IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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The United States respectfully files this Statement of Interest ("Statement") pursuant to 28 U.S.C. § 517, which authorizes the Department of Justice ("Department") to attend to the interests of the United States in federal court.[1]

The Department of Justice does not represent the Defendant Federal Elections Commission (the "Commission") in this case because the Commission possesses independent litigating authority and the Commission has not requested representation by the Department in this matter. Accordingly, the United States has not appeared on behalf of the Commission. Nevertheless, because the Commission has not yet appeared in this case and no other parties have appeared to assist this Court in evaluating its jurisdiction to enter judgment (including a default judgment), the Department submits this Statement to explain why the plaintiffs have not established standing to sue.

Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Noah Bookbinder have not alleged an injury sufficient to demonstrate standing. Under binding Circuit precedent, the Commission's delay in acting on an administrative petition is, standing alone, not an injury. *See Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997). The Supreme Court

[1] 28 U.S.C. § 517 vests the Attorney General with discretion over how and when to protect the United States' interests in litigation. This statute provides a mechanism for the United States to submit its views in cases in which the United States is not a party, and does not necessitate intervention under Rule 24. *See, e.g.*, *Harrison v. Republic of Sudan*, 802 F.3d 399, 406–07 (2d Cir. 2015), *adhered to on denial of reh'g*, 838 F.3d 86 (2d Cir. 2016) (accepting as authoritative the United States' views, submitted via statement of interest pursuant to 28 U.S.C. § 517, about requirements of a sanctions regime at issue in the litigation); *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 376 n.17 (2d Cir. 2006), *aff'd and remanded*, 551 U.S. 193 (2007) (recognizing the United States' authority to file a statement of interest "on its own initiative"); *Koumoin v. Ki-Moon*, No. 16-CV-2111 (AJN), 2016 WL 7243551, at *3 (S.D.N.Y. Dec. 14, 2016) (recognizing the United States' appearance in case via statement of interest to assert immunity of foreign diplomatic officials): *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 288 n.4 (S.D.N.Y. 2000) (recognizing United States' authority to file a statement of interest to express its views about the interpretation of an international treaty).

has made clear that "a bare procedural violation, divorced from any concrete harm" does not satisfy the injury-in-fact requirement of Article III. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016). CREW's alleged organizational harm is not concrete because it is based on speculative harm that documents *might* be lost during the delay and, regardless, fails because CREW does not allege how it would use the information it seeks in this case in particular. Individual Plaintiff Noah Bookbinder likewise lacks standing because he does not explain how missing information about an election in the State of Missouri from 2016 impacts his ability to cast an informed vote in Maryland where he is registered to vote. Accordingly, this Court should vacate the default judgment entered against the Commission and dismiss this case.

The Department does not intend to address any other issues in this case, including the merits of the claims in the Complaint, in light of the Commission's decision not to request representation.

BACKGROUND

Plaintiffs CREW and Noah Bookbinder filed an administrative complaint with the Commission on June 29, 2018. Compl. for Injunctive and Declaratory Relief, Dkt. 1 ("Compl.") at ¶ 1. The administrative complaint alleged that certain persons and entities "executed a conduit contribution scheme that used nonprofits to funnel money to federal super PACs in order to conceal the identity of donors supporting the election of now-former Missouri Governor Eric Greitens in 2016." *Id.* Plaintiffs then filed an amended administrative complaint on August 8, 2018, and another amended administrative complaint on November 20, 2018. *Id.*

On September 16, 2019, Plaintiffs filed this lawsuit "challenging the [Commission's] failure to act on [their] administrative complaint[.]" *Id.* Plaintiffs claimed authority to bring suit under 52 U.S.C. § 30109(a)(8)(A) which allows anyone who files an administrative complaint with the Commission to file suit in this court if the Commission does not act on an administrative

complaint during the 120-day period beginning on the date the complaint is filed. *Id.*; *see* 52 U.S.C. § 30109(a)(8)(A).

