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 OPPOSITION TO
FEC'S SECOND MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

INDEX OF EXHIBITS

INTRODUCTION

Despite dozens of new pages, the FEC's "Second Motion to Dismiss" treads little new ground. Instead, it largely rehashes the same mootness arguments already refuted in completed briefing on the FEC's first Motion to Dismiss (and in subsequent filings). It is baffling why the Commission took the resources of the taxpayers, Plaintiff, and the Court merely to procedurally reprioritize its misguided jurisdictional arguments. Although Heritage Action for America ("Heritage Action") shares the FEC's interest in promptly resolving this case, it does not share the Commission's interest in redundant briefing. So this second opposition will be brief.

Most of the FEC's latest salvo misses the mark by (again) conflating mootness with standing. Time and again the Commission invokes *standing* cases in an attempt to shirk its "heavy burden" to establish *mootness*. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189–90 (2000). Those cases are beside the point, as Heritage Action has alleged an unlawful agency policy that the Commission does not even acknowledge—let alone repudiate—even as the policy's architect touts that strategy as poised to return.

In any event, this case is not moot because Heritage Action has not obtained all of the relief it sought in the complaint. The FEC has not, and cannot, establish that the concealment policy is gone for good. And Heritage Action's situation—the same plight as at least seven other similarly situated respondents harmed by the concealment policy—is capable of repetition yet evading review. This case should continue, starting with discovery to reveal the full extent of the FEC's unlawful concealment. Pl.'s Mot. for Discovery, Dkt. No. 29.

BACKGROUND

The background relevant to the first Motion to Dismiss, Dkt. No. 17, is set forth in Heritage Action's first Opposition. Pl.'s Combined Mem. in Opp'n to Defs.' Mot. to Dismiss & in Support of Pl.'s Cross-Mot. for Summ. J. 4–11, Dkt. No. 20-1 ("1st Opp'n"). Since that time, the parties

have completed briefing on: Heritage Action's Cross-Motion for Summary Judgment, Dkt. No. 20; the FEC's Motion to Stay Briefing on that cross-motion (which this Court denied), Dkt. No. 22; Pl.'s Motion for Discovery, Dkt. No. 29; as well as Heritage Action's Motion to Expedite Consideration of and Motion for a Hearing Regarding the Motion for Discovery, Dkt. Nos. 32, 33. The Commission previously informed the Court of the MUR file closures that are the focus of its Second Motion to Dismiss, Dkt. No. 27. And Heritage Action previously informed the Court of one FEC Commissioner's acknowledgment of the concealment policy and commitment to using the tactic again if given the opportunity, Notice, Dkt. No. 34,[1] as well as the D.C. Circuit's most recent rejection of the legal theory behind the concealment policy, Notice, Dkt. No. 37.

ARGUMENT

I. THE FEC AGAIN WRONGLY CONFLATES MOOTNESS WITH STANDING.

As a threshold matter, Heritage Action explained in its first Opposition why the Commission was wrong to conflate mootness with standing. 1st Opp'n 13. Although the FEC now at least acknowledges it "has the burden of proving mootness," it still attempts to dodge that burden by pivoting (in the same sentence) to standing. 2d Mot. 20. But the two are not the same, *Reid v. Hurwitz*, 920 F.3d 828, 833 (D.C. Cir. 2019), and it is *the FEC*, not *Heritage Action*, who bears the "heavy burden" to establish mootness at this stage, *Laidlaw*, 528 U.S. at 189–90. While the Commission misleadingly invokes cases that exclusively address *standing* when purporting to describe the standard for *mootness*, this Court should reject that ploy. *See, e.g.*, 2d Mot. 20 (quoting *Klayman v. Obama*, 142 F. Supp. 3d 172, 184 (D.D.C. 2015), for much of its paragraph

[1] That same Commissioner soon doubled down on the concealment policy's validity and usefulness in a lengthy public statement. *Statement of Commissioner Ellen L. Weintraub on the Voting Decisions of FEC Commissioners* (Oct. 4, 2022) (lauding "the alternative enforcement path" that is the concealment policy at issue in this case), *available at* https://tinyurl.com/48zvuyc3, attached as Exhibit A.

purporting to describe mootness when that case was about standing and did not mention mootness at all); 2d Mot. 22 (quoting *CREW v. FEC*, 799 F. Supp. 2d 78 (D.D.C. 2011), which addressed only standing).

