Action, as a 501(c)(4) organization engaged in the policy debate, remains continually exposed to FEC complaints, which may be filed by any person. Indeed, there is nothing to stop CLC (or anyone else) from filing another administrative complaint against Heritage Action in the future to manufacture another citizen suit made possible by the FEC's concealment policy. And CLC continues to publicize its complaint against Heritage Action. CLC, *CLC Sues Secret Money Group, Heritage Action, for Violating*

Disclosure Laws (May 5, 2022), https://campaignlegal.org/update/clc-sues-secret-money-group-heritage-action-violating-disclosure-laws. Nor is there any reason to believe that the Commission would not conceal its votes and statements of reasons again—as it continues to do in seven other enforcement matters—for the purpose of triggering another citizen suit. *See* Statement Regarding Concluded Enforcement Matters 2. Indeed, the three Commissioners who spawned the concealment policy recently issued a statement of reasons explaining why they voted to take enforcement action against Heritage Action—and would no doubt look forward to another opportunity to take such action. *Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub* (July 7, 2022) (Exhibit H, attached). The FEC falls far short of meeting its "stringent" burden of demonstrating mootness. *Laidlaw*, 528 U.S. at 189.

II. THE FEC'S FAILURE TO ACT IS REVIEWABLE.

Shifting from jurisdiction to reviewability, the FEC offers three reasons for why its concealment of voting records and statements of reasons in eight matters is not reviewable under the APA, but each one misses the mark.

A. The FEC's Failure To Act Constitutes Agency Action.

To start, the FEC contends that APA review is unavailable on the theory that under *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004), Heritage Action has not challenged any "discrete" agency action. Mot. 29–35. The FEC "vastly overstates the rule articulated" in that case. *Xie v. Kerry*, 780 F.3d 405, 407 (D.C. Cir. 2015).

1. The "discreteness requirement" set forth in *Southern Utah* provides that agency "inaction qualifies as 'failure to act'" reviewable under the APA "only where it is 'discrete.'" *Amador Cnty. v. Salazar*, 640 F.3d 373, 382 (D.C. Cir. 2011). That means that while "plaintiffs may challenge an agency's failure to promulgate a rule," for example, "they may not raise a 'broad

programmatic attack,' such as the challenge to Interior's failure to manage off-road vehicle use in federal wilderness study areas brought" in *Southern Utah*. *Id.* (permitting review of the "discrete agency inaction" of the "failure to disapprove [a] compact despite its inconsistency with" a statute); *see, e.g.*, *Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 620 (D.C. Cir. 2020) (failure to meet "statutory responsibility to issue standards … specifically applicable to birds" qualifies as "'discrete'"). In other words, *Southern Utah* is just the flipside of *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)—whether agency action or inaction is involved, the APA does not permit review of "claims seeking *wholesale* improvement of a program by court decree." *Cobell v. Norton*, 392 F.3d 461, 472 (D.C. Cir. 2004) (cleaned up); *see Lujan*, 497 U.S. at 890 (APA does not permit review of "the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans").

The D.C. Circuit's decision in *Xie* provides a good example of how the discreteness inquiry plays out in practice. In that case, the plaintiff contended that the State Department had failed to adjudicate certain Chinese work visas—including her application—in violation of the INA's temporal-priority provision. 780 F.3d at 405–06. The D.C. Circuit held that the plaintiff had identified discrete agency action because she had "point[ed] to a precise section of the INA, establishing a specific principle of temporal priority that clearly reins in the agency's discretion," and had "argue[d] that the disparate cut-off dates for various subcategories manifest a violation of the principle." *Id*. at 407–08. Unlike the challenge in *Southern Utah*, which sought to "launch the district court onto a path of working out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management," the plaintiff in *Xie* merely sought compliance with "a specific statutory requirement." *Id.* at 408 (cleaned up).

The "discrete agency inaction" here, *Amador Cnty.*, 640 F.3d at 382, is at least as specific as the one at issue in *Xie*. Heritage Action challenges the FEC's discrete failure to act in "eight enforcement matters," including MUR 7516. Statement Regarding Concluded Enforcement Matters 2, 5; Compl. ¶¶ 3, 7, 32. Heritage Action is aggrieved by the agency's failure to act, Compl. ¶¶ 72–75, 78, and has "point[ed] to a precise section of" federal law "that clearly reins in the agency's discretion" by directing the FEC to timely disclose its voting records and statements of reasons following a dismissal, *Xie*, 780 F.3d at 408; Compl. ¶¶ 82–83 (citing 5 U.S.C. § 555(e); 52 U.S.C. § 301109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a)). Because Heritage Action has "identif[ied] a legally required, discrete act that" the FEC "has failed to perform," *Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009) (Kavanaugh, J.), it is "entitled to have" the FEC's "current approach ascertained and its lawfulness adjudicated," *Xie*, 780 F.3d at 408; *see, e.g.*, *Venetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925, 931 (D.C. Cir. 2008) (holding that "a policy of permitting employees to disclose confidential information without notice is surely" agency action reviewable under the APA).