Plaintiffs allege various injuries caused by the Commission's delay. Plaintiff CREW asserts organizational harm to itself based on its assertion that delays "hamper [CREW's] ability to access the information that it is entitled to under the statute" because "documents may be destroyed or lost and witness memories may fade" or "the organization at issue may shut down or cease operations making it more difficult to access documents and witnesses." Compl. ¶¶ 56–57. Plaintiff CREW also claims that "the running of the five-year statute of limitations constrains the FEC's enforcement, as after the statute has run, it can no longer issue fines." *Id.* ¶ 56. CREW further alleges that it "is hindered in carrying out its core programmatic activities when those individuals and entities that attempt to influence elections and elected officials are able to keep their identities hidden." *Id.* ¶ 8. Individual Plaintiff Bookbinder asserts a separate injury, alleging that he "is harmed in exercising his right to an informed vote when a political committee fails to report the true source of its contributions." *Id.* ¶ 11.

The Commission did not appear in this case to defend itself and did not submit an Answer. On February 3, 2020, the Clerk docketed an Entry of Default. Dkt. 7. Plaintiffs moved for default judgment on March 16, 2020, which the Court granted on April 9, 2020. Dkt. 8 & 9. The default judgment instructed the Commission to conform with the order "within 90 days." Dkt. 9. No other parties have intervened in this case or requested permission to file an amicus brief. Since the Commission did not defend the action and no other party has appeared, the Department now files this Statement to help the Court analyze its jurisdiction over this case.

ARGUMENT

I. THE FEDERAL ELECTION COMMISSION'S INDEPENDENT GRANT OF LITIGATING AUTHORITY

The Department has not entered an appearance on behalf of the Commission in this case because the Commission has independent litigating authority to defend against Plaintiffs' lawsuit, and the Commission has not otherwise requested representation by the Department.

The Federal Election Commission is an independent regulatory agency of the United States created by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, which amended the Federal Election Campaign Act of 1971 (the "Act"). The Commission is composed of six voting members whom the President appoints with the advice and consent of the Senate. 52 U.S.C. § 30106(a)(1). No more than three members of the Commission may be affiliated with the same political party. *Id.*

The Commission has the power to initiate, defend, or appeal certain civil actions through its General Counsel when enforcing the provisions of the Act and certain provisions of the Internal Revenue Code. *See* 52 U.S.C. § 30107(a)(6); 26 U.S.C. §§ 9010(a), 9040(a). Pursuant to Section 30107(a)(6) of Title 52 of the U.S. Code, the Commission has authority to litigate any civil action in which the principal interest implicated is any power or authority vested in the Commission by law. *See* 52 U.S.C. § 30107(a)(6) ("The Commission has the power to initiate . . ., defend (in the case of any civil action brought under section 30109(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of [the] Act . . . through its general counsel[.]"). An affirmative vote of four members of the Commission is required for the Commission to take any action under Section 30107(a)(6), including to exercise its primary litigating authority to defend civil actions brought against it under Section 30109(a)(8). *See* 52 U.S.C. § 30106(c).

This action is one for which the Commission has primary litigating authority. Plaintiffs brought this case under 52 U.S.C. § 30109(a)(8), which authorizes suit against the Commission where the Commission dismisses an administrative complaint or fails to take action on an administrative complaint within 120 days. *See* Compl. ¶ 1. It is the understanding of the United States that the Commission cannot currently exercise its power to defend cases like this brought under Section 30109(a)(8) because only three of the Commission's six seats are presently filled.[2] The Commission thus lacks the four votes required to authorize its General Counsel to appear and defend this case or to ask the Department of Justice to defend this case on the Commission's behalf.

The Commission lacks the ability to defend itself in this action and no other party has addressed the jurisdiction of this Court, so this Court understandably entered a default judgment against the Commission. However, the Department believes it necessary to submit this Statement on behalf of the United States to assist this Court in determining whether that judgment must be vacated, as it does not appear that the Commission will have a quorum soon.[3] The Department's role in this action is limited and—to be clear—it does not represent the Commission. Instead, it submits this Statement pursuant to 28 U.S.C. § 517 based on its interest in ensuring that agencies

[2] *Leadership and structure*, Federal Election Commission Website, https://www.fec.gov/about/leadership-and-structure/ (listing current Commissioners) (last visited Oct. 15, 2020).