II. THE FEC HAS FAILED TO ESTABLISH MOOTNESS.

Turning to the actual issue here—mootness—none of the FEC's transparent attempts to unilaterally moot this case can succeed, for the reasons Heritage Action has already explained. 1st Opp'n 14–20. Heritage Action has not obtained all the relief it desires, and even if it had, subsequent events only further confirm that both exceptions to the mootness doctrine, voluntary cessation and capable of repetition yet evading review, mean this case remains a live controversy.

A. Heritage Action has not obtained all of the relief it seeks in its challenge to the FEC's unlawful concealment policy.

To start, Heritage Action has yet to receive all of its requested relief, meaning this case cannot be moot. In an attempt to evade this problem, the Commission incorrectly blinkers its characterization of the "relief" Heritage Action seeks by focusing almost exclusively on the Complaint's prayer for the release of concealed records. 2d Mot. 1, 8, 15, 20; *see* Compl. 28, ¶ c, Dkt. No. 1. But from the beginning 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. Compl. 28, ¶¶ a–b. So this case is not just about "materials," "documents," and "information." 2d Mot. 16, 20, 21.

And as for documents, Heritage Action sought those records in *at least* MUR 7516 and seven other enforcement matters that it believed were subject to the concealment policy. Compl. 28, ¶ d (seeking "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"). Given the surreptitious nature of the FEC's policy and its course of conduct—which Judge Kelly

and Judge Jackson have described as "unseemly" and "disturbing,"[2] and which four Judges of the D.C. Circuit have recently described as "of great[] concern"[3]—it would hardly be a surprise if other MURs have suffered or are still suffering similar fates. And because the FEC has never disavowed the existence of the concealment policy, it cannot represent, and has not represented, that only eight matters have fallen prey to the concealment policy. That is why discovery would be appropriate and another reason why this case is not moot.

In any event, as Heritage Action has explained, courts "have never allowed agencies to defeat judicial review of their [policies] by occasionally waiving them in individual cases." Reply in Support of Cross-Mot. for Summ. J., Dkt. No. 28 (quoting *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 641 (D.C. Cir. 2002), and collecting other cases). And "even though a party may have obtained relief as to a specific request [for documents], this will not moot a claim that an agency *policy or practice* will impair the party's lawful access to information in the future." Opp'n to Mot. to Stay, Dkt. No. 24 (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)).[4]

Moreover, a declaratory judgment would provide effectual relief to Heritage Action both by undermining the false premise underlying the citizen suit (that the FEC failed to act on Campaign Legal Center's ("CLC") administrative complaint) and helping explain why Heritage Action did not intervene in CLC's suit alleging the FEC's failure to act sooner. As Heritage Action

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[2] Mem. 7, *CLC v. FEC*, No. 1:21-cv-0406-TJK (D.D.C. June 6, 2022), Dkt. No. 34, *appeal filed*, No. 22-5140 (D.C. Cir. May 20, 2022); *CLC v. FEC*, No. 1:20-cv-0809-ABJ, 2021 WL 5178968, at *9 (D.D.C. Nov. 8, 2021).

[3] *CREW v. FEC*, 55 F.4th 918, 921 (D.C. Cir. 2022) (Rao, J., concurring in the denial of rehearing en banc).

[4] The FEC's primary case on the informational relief point, *CREW v. FEC*, 799 F. Supp. 2d 78 (D.D.C. 2011), is inapposite because it is neither about mootness nor about a policy or practice of concealment. *See* 2d Mot. 22.

has explained, the prospect that a declaratory judgment in its favor will affect future litigation typically defeats mootness. 1st Opp'n 16–17 (collecting cases). A declaration that the FEC was unlawfully concealing its actions on CLC's administrative complaint would help Heritage Action defend against CLC's citizen suit, by confirming that CLC lacked proper authorization to bring it in the first place. Revealing and confirming the full extent of the Commission's concealment policy also would help Heritage Action intervene in CLC's suit against the FEC that alleged unlawful failure to act and (because of the FEC's "unseemly" failure to appear) eventually authorized the separate citizen suit by default. Mem. 7, *CLC v. FEC*, No. 1:21-cv-0406-TJK (D.D.C. June 6, 2022), Dkt. No. 34, *appeal filed*, No. 22-5140 (D.C. Cir. May 20, 2022). Judge Kelly denied intervention on the (incorrect) premise that Heritage Action's motion to intervene was untimely. *Id.* But 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. *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).

Critically, a declaratory judgment also will provide Heritage Action relief against *future* applications of the concealment policy (both to MURs in which it is a party and to MURs in which it has an informational interest). As explained both in earlier filings and below, the Commission's voluntary cessation without either a judicial decision or settlement to bind it leaves the door wide

open for the concealment policy to return, as its architect desires. *See* Ex. A.[5] So an enforceable judgment is needed to prevent the concealment policy's future reapplication.