Indeed, the agency inaction challenged here was sufficiently discrete to allow three Commissioners both to describe it as a "practice" that so far had been applied to "eight enforcement matters" and to condemn it as conflicting with "Congress's carefully crafted framework" in FECA. Statement Regarding Concluded Enforcement Matters 2, 5. If three Commissioners can craft a lengthy statement analyzing the legal deficiencies of this discrete "practice," there is no reason why this Court cannot do likewise. By the same token, the concealment policy here was sufficiently discrete for Commissioner Weintraub to explain it in detail to the New York Times. While the FEC's attorneys may pretend that it is business as usual over at the Commission, courts

"are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com.*, 139 S. Ct. at 2575.

Tellingly, the FEC does not seriously dispute that if Heritage Action had challenged the Commission's failure to timely disclose the voting records and statements of reasons *in its case alone* (MUR 7516), that agency inaction would readily qualify as discrete. After all, such a failure to disclose would be materially indistinguishable from a failure to promulgate a rule (or standards), disapprove a compact, or adjudicate a subcategory of work visas. *See supra* Part I.A. By way of analogy, no one would think that a failure to comply with FOIA is insufficiently discrete. That Heritage Action *also* challenges the same failure to disclose in seven other matters—a failure "premised" on the same "unsupportable" legal "fiction" in all eight cases, Statement Regarding Concluded Enforcement Matters 2—should have no relevance insofar as discreteness is concerned. Instead, the FEC's discreteness theory is really just a repackaged version of its *mootness* argument—because "the Commission has terminated the MUR and released the record" "in this case," the FEC claims, Heritage Action should no longer be able to challenge the concealment policy as applied "'*in any enforcement matter*.'" Mot. 33, 35. But the FEC's mootness theory is no more persuasive when dressed in discreteness garb. *See supra* Part I.B.

2. In response to all this, the FEC points to three decisions that are readily distinguishable. Mot. 30–32. *First*, in *Bark v. United States Forest Service*, 37 F. Supp. 3d 41 (D.D.C. 2014), the plaintiff "attached a 'policy' label to their own amorphous description of the Forest Service's practices." *Id*. at 50–51. There is no similar problem describing the FEC's action at issue here, because three Commissioners have described the Commission's concealment of its votes and statements of reasons in eight enforcement matters, Statement Regarding Concluded Enforcement Matters 2, 5. Although the FEC describes these eight matters as "a vaguely defined

small group of unidentified FEC enforcements matters," Mot. 29, 33, the FEC knows exactly which matters are at issue because it redacted the identifying information from the Commissioners' statement, *see* Statement Regarding Concluded Enforcement Matters 2, 5. It is not as if Heritage Action is hiding the ball here.

Second, in *CREW v. DHS*, 387 F. Supp. 3d 33 (D.D.C. 2019), the plaintiff sought "to force compliance with a broad statutory mandate" that would require this Court "to decide just how much detail is necessary for every form prepared by DHS to comply with" the Federal Records Act. *Id*. at 50–51. Here, by contrast, Heritage Action has "point[ed] to a precise section of" federal law that constrains the FEC's discretion and requires a concrete action in a discrete universe of cases. *Xie*, 780 F.3d at 408; Compl. ¶¶ 82–83 (citing 5 U.S.C. § 555(e); 52 U.S.C. § 301109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a)).

Third, although there was no "overarching policy" to review in *Lillemoe v. USDA*, No. 15-cv-2047-CLF, 2020 WL 1984256, at *7 & n.4 (D.D.C. Apr. 27, 2020), the court *did review* four discrete agency actions. *Id*. at *8–13. And that is exactly what Heritage Action seeks here with respect to the FEC's failure to act in eight discrete enforcement matters, Compl. ¶¶ 3, 7, 32.