[3] The President announced his intent to nominate Allen Dickerson to the Commission in June. *President Donald J. Trump Announces Intent to Nominate and Appoint Individuals to Key Administration Posts*, White House, https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-individuals-key-administration-posts-43/?utm_source=link (last visited Oct. 15, 2020). The President submitted the nomination of Allen Dickerson to the Senate on September 16, 2020. *See PN2237 — Allen Dickerson — Federal Election Commission*, United States Congress, https://www.congress.gov/nomination/116th-congress/2237?s=1&r=6 (last visited Oct. 15, 2020).

of the Executive Branch are not burdened by default judgments, caused by structural barriers to representation, that a court may lack jurisdiction to enter.

II. PLAINTIFFS DO NOT HAVE STANDING

Plaintiffs lack standing to challenge the Commission's purported failure to act on their administrative complaint. Federal courts have "an affirmative obligation to consider whether the constitutional and statutory authority exist . . . to hear each dispute." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (citation omitted); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.") "Because Article III limits the constitutional role of the federal judiciary to resolving cases and controversies, a showing of standing 'is an essential and unchanging' predicate to any exercise of our jurisdiction." *Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1133 (D.C. Cir. 2005) (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (*en banc*) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "Where a party's Article III standing is unclear, [a court] *must* resolve the doubt, *sua sponte* if need be." *Cierco v. Mnuchin*, 857 F.3d 407, 415–16 (D.C. Cir. 2017) (citation omitted). The "irreducible constitutional minimum of standing contains three elements": (1) an "injury in fact" which is "concrete and particularized" and "actual or imminent"; (2) a "causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be 'redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (citations omitted).

A. The Commission's Delay Is Not Enough, On Its Own, To Establish Standing

The Commission's delay in taking action on Plaintiffs' administrative complaint is not sufficient to confer standing. Plaintiffs allege that they were injured when the Commission failed to act on their administrative complaint within the 120-day period provided by Section 30109(a)(8)(A). *See* Compl. ¶ 1 ("the FEC has failed to act"); *id.* ¶ 12 (alleging that they are

"harmed . . . when the FEC refuses to act on meritorious complaints"). As this Circuit has held, however, the Commission's delay in acting on an administrative complaint under Section 30109(a)(8)(A) is not an injury sufficient to show standing. In *Common Cause*, the D.C. Circuit explained that Section 30109(a)(8)(A) "does not confer standing; it confers a right to sue upon parties who otherwise *already have standing*." 108 F.3d at 419 (emphasis added). And the Supreme Court more recently confirmed that a plaintiff "could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo*, 136 S. Ct. at 1549 (2016).

District courts in this circuit apply the holding of *Common Cause* to cases like this one. Earlier this year, for example, a district court dismissed a case brought by the Campaign Legal Center ("CLC") alleging that the Commission harmed that organization by not acting on CLC's administrative complaint within 120 days. *See Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 18-CV-0053 (TSC), 2020 WL 2735590, at *2 (D.D.C. May 26, 2020) *appeal docketed*, No. 20-5159 (D.C. Cir. June 9, 2020). Plaintiff there had "filed an administrative complaint with Defendant FEC" but "a year passed with no FEC action[.]" *Id.* at *1. CLC then sued the Commission in district court, "arguing that the delay violated [§ 30109(a)(8)(A)'s] 120-day rule[.]" *Id.* The court dismissed the case, explaining that the 120 days referenced in "§ 30109(a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Id.* at *2 (quoting *Common Cause*, 108 F.3d at 419). "Given [the] binding precedent from this Circuit on this issue," the court found that CLC did not suffer an injury from delay sufficient to establish Article III standing. *Id.*; *see also Judicial Watch Inc. v. Fed. Election Comm'n*, 293 F. Supp. 2d 41 (D.D.C. 2003) ("The [D.C. Circuit] made clear that while the FEC's

failure [to] act within the 120-day period of [§ 30109(a)(8)(A)] conferred a right to sue, it did not also confer standing.").