B. In all events, the two exceptions to the mootness doctrine apply.

1. The Commission's voluntary cessation of concealing records in a handful of MURs does not moot this case.

Even if Heritage Action had received its requested relief, this case would still be alive. "The only conceivable basis for a finding of mootness in this case is [the Commission's] voluntary conduct. … It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. [I]f it did, the courts would be compelled to leave "[t]he defendant ... free to return to his old ways." *Laidlaw*, 528 U.S. at 189 (internal quotation marks omitted). The standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* That "heavy burden" "lies with the party asserting mootness." *Id.*[6]

[5] The FEC's primary case on the declaratory relief point is inapposite because that case involved "negotiated settlements by the parties" rather than "the mere 'voluntary cessation of allegedly illegal activity,'" as is the case here. *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 162 (D.C. Cir. 1997) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)); *see* 2d Mot. 24–25.

[6] The FEC again misunderstands the standard for mootness when it quotes *Klayman*'s language about "certainly impending" harms. 2d Mot. 28. As explained above, *Klayman* was about standing, not mootness. There is no requirement that a plaintiff's endurance of another unlawful injury be certainly impending to defeat mootness. Rather, it is the defendant's burden to make "absolutely clear" that recurrence cannot reasonably be expected. *Laidlaw*, 528 U.S. at 189. The FEC's next case, *Aulenback*, is distinguishable because the agency there entered into a settlement, as opposed to unilaterally ceasing the alleged misconduct. 103 F.3d at 162. And the FEC's out-of-circuit case, *In re Burrell*, addressed "continuing legal harm from res judicata or collateral estoppel arising from [plaintiff's] mooted claims when such harm is merely hypothetical and speculative," not—as the FEC's selective quotation suggests—just the specter of continuing legal harm in general. *Compare* 415 F.3d 994, 999 (9th Cir. 2005), *with* 2d Mot. 29.

As Heritage Action has explained, the FEC has not acknowledged—much less disavowed—the concealment policy, and it is far from "absolutely clear" that the concealment policy will not recur. *Id.*; *see* 1st Opp'n 18–20. 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. *See* 2d Mot. 20 (minimizing "the Commission's *supposed* failure to disclose vote certifications and statements of reasons" (emphasis added)); *id.* at 27, 31, 34. Indeed, the Commission casually mentions Commissioner Ellen L. Weintraub's "views" about the legality of the concealment policy, 2d Mot. 16, despite both controlling D.C. Circuit precedent to the contrary, *see, e.g.*, *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021), *rehearing denied*, 55 F.4th 918 (D.C. Cir. 2022); *see* Notice, Dkt. No. 37, and the Commission's own acknowledgment in prior litigation that "it takes four Commissioner votes to proceed on an enforcement matter, but only three to cause a file to be closed," FEC Br. 47, *CREW v. FEC*, 993 F.3d 880 (No. 19-5161), 2019 WL 6341135. The Commission itself has had every opportunity and every reason to disavow the unlawful practice that Heritage Action has alleged in this litigation and yet … crickets.

Moreover, the Commission's voluntary-cessation argument hangs on the "commit[ment]" of just one of six Commissioners "to advocat[e]" for "clos[ing] files when they have reached a final determination." 2d Mot. 10, 11 n.11. Even if that one Commissioner disagrees (and continues to disagree) with her predecessor about the concealment policy—a fact that alone highlights the policy's dubious nature—the FEC's composition is not static, and under the Commission's view, the loss of a single other Commissioner opposing the concealment policy would rejuvenate it immediately. The Commissioner's present opposition to the concealment policy, moreover, does not mean either (i) that she necessarily will continue to hold the line or (ii) that any successor of hers would take the same approach. After all, as the FEC puts it,

"Commissioners remain free to reconsider their earlier votes and change their minds." FEC Opp'n to Pl.'s Mot. for Summ. J. 32, Dkt. No. 26; *see* 2d Mot. 32 ("[I]t was simply a difference in views between Commissioner Lindenbaum and her predecessor….").