3. The FEC's remaining arguments are a distraction. For example, the claim that *three Commissioners* lack the power to establish any enforcement policy, is beside the point, Mot. 32–33, because Heritage Action challenges *the Commission's* failures to act in eight enforcement matters, Compl. ¶¶ 3, 7, 32. That is no different than "a failure of the Commission to act" on an administrative complaint caused by the actions of three Commissioners, which no one disputes could be challenged under § 30109(a)(8)—as evidenced by CLC's own suit against the FEC here. And while the FEC warns the Court not "to override the discretion that the Commission has exercised in enforcement matters for decades," Mot. 11, 33, federal law "do[es] not leave [its]

discretion unbounded," *Dep't of Com.*, 139 S. Ct. at 2568; *see infra* Part II.C. Finally, the relief requested in this case would not lead to "judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve," *S. Utah*, 542 U.S. at 66, because Heritage Action seeks relief expressly authorized by the APA to force compliance with specific statutory mandates in eight discrete enforcement matters,[2] *see infra* Part II.C.

B. Heritage Action Has No Other Adequate Remedy.

Next, the FEC makes the baffling claim that APA review is unavailable here because Heritage Action also cannot obtain review of the concealment policy under FECA. Mot. 35–41.

APA review is available only where "there is no other adequate remedy in a court." 5 U.S.C. § 704. An alternative remedy is not "adequate" if it offers only "doubtful and limited relief." *Bowen v. Massachusetts*, 487 U.S. 879, 901 (1988). Here, the FEC acknowledges that Heritage Action has no alternative remedy at all because "only FEC administrative complainants" can sue under FECA, and thus Heritage Action "cannot … pursue[]" its case "under FECA's judicial review provision." Mot. 36, 39. The FEC does not explain how FECA can provide an "adequate" remedy here if FECA affords *no* remedy at all to administrative respondents like Heritage Action. Just as the Tucker Act does not provide an adequate remedy under the APA because it does not permit an equitable claim for prospective relief, *Bowen*, 487 U.S. at 904–05,

[2] The FEC makes no argument—and thus has forfeited any claim—that the agency action at issue here is not "final." *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012) ("The APA's finality requirement is not jurisdictional, however. Therefore, a 'finality' objection must be raised by the agency in order to be preserved. In this case, the Government never raised finality with the District Court and therefore forfeited the objection." (citations omitted)). And for good reason. Where, as here, "an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review." *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001); *e.g.*, *All. To Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) (explaining that review under APA § 706(2) is available in a case alleging a failure to act).

FECA is not an adequate remedy here because it does not permit administrative respondents like Heritage Action to bring any claim against the FEC for its failure to act, Mot. 36, 39. Nor does the FEC cite any authority supporting its head-scratching argument that APA review is unavailable if a plaintiff lacks any other remedy. The cases cited by the FEC all involve attempts by *administrative complainants* to bring concurrent claims under both FECA and the APA. Mot. 38–39. Those cases are inapposite here because, as the FEC concedes, FECA provides no remedy at all to administrative respondents like Heritage Action. While FECA may be an exclusive remedy for *administrative complainants*, FECA offers no adequate remedy at all for *administrative respondents*.

C. The FEC's Failure To Act Is Not Committed To The FEC's Discretion.

Finally, the FEC makes the passing claim that APA review is unavailable here because the Commission's concealment of its voting records and statements of reasons "is committed to agency discretion by law." Mot. 39 (quoting 5 U.S.C. § 701(a)(2)). That argument is a nonstarter because federal law constrains the FEC's discretion.

Although the APA embodies a "basic presumption of judicial review," *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967), review is not available "to the extent that" the action is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). To "honor the presumption of judicial review," the Supreme Court has read this exception "quite narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Com.*, 139 S. Ct. at 2568 (cleaned up). The Court has "generally limited the exception to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion, such as a decision not to institute enforcement proceedings." *Id.* (cleaned up) (citing *Heckler v.*

Chaney, 470 U.S. 821, 831-32 (1985)); *see also Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (explaining this "exception" is "confin[ed] … to those rare administrative decisions traditionally left to agency discretion" (cleaned up)).

The FEC suggests that its concealment of voting records and statements of reasons falls into this nonreviewable category, Mot. 40–41, but the FEC's mandatory duty to disclose its decisions "is not one of those areas traditionally committed to agency discretion," *Dep't of Com.*, 139 S. Ct. at 2568. Although the FEC's dismissal of a complaint in the exercise of prosecutorial discretion is unreviewable under *Chaney*, *see New Models*, 993 F.3d 880, the FEC's duty to disclose its decisions is a discrete obligation that follows the agency's decision not to institute enforcement proceedings.

Moreover, there is "'law to apply'" here because federal law "constrains" the FEC's "discretion" to conceal its votes. *Dep't of Com.*, 139 S. Ct. at 2568–69. For starters, FECA sets forth a reticulated scheme governing the FEC's processing of administrative complaints, 52 U.S.C. § 30109(a)(1), requiring the agency to hold an initial "reason to believe" vote on the merits of the administrative complaint, which demands "an affirmative vote of 4 of its members" to proceed with an investigation, *id.* § 30109(a)(2). If enforcement based on a complaint is denied, the APA requires the FEC to give "[p]rompt notice" of the "denial" along with a "statement of the grounds for denial." 5 U.S.C. § 555(e). Similarly, FECA requires the agency to "make public" a "determination" that "a person has not violated [the] Act." 52 U.S.C. § 30109(a)(4)(B)(ii). The FEC's own regulations identify the triggering event for this disclosure obligation: the agency must "advise both complainant and respondent by letter" and "make public such action and the basis therefor" if "the Commission finds no reason to believe, or otherwise terminates its proceedings." 11 C.F.R. §§ 111.9(b), 111.20(a). When the FEC fails to obtain "an affirmative vote of 4 of its

members" on the initial "reason to believe" vote, 52 U.S.C. § 30109(a)(2), the "proceedings on an administrative complaint have been terminated," Mot. 40. On top of all of this, the Freedom of Information Act further constrains the FEC's discretion by requiring the agency to disclose its "votes" and "opinions" in enforcement matters. 5 U.S.C. § 552(a)(2), (5). Because the FEC's concealment of its votes and statements of reasons "is amenable to review for compliance with those and other provisions of" federal law, the FEC's action "is subject to judicial review." *Dep't of Com.*, 139 S. Ct. at 2569.

III. THE FEC'S CONCEALMENT POLICY VIOLATES THE APA.

Because the Court has jurisdiction to review the FEC's failure to act, the Court should hold that the FEC's concealment policy is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A), and "agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1); *see, e.g.*, *Ramirez v. ICE*, 471 F. Supp. 3d 88, 92–93, 182, 191 (D.D.C. 2020) (agency's failure to act violated both § 706(1) and § 706(2)).[3]

A. The FEC's Concealment Of Its Voting Records And Statements Of Reasons Is Contrary To Law and Arbitrary and Capricious.

The FEC's concealment of its voting records and statements of reasons is contrary to law and arbitrary and capricious. 5 U.S.C. § 706(2)(A). An agency acts contrary to law and arbitrarily and capriciously when it fails to comply with federal statutes or its own regulations. *City of Anaheim v. FERC*, 558 F.3d 521, 522 (D.C. Cir. 2009); *Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014). And an agency acts arbitrarily and capriciously

[3] The Court can enter summary judgment, even though the FEC has not yet filed an administrative record, because "if an agency fails to act, there is no 'administrative record' for a federal court to review." *Nat'l L. Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affs.*, 842 F. Supp. 2d 127, 130–31 (D.D.C. 2012). In any event, the FEC has released the file in MUR 7516, FEC, *MUR #7516: Summary*, https://www.fec.gov/data/legal/matter-under-review/7516/ (last visited Aug. 4, 2022), which would be the administrative record.

when it makes "unexplained departures from precedent." *Ramaprakash v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003).

1. The FEC has acted contrary to law and arbitrarily and capriciously by concealing its voting records and statements of reasons after dismissing the administrative complaints in at least eight terminated enforcement matters. It has violated the APA by failing to provide "[p]rompt notice" and "a brief statement of the grounds" after the "denial" of a complaint through a deadlock dismissal. 5 U.S.C. § 555(e). It has violated FECA and its own regulations by failing to notify the parties that the administrative complaint has been dismissed and the matter terminated, due to the Commission's failure to authorize enforcement of the complaint, and by failing to publicly release the voting records and statements of reasons. 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a). And it has violated D.C. Circuit precedent by failing to release statements of reasons for the dismissals. *DCCC*, 831 F.2d at 1135; *Common Cause*, 842 F.2d at 449.

The FEC's only possible defense on the merits is that these provisions do not require notice and public disclosure unless and until four Commissioners vote to administratively close the file on the theory that the matter remains perpetually open for reconsideration because the Commissioners might change their minds on the reason-to-believe vote at some time in the future. As three Commissioners explained, this theory is meritless for multiple reasons. Statement Regarding Concluded Enforcement Matters; FOIA Statement.

First, FECA makes clear that in complaint-generated enforcement matters, the complaint is dismissed as a basis for enforcement if the FEC fails to garner the requisite four votes to enforce based on the allegations in the complaint. FECA requires the votes of four Commissioners to find reason to believe in order to initiate an enforcement action based on an administrative complaint. 52 U.S.C. § 30109(a)(2). Without four votes, the FEC cannot proceed any further. Unlike the

reason to believe vote, FECA says nothing about a vote to close the file. *See supra* Part D. The concealment policy flips FECA's four-vote requirement on its head by effectively imposing an extra-statutory requirement that four Commissioners must agree in order to *terminate* a proceeding. *Ark. Dairy Coop Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 829 (D.C. Cir. 2009) (agencies may not interpret a statute in a way that "would lead to absurd results" or "would thwart the obvious purpose of the statute" (quoting *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)). That is not the law.

Second, the FEC's regulations further clarify that the proceedings have "terminat[ed]" when fewer than four Commissioners vote to find "reason to believe" that a respondent violated FECA based on a complaint. *See* 11 C.F.R. § 111.9(b) ("If the Commission finds no reason to believe, or ***otherwise*** terminates its proceedings ... ." (emphasis added)); *id.* § 111.20(a) ("If the Commission makes a finding of no reason to believe or no probable cause to believe or ***otherwise*** terminates its proceedings … ." (emphasis added)). Because the use of the term "otherwise" indicates that failing to find "reason to believe" constitutes a "terminat[ion]" of the matter, the FEC must disclose its voting records after "a finding of no reason to believe." *Id.* § 111.20(a).

Third, the FEC's failure to garner four votes to enforce an administrative complaint represents final agency action under *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). The matter is terminated because it is the "consummation" of the FEC's consideration of the complaint, and the "rights or obligations" of the complainant and respondent "have been determined," *id.*, because "the Commission failed to achieve the four votes necessary to proceed" with an enforcement action, *CLC*, 31 F.4th at 787. The FEC's inclusion of a statement of reasons in the file confirms that the Commissioners view the matter as final, because the D.C. Circuit requires Commissioners to prepare such a statement following the dismissal of a complaint, *id.* at 785; *see* FOIA Statement

3; FEC Enforcement Manual at 111 (June 2013), https://tinyurl.com/4ux69bvn. The FEC's action must be considered final, because otherwise a deadlock dismissal would not be subject to judicial review under the APA, which is not the law. *See CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018) ("The Commission's [deadlock] dismissal of CREW's complaint constituted the 'agency action' supporting the district court's jurisdiction.").

Fourth, under settled D.C. Circuit precedent, when the Commissioners split (usually 3-3) in their vote whether to find reason to believe a FECA violation occurred, and fewer than four Commissioners vote to authorize enforcement based on an administrative complaint, "the complaint is dismissed." *CLC*, 31 F.4th at 785. The D.C. Circuit has described these split votes as "deadlock dismissals." *E.g.*, *Common Cause*, 842 F.2d at 448–49. Because the "FEC cannot investigate complaints absent majority vote" under FECA, the "statute compels FEC to dismiss complaints in deadlock situations." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016); *Crossroads Grassroots Pol'y Strategies*, 788 F.3d at 315 (Because "there [were] fewer than four votes" to proceed with enforcement, the FEC "dismisse[d] the administrative complaint."). The suggestion that a vote to close the file is necessary to dismiss the complaint is wrong because "[f]inal orders are not limited to the last order issued in a proceeding," *Reuters Ltd. v. FCC*, 781 F.2d 946, 947 n.1 (D.C. Cir. 1986). "The mere possibility that an agency might reconsider" at some point in the future "does not suffice to make an otherwise final agency action nonfinal," *Sackett v. EPA*, 566 U.S. 120, 127 (2012), because "if the possibility ... of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule ... would ever be final as a matter of law,'" *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1013 (D.C. Cir. 2002). Therefore, under controlling precedent, "a vote to close the file, while

welcome and administratively convenient, is legally immaterial." Statement Regarding Concluded Enforcement Matters 3.

Fifth, the FEC has long taken the position in court that dismissals must occur when fewer than four Commissioners vote to find reason to believe. *See, e.g.*, FEC's Partial Mot. to Dismiss at 12, *CREW v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017) (No. 16-cv-259), Dkt. No. 12 (explaining that "[a]s a result of" a "three-to-three" "split vote, the Commission closed the file"); FEC's Motion to Dismiss at 11, *CREW v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015) (No. 14-cv-1419), Dkt. No. 5 ("If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint."); FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) ("[T]he Commission will dismiss a matter ... when the Commission lacks majority support for proceeding with a matter."). This "past administrative practice" constitutes a "tacit admission" that a failure by four or more Commissioners to find reason to believe terminates an action and triggers the required notifications because the complaint has been dismissed. *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 839 (D.C. Cir. 1984); *see also Nat'l Ass'n for Better Broad. v. FCC*, 830 F.2d 270, 277 (D.C. Cir. 1987) (agency's "past practice" informs statutory interpretation); *Gelman v. FEC*, 631 F.2d 939, 943 (D.C. Cir. 1980) (noting that court's "reading of the statute" is "consonant with the FEC's past practice").

Finally, the Commission's concealment policy thwarts FECA's judicial-review process. FECA provides for judicial review of dismissals of administrative complaints—including deadlock dismissals—and of failures to act on complaints. *See* 52 U.S.C. § 30109(a)(8)(C). When a complaint is dismissed because fewer than four Commissioners vote to find reason to believe a

violation occurred, the reviewing court must assess whether the Commission's *action* was "contrary to law." *Id.* But where, as here, three Commissioners unlawfully keep an otherwise terminated matter file from being closed indefinitely and thereby prevent the agency's public release of voting records and statements of reasons, the reviewing court is left with the misimpression that the Commission has *failed to act*. While the court should be assessing the merits of the FEC's decision not to enforce the complaint, the court is instead adjudicating a failure-to-act claim based on a misimpression deliberately created by the three Commissioners. Coupled with the Commissioners' unprecedented refusal to authorize the FEC's attorneys to defend the resulting lawsuits—resulting in default judgments against the FEC—the Commission's concealment policy is allowing complainants to bypass judicial review of the FEC's dismissal of a complaint and so they can proceed to file citizen suits against respondents.

2. The FEC has also acted arbitrarily and capriciously because it has departed from longstanding agency precedent without any explanation. *See Ramaprakash*, 346 F.3d at 1130. For decades, the FEC has consistently "[a]dher[ed]" to its "typical practice" of administratively closing the file of an enforcement matter when fewer than four Commissioners vote to find reason to believe a violation of FECA occurred based on a complaint and there are no further enforcement questions presented. *CREW v. FEC*, 971 F.3d 340, 346 (D.C. Cir. 2020). The Commission has adhered to this policy and practice even in matters in which there is deep substantive disagreement among the Commissioners and they split on whether to find reason to believe a violation of FECA occurred. *See supra* Part D.[4] But the Commission departed from this precedent without

[4] The MURs cited by the Commission are not to the contrary. *See* Mot. 34. In MURs 7350, 7351, 7357, and 7382, two Commissioners abstained from voting in the first reason-to-believe vote, while in MUR 5754, one Commissioner did not vote in the original reason-to-believe vote. In these MURs, one or more Commissioners in position to cast the deciding vote did not

explanation when three Commissioners declined to administratively close the file in eight enforcement matters. Such unexplained departure from agency precedent is arbitrary and capricious. *See Ramaprakash*, 346 F.3d at 1130.

The respondents in these matters have consequently been subjected to "differential treatment" compared to respondents in other matters where the Commission has continued to adhere to its longstanding practice of closing the file in split-vote cases. *U.S. Postal Serv. v. Postal Regul. Comm'n*, 785 F.3d 740, 753 (D.C. Cir. 2015); *see, e.g.*, MUR 7882, Certification (Apr. 8, 2022). This "differential treatment" compared to similarly situated respondents likewise constitutes arbitrary and capricious action. *U.S. Postal Serv.*, 785 F.3d at 753; *see SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014) (Kavanaugh, J., dissenting) ("What's up is that the [agency] is treating similar cases dissimilarly, the paradigmatic arbitrary and capricious agency action.").

B. The FEC Has Unlawfully Withheld And Unreasonably Delayed Release Of Its Voting Records And Statements Of Reasons In The Terminated Matters.

For similar reasons, the FEC has "unlawfully withheld or unreasonably delayed" notice of its terminating actions and release of its voting records and any statements of reasons in eight terminated enforcement matters. 5 U.S.C. § 706(1). The Court can compel the agency to act

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weigh in at the initial vote, thus leaving the issue undecided. In contrast, the three controlling Commissioners in the eight enforcement matters at issue here have definitively ruled out finding reason to believe and have filed statements of reasons to that effect.

MUR 6623 exemplifies the common occurrence of Commissioners voting on alternate slates of potential actions. In that MUR, the Commissioners voted 3-3 against one slate of actions but 5-1 to adopt a slightly different slate of actions, both of which included a reason-to-believe finding as to one respondent. A majority of Commissioners thus supported this reason-to-believe finding and voted in favor of the slate upon which there was consensus as to the other proposed actions. In contrast, the three controlling Commissioners here do not support finding reason to believe.

where, as here, "an agency failed to take a discrete agency action that it is required to take" pursuant to federal statutes, "agency regulations that have the force of law," and binding D.C. Circuit authority. *S. Utah*, 542 U.S. at 64–65. The FEC has failed to take discrete agency actions—notice and public disclosure of its votes and statements of reasons—that it is required to take under the APA, FECA, FEC regulations, and D.C. Circuit precedent after dismissing an administrative complaint. *See supra* Parts B, C, D. Even if the FEC were correct that an enforcement matter is not "terminated" until four Commissioners vote to administratively close the file, the FEC cannot keep an enforcement matter open indefinitely because the APA imposes an additional obligation "to conclude a matter presented to it." 5 U.S.C. § 555(b).

When an agency "is compelled by law to act within a certain time period," the analysis is straightforward, and the court "can compel the agency to act" within that time period. *S. Utah*, 542 U.S. at 64–65. The D.C. Circuit also considers the *TRAC* factors when determining whether relief under § 706(1) is warranted:

> (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.

Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*) (internal quotation marks and citations omitted); *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (applying *TRAC* to unreasonable-delay claim under section 706(1)). These factors "are not 'ironclad,'" but are "intended to provide 'useful guidance

in assessing claims of agency delay.'" *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *TRAC*, 750 F.2d at 80).

All of the *TRAC* factors weigh in favor of relief. The first two *TRAC* factors are the "most important." *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-01136-APM, 2020 WL 2331774, at *5 (D.D.C. May 11, 2020) (quoting *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012)). "Courts generally consider the first two *TRAC* factors together" and look to whether there is a "regulatory timeline" that governs the FEC's actions. *Ahmed v. U.S. Dep't of Homeland Sec.*, No. 21-cv-893-APM, 2022 WL 424967, at *5 (D.D.C. Feb. 11, 2022). Here, FEC regulations require the General Counsel to notify the parties when the Commission terminates a proceeding and publicly release the matter records 30 days later. 11 C.F.R. §§ 111.9(b), 111.20(a). Although the FEC terminated the agency proceedings in eight enforcement matters more than one year ago, Defendants have not taken these ministerial steps that they are required to take because they have not notified respondents of the Commission's terminating actions or released its voting records and any statement of reasons in seven of those matters. *See supra* Parts F, G. The FEC's failure to take the required actions more than one year after the matters were terminated is in plain violation of the timetable required by regulation.

The "overlap[ping]" third and fifth *TRAC* factors likewise weigh in favor of relief. *In re Barr Lab'ys, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991). The Commission's actions do not relate to any "economic regulation," and "the interests prejudiced by delay" include respondents' First Amendment rights. *TRAC*, 750 F.2d at 80. Indeed, the Commission's unlawful delay directly harmed Heritage Action because it wrongfully exposed Heritage Action to a citizen suit. *See supra* Part H.

As to the fourth factor, requiring the FEC to issue the required notices and publicly release the file will not have any impact on the Commission's priorities. *See TRAC*, 750 F.2d at 80. The required actions are simple administrative housekeeping measures that do not require any diversion of resources from competing priorities. And, as to the sixth factor, although the Court "need not 'find any impropriety lurking behind agency lassitude,'" *id*., there has certainly been "bad faith or improper behavior" here, *Dep't of Com.*, 139 S. Ct. at 2574. As three Commissioners have explained, the FEC has flouted its own regulations and precedent in a way that deceives the public and reviewing courts into believing the FEC had not acted on the administrative complaints and to expose respondents to citizen suits based on false pretenses. Statement Regarding Concluded Enforcement Matters 2, 5.

C. Mandamus Is Necessary To Compel The FEC To Comply With Federal Law To The Extent There Is No Other Adequate Remedy.

In addition to the APA, the Court has authority "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The standards for obtaining mandamus relief and relief under § 706(1) "are essentially the same." *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 n.6 (D.C. Cir. 2010). "To show entitlement to mandamus, plaintiffs must demonstrate (1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists." *Am. Hosp. Ass'n*, 812 F.3d at 189.

For the reasons already explained, mandamus is appropriate to the extent such relief is unavailable under the APA. *See supra* Part II.B. Each of these sources of federal law contain mandatory, non-discretionary duties. *See* 5 U.S.C. § 555(e) ("shall"); 52 U.S.C. § 30109(a)(4)(B)(ii) ("shall"); 11 C.F.R. § 111.9(b) ("shall"); 11 C.F.R. § 111.20(a) ("shall"); *CLC*, 31 F.4th at 785 ("must"). The FEC asserts, without any supporting argument, that its legal

obligations with respect to terminated matters are "disputab[le]" because the Commissioners are split on the matter here. Mot. 43. The Court need not even address such "perfunctory and undeveloped arguments," which are deemed waived. *Robinson v. Farley*, 264 F. Supp. 3d 154, 162 (D.D.C. 2017) (cleaned up). In any event, the APA, FECA, FEC regulations, and D.C. Circuit precedent impose a "clear duty to act" and render Heritage Action's right to relief "clear and indisputable." Mot. 43. The fact that three Commissioners oppose an order that would eliminate their concealment policy is neither surprising nor relevant to the availability of mandamus. *See, e.g.*, *Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296 (1989) (holding that petitioner had clear and indisputable right to relief notwithstanding a dissenting opinion).