B. Plaintiffs' Other Purported Harms Are Speculative

Plaintiffs' alleged harms arising from the Commission's purported delay are not an "injury in fact" because they are neither "concrete and particularized" nor "actual or imminent." *See Lujan*, 504 U.S. at 560. The Supreme Court has long expressed "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *see also In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 25–26 (D.D.C. 2014) ("Courts for this reason are reluctant to grant standing where the alleged future injury depends on the actions of an independent third party.").

Plaintiffs here allege that waiting for the Commission's final determination might "hamper [CREW's] ability to access [third-party] information that it is entitled to under the statute" because, in the meantime, third-party "documents *may* be destroyed or lost and witness memories *may* fade" or "the organization at issue *may* shut down or cease operations making it more difficult to access documents and witnesses." Compl. ¶¶ 56–57 (emphasis added). These types of allegations are quintessentially speculative—they ask this Court to guess at how long the Commission would take (in the absence of judicial action) to rule on the administrative petition and to speculate about whether records would actually be lost or memories actually fade during this time. If alleging just the *potential* loss of information, which is an inherent risk of any delay, is sufficient to establish injury, then any delay would be *per se* Article III harm, contrary to the holding of the D.C. Circuit. *See Common Cause*, 108 F.3d at 419.

Plaintiffs' other theory of harm—that they are deprived of information during the delay—likewise fails because it is neither concrete nor particularized. *See* Compl. ¶ 8. To show

organizational injury, CREW must demonstrate that "the defendant's conduct perceptibly impaired the organization's ability to provide services" which must be significant enough to cause "an inhibition of [the organization's] daily operations." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919, 920 (D.C. Cir. 2015) (citation omitted) (finding that organization had no standing because it "alleged no more than an abstract injury to its interests"). In a previous case where CREW and Noah Bookbinder sued the Commission, another court in this Circuit dismissed their case for lack of standing. *Citizens for Responsibility & Ethics In Washington v. Fed. Election Comm'n*, 267 F. Supp. 3d 50, 54–55 (D.D.C. 2017) (J. Leon). CREW's complaint in that case described how the type of information it sought helped CREW to pursue its general organizational goals, but the court found those high-level explanations were not enough to show any actual injury. *Id.* As the court explained, the "Complaint does not allege what CREW would use [the sought-after] information for *in this case in particular*." *Id.* (emphasis added). The court also rejected CREW's claim that "the information they seek would help them ferret out corruption . . . which is consistent with CREW's general mission to 'publicize[ ] the role of these individuals and entities in the electoral process and the extent to which they have violated federal campaign finance laws,'" and explained that "such an interest in knowing or publicizing that the law was violated is akin to claiming injury to the interest in seeing the law obeyed, which simply does not present an Article III case or controversy[.]" *Id*. (citation omitted) The Complaint in this case suffers from the same defect—Plaintiffs here discuss their mission and projects in general terms, but they do not allege with any specificity how they would use the information that they seek *in this case in particular*. *See e.g.*, Compl. ¶¶ 4–8.

Individual Plaintiff Bookbinder's claim of injury as a voter fares no better. He claims that he "is harmed in exercising his right to an informed vote when a political committee fails to report

the true source of its contributions." Compl. ¶ 11. This alleged harm is neither concrete nor particularized because he "does not allege what [he] would use [the sought-after] information for in this case in particular." *Citizens for Responsibility & Ethics In Washington*, 267 F. Supp. 3d at 54–55 (D.D.C. 2017). For missing information to create an injury in fact for an individual voter, the information must be "useful" to assist the individual in exercising his or her vote. *Common Cause*, 108 F.3d at 418 ("[a] voter deprived of useful information at the time he or she votes suffers a particularized injury sufficient to create standing"); *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 475 F.3d 337, 339 (D.C. Cir. 2007) (In a case related to Bush/Cheney campaign activities, the court noted that "[o]ne might wonder why the case is not moot. The election is over; President Bush is constitutionally barred from running again; and Vice President Cheney has announced that he will not run."). Bookbinder is a registered voter in Maryland, Compl. ¶ 11, but the complaint only alleges potential violations from a 2016 campaign for the governor of Missouri. *Id.* ¶ 1. The complaint makes no effort to explain how missing information about a statewide election in Missouri from 2016 could possibly impact Bookbinder's ability to exercise an informed vote in Maryland today.

