[ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 22-5164, 22-5165

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION
Defendant-Appellee,

45COMMITTEE, INC.,
Movant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

OPPOSED MOTION TO HOLD APPEALS IN ABEYANCE

Brett A. Shumate
E. Stewart Crosland
Brinton Lucas
Stephen J. Kenny
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bshumate@jonesday.com

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
BACKGROUND 4
ARGUMENT 12
CONCLUSION 15
CERTIFICATE OF COMPLIANCE 16
CERTIFICATE OF SERVICE 17
ADDENDUM

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Petroleum Inst. v. EPA,
683 F.3d 382 (D.C. Cir. 2012).....14

Basardh v. Gates,
545 F.3d 1068 (D.C. Cir. 2008).....13

Citizens for Resp. & Ethics in Wash. v. FEC,
164 F. Supp. 3d 113 (D.D.C. 2015).....7

Citizens for Resp. & Ethics in Wash. v. FEC,
243 F. Supp. 3d 91 (D.D.C. 2017).....7

Citizens for Resp. & Ethics in Wash. v. FEC,
993 F.3d 880 (D.C. Cir. 2021).....2, 5, 6, 7, 13

Common Cause v. FEC,
842 F.2d 436 (D.C. Cir. 1988).....5

Crossroads Grassroots Pol'y Strategies v. FEC,
788 F.3d 312 (D.C. Cir. 2015).....5

Democratic Cong. Campaign Comm. v. FEC,
831 F.2d 1131 (D.C. Cir. 1987).....7

Devia v. Nuclear Regul. Comm'n,
492 F.3d 421 (D.C. Cir. 2007).....14

Heckler v. Chaney,
470 U.S. 821 (1985).....7

United States v. Quinn,
475 F.3d 1289 (D.C. Cir. 2007).....14

Wheaton Coll. v. Sebelius,
703 F.3d 551 (D.C. Cir. 2012).....13

STATUTES

52 U.S.C. § 30106 .....4, 5

52 U.S.C. § 30107 5

52 U.S.C. § 30109 .....3, 5, 6, 8, 9, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Pub. L. No. 92-225, 86 Stat. 3 (1972) 4

OTHER AUTHORITIES

11 C.F.R. § 111.9 6

11 C.F.R. § 111.20 6

Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021) 8

Matter Under Review 5024 (Nov. 4, 2003) 7

INTRODUCTION

In March 2020, Campaign Legal Center sued the Federal Election Commission (FEC) for allegedly failing to act on the Center's administrative complaint against 45Committee, Inc. After the Commission failed to appear or defend itself, the district court (Jackson, J.) ruled on November 8, 2021, that the Commission had unlawfully failed to act and gave the agency 30 days to do so. The Commission did not respond by that deadline. On April 21, 2022, the court therefore issued a final judgment declaring that the Center could bring a citizen suit against 45Committee under the Federal Election Campaign Act of 1971 (the Act). The Center then sued 45Committee the next day, April 22, in a case now pending before Judge Mehta.

In response to a Freedom of Information Act (FOIA) request, the Commission nevertheless revealed that it had in fact acted on the Center's administrative complaint shortly after the Center had sued the agency. On June 23, 2020, the bipartisan, six-member Commission voted on the matter, but the Center's administrative complaint evidently failed to garner the four votes necessary to initiate an enforcement action. At that point, the Commission was required to notify the parties that the administrative proceedings were over and to release the voting records along with any

statements of reasons by the Commissioners. Had it done so, Judge Jackson could not have authorized the Center's citizen suit against 45Committee on the erroneous premise that the Committee had failed to act.

But things took a wrong turn. The three Commissioners who voted in favor of initiating an enforcement action—but who failed to secure the necessary fourth vote—blocked the Commission from notifying the parties of the agency's action and from defending against the Center's lawsuit. Through this policy of concealment, these Commissioners subjected 45Committee to a citizen suit authorized on the false premise that the agency had never acted on the Center's administrative complaint. After learning of this concealment, 45Committee sought post-judgment intervention in order to appeal, but Judge Jackson denied the request on timeliness grounds.

In order to fully defend itself in both these appeals and the Center's citizen suit pending before Judge Mehta, 45Committee needs the FEC to provide unredacted voting records and any statements of reasons associated with the Center's administrative complaint. If, as seems likely, those materials reveal that the decision by the Commissioners who voted against enforcement was "based even in part on prosecutorial discretion," that decision will qualify as "not reviewable" in court, *Citizens for Resp. & Ethics in Wash. v. FEC*, 993

F.3d 880, 882 (D.C. Cir. 2021) (*CREW*), and 45Committee will be better positioned to advance these appeals and mount a defense before Judge Mehta. Unlike in the similar pair of pending appeals brought by Heritage Action for America (Nos. 22-5140, 22-5167), however, the Commission has steadfastly refused to release its unredacted voting records and any statements of reasons. To secure those materials, 45Committee is pursuing both a FOIA lawsuit against the FEC, No. 1:22-cv-502 (D.D.C.) (Jackson, J.), as well as an action under the Administrative Procedure Act (APA) challenging the Commission's policy of concealment, No 1:22-cv-1749 (D.D.C.) (Mehta, J.)

Given that background, these consolidated appeals should be placed into abeyance pending the disposition of 45Committee's FOIA and APA suits. It makes little sense to plow ahead with these appeals when resolution of the merits question here—whether the Center may bring a citizen suit against 45Committee under 52 U.S.C. § 30109(a)(8)(C)—is likely to be significantly affected by consideration of these materials. If 45Committee secures these documents and uses them to conclusively defeat the Center's citizen suit, 45Committee will drop these appeals. Holding these appeals in abeyance thus

will conserve judicial and party resources by potentially obviating any need to resolve these appeals, without any material prejudice to the Center.[1]

BACKGROUND

1.a. Congress enacted the Federal Election Campaign Act of 1971 to regulate the financing of federal election campaigns. Pub. L. No. 92-225, 86 Stat. 3 (1972). Congress subsequently amended the Act to create the FEC—an independent agency run by six presidentially-appointed Commissioners—and granted the agency "exclusive jurisdiction" over the Act's civil enforcement. 52 U.S.C. § 30106(b)(1).

To prevent any one political party from wielding the Commission's enforcement powers for partisan gain, Congress carefully structured the FEC to consist of no more than three members affiliated with the same political party. *Id.* § 30106(a). In addition, Congress directed that "[a]ll decisions" of the Commission concerning "the exercise of its duties and powers" must be made "by a majority vote" of the Commissioners. *Id.* § 30106(c).

[1] 45Committee has conferred with Campaign Legal Center about this motion, and the Center opposes the relief requested. The FEC has not appeared in this matter and there is no counsel of record to notify. Nonetheless, out of an abundance of caution, counsel for 45Committee contacted the FEC's Office of General Counsel by email, informing the Commission of 45Committee's intention to file this motion and asking for the Commission's position. The Commission did not respond.

Congress further provided that a private party may lodge an administrative complaint with the Commission alleging a violation of the Act. *Id.* § 30109(a)(1). After reviewing the complaint, along with any response, the FEC must vote on whether there is "reason to believe" that the respondent has committed a statutory violation. *Id.* § 30109(a)(2). Unless there is "an affirmative vote of 4" Commissioners that such a "reason to believe" exists, the FEC cannot