IV. THE COURT SHOULD DECLARE THE CONCEALMENT POLICY UNLAWFUL, COMPEL THE FEC TO ACT, AND REMAND.

The Court should issue two remedial orders authorized by the APA to provide "complete relief" to Heritage Action. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

First, the Court should issue a declaratory judgment "hold[ing] unlawful" the FEC's concealment policy because it violates the APA, FECA, FEC regulations, and D.C. Circuit precedent. 5 U.S.C. § 706(2)(A). The Court should also declare that the FEC "unlawfully withheld or unreasonably delayed" issuing the required notifications to parties in the eight enforcement matters and publicly releasing its voting records and statements of reasons. *Id.* § 706(1). As explained in Part I.B., this relief would undermine CLC's citizen suit against Heritage Action and should protect Heritage Action from falling victim to the concealment policy again in the future because a "declaratory judgment is the functional equivalent of an injunction" against the government, *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008).

Second, the Court should issue an order "compel[ling]" the FEC to issue the required notifications to the parties in the eight enforcement matters and publicly release its voting records and any statements of reasons. 5 U.S.C. § 706(1); 28 U.S.C. § 1361. As explained in Part I.B., this would redress Heritage Action's ongoing informational injury from the concealment policy. The Court should also remand this matter to the Commission with instructions to act within 30 days while retaining jurisdiction in the event the FEC fails to act in a timely manner. *See* Order, *CLC v. FEC*, No. 21-cv-406-TJK (D.D.C. Mar. 25, 2022) (retaining jurisdiction after remand).[5]

Finally, the FEC's contention that Heritage Action cannot seek "broader relief" that benefits non-parties in seven other enforcement matters is foreclosed by D.C. Circuit precedent. Mot. 26. In *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the D.C. Circuit rejected the government's contention that a district court "erred by granting nationwide relief to plaintiffs and non-parties alike," *id*. at 1408. In an APA case like this one, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Id*. at 1409. As this Court has similarly explained, "[w]hen courts encounter an APA violation the ordinary remedy is to stop the unlawful agency action." *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 115 (D.D.C. 2020) (quotation marks omitted).

This approach aligns with recent Supreme Court decisions affirming that the APA permits broad relief against agencies that extends beyond the parties immediately before the court. In

[5] Although Heritage Action requested an injunction in the Complaint, Heritage Action does not presently seek an injunction, because courts "have long presumed that officials of the Executive Branch will adhere to the law as declared by the court." *Miers*, 542 F.3d at 911. Heritage Action reserves the right to seek injunctive relief in the future if the Commission fails to comply with the Court's declaratory judgment and order.

Regents, the Court explained that its affirmance of an "order vacating" unlawful agency action under the APA made it "unnecessary to examine the propriety of the nationwide scope of the injunctions" entered by other lower courts. 140 S. Ct. at 1916 n.7. And that distinction between nationwide vacaturs and nationwide injunctions drew no objection from the four dissenting Justices, including those who had not been shy about criticizing nationwide injunctions. *Id.* at 1916–36; *cf. Biden v. Texas*, 142 S. Ct. 2528, 2540 n.4 (2022) (distinguishing between injunctive relief and relief under APA § 706). Accordingly, there is no jurisdictional or equitable impediment to granting relief under the APA that also benefits the other parties who are adversely affected by the agency's unlawful conduct. *See, e.g.*, *Ala. Ass'n of Realtors v. HHS*, 539 F. Supp. 3d 29, 43 (D.D.C. 2021).

CONCLUSION

The Court should deny the FEC's Motion to Dismiss and grant Heritage Action's Motion for Summary Judgment.

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Respectfully submitted,

/s/ Brett A. Shumate

Brett A. Shumate
(D.C. Bar No. 974673)
E. Stewart Crosland
(D.C. Bar No. 1005353)
Brinton Lucas
(D.C. Bar No. 1015185)
Stephen J. Kenny
(D.C. Bar No. 1027711)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for Plaintiff