The approaching statute of limitations is also not relevant to the Plaintiffs' purported informational injury. Plaintiffs allege that "the running of the five-year statute of limitations constrains the FEC's enforcement, as after the statute has run, it can no longer issue fines." Compl. ¶ 56; *see id.* ¶ 47. Plaintiffs carefully limit the alleged impact of the statute of limitations to only the Commission's ability to issue fines—importantly, they never claim that the running of the statute would impact the Commission's (or their own) ability to acquire the sought-after information. *See id.* In fact, CREW has elsewhere argued that even if the five-year statute of limitations for imposing fines has passed, the Commission *still* has the equitable power to compel

disclosure. *See Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 209 F. Supp. 3d 77, 85 n.3 (D.D.C. 2016). And, of course, the potential inability of the Commission to impose fines on alleged violators does not confer standing on a private party. *Common Cause*, 108 F.3d at 418 (holding no standing when requested relief is for the Commission to "get the bad guys" and impose monetary penalties "rather than disclose information").

Plaintiffs have not pleaded any injury that could establish they have standing to the Commission. The D.C. Circuit is clear that the 120-day alone is not sufficient. *Common Cause*, 108 F.3d at 419. Plaintiffs have failed to allege exactly how not having the information they seek in this case has caused them a concrete or specific injury. Plaintiffs thus have not demonstrated that they have standing to sue.

III. THIS COURT DOES NOT HAVE JURISDICTION TO ENTER JUDGMENT AGAINST THE COMMISSION

"The Court cannot enter a default judgment when it lacks jurisdiction over an action." *Terry v. Dewine*, 75 F. Supp. 3d 512, 530 (D.D.C. 2014). Even when a party does not appear, "entry of a default judgment is not automatic[.]" *Mwani v. bin Laden*, 417 F.3d 1, 6 (D.C. Cir. 2005). "The procedural posture of a default does not relieve a federal court of its 'affirmative obligation' to determine whether it has subject-matter jurisdiction over the action." *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 61 (D.D.C. 2013), *aff'd*, 782 F.3d 9 (D.C. Cir. 2015) (quoting *Ludwig*, 82 F.3d at 1092).

Although the Court already issued a default judgment in this case, the Court should vacate that judgment as void. A default judgment must be vacated when plaintiffs lack standing or jurisdiction. *See Bell Helicopter Textron, Inc. v. Iran*, 734 F.3d 1175, 1180 (D.C. Cir. 2013); *Jakks Pac., Inc. v. Accasvek, LLC*, 270 F. Supp. 3d 191, 199 (D.D.C. 2017), *aff'd*, 727 F. App'x 704

(D.C. Cir. 2018) (vacating default judgment entered when court did not have subject matter jurisdiction).

The time that has passed since this Court entered the default judgment has no bearing on whether to vacate for lack of standing. "The Supreme Court has long instructed that judgments in excess of subject-matter jurisdiction 'are not voidable, but simply void.'" *Bell Helicopter*, 734 F.3d at 1180 (citation omitted) (explaining no "reasonable time" constraint on challenging jurisdiction of default judgments). There is "no time limit on an attack upon a void judgment." *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962).

Plaintiffs here suffered no cognizable injury and accordingly lack Article III standing. The Court should vacate the default judgment and dismiss the case.

CONCLUSION

The Department respectfully suggests that plaintiffs have failed to establish standing to sue. Accordingly, the Court should vacate its default judgment and dismiss this case in its entirety.

Dated: October 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2020, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to attorneys who have appeared in this case.

/s/ Zachary A. Avallone
Zachary A. Avallone