Perhaps most importantly, the concealment policy's architect has given every indication that it will be applied to future MURs once she has the votes again to do so. As Heritage Action has explained, Commissioner Weintraub confirmed in October that she and her colleagues caused numerous MURs to be victims of the concealment policy *and* that they have not abandoned the policy. *See* Notice, Dkt. No. 34. She made "zero apologies for using every tool [she] can find to get the law enforced" via the novel concealment policy. *Id.* at 2. Even controlling D.C. Circuit precedent could not stop Commissioner Weintraub's determination; her defense of the concealment policy in defiance of what she recognized as that court's "bad caselaw" makes clear that only this Court's invalidation of the concealment policy has any certainty of restraining the policy's future application—especially now that the D.C. Circuit has declined her invitation to revisit its precedents *en banc*. *Id.*; *compare* Ex. A at 4, *with CREW*, 55 F.4th 918 (denying rehearing en banc); *see also* Dkt. 19-9, Exhibit H, *Statement of Reasons of Commissioners Shana M. Broussard and Ellen L. Weintraub* (July 7, 2022) (arguing that Heritage Action violated FECA and should be subject to enforcement). And after Heritage Action pointed this out, Commissioner Weintraub responded in her public statement confirming that she "quite consciously and intentionally cast votes that put these matters on their current paths," that this strategy "is indeed departing from past Commission practice," and that she believes this is a "proper response to changes the D.C. Circuit has made to the law underlying the Commission's dismissals," which she sees as a "series of unfortunate precedents," Ex. A at 4, 6 n.29. It is mystifying why the FEC's

Acting General Counsel refuses to acknowledge the existence of the concealment policy when Commissioner Weintraub has been quite candid about its existence.[7]

At bottom, the FEC's assertion that there is "no evidence" that the challenged conduct will recur strains credulity. 2d Mot. 33. Where there's smoke there's fire (which is why discovery is urgently needed to confirm the full extent of the concealment policy). And a temporary lull cannot be mistaken for an "absolutely clear" termination, *Laidlaw*, 528 U.S. at 189, especially where the concealment policy's instigator continues to pound the drum for its return. The law does not require Heritage Action to wait until the FEC (and CLC) tries to run this play again.

2. The concealment policy's application is capable of repetition yet evading review.

The second exception to mootness also applies in this case. Cases that present issues that are "capable of repetition, yet evading review" are not moot. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). That exception applies when the challenged action occurs too quickly to be fully litigated prior to cessation and there is a reasonable expectation that the same complaining party will be targeted again. *See id.*

Here, three Commissioners' obvious and admitted aim was to trigger a citizen suit by concealing FEC action on an administrative complaint. Under the Federal Election Campaign Act, that can be accomplished quickly: a failure-to-act suit leading to a citizen suit may be filed merely 120 days after the administrative complaint is lodged. 52 U.S.C. § 30109; *see, e.g.*, *Giffords v. FEC*, No. 19-cv-1192-EGS, 2021 WL 4805478, at *2 (D.D.C. Oct. 14, 2021) (CLC filed four

[7] According to the FEC's General Counsel, while "the decision of whether to defend a Section 30109(a)(8) action is subject to the vote … of the FEC Commissioners," the decision to defend the FEC against this lawsuit and others "brought pursuant to the APA and the Freedom of Information Act" "is not subject to a Commissioner vote." FEC Opp'n to Mot. for Discovery 27, Dkt. No. 30. Accordingly, the arguments made by the FEC in this case do not represent the views of *any*, much less a majority, of the Commissioners.

administrative complaints in July 2018 and filed suit against the FEC in April 2019 for failing to act on those complaints). Combine that with the concealment policy, which in Heritage Action's MUR operated to conceal FEC action for years, and the concealment issue occurs too quickly (and too surreptitiously) to be litigated before voluntary cessation like the FEC's belated document dump here. *See, e.g.*, *Ralls Corp. v CFIUS*, 758 F.3d 296, 322 (D.C. Cir. 2014) (applying "two-year rule of thumb" for voluntary cessation of agency action). And as explained both above and previously, there is more than a reasonable expectation that Heritage Action will be targeted again. *See supra* Part II.B.1.; 1st Opp'n 19–20. At bottom, if the FEC's voluntary cessation moots this case, then the concealment policy's application will evade review and remain capable of repetition (as its architect intends). *See* Ex. A at 2 n.11 (asserting that "this APA action … is quite moot").

* * *

Lastly, this Court should reject the Commission's plea to "exercise … discretion and dismiss this matter on prudential grounds." 2d Mot. 27. Setting aside the fact that this discretion would apply only to the request for a declaratory judgment (and not vacatur), numerous Judges in this District and Circuit have expressed concern over the Commission's tactics, but each in a procedural posture they found unfit to actually confront the concealment policy. This case presents that opportunity—indeed that imperative—to both shed light on the concealment policy's full extent and ensure that it is then snuffed out for good.

CONCLUSION

The Court should deny the FEC's first and second Motions to Dismiss.

Dated: January 18, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and distribution to all registered participants of the CM/ECF System, which will serve all counsel of record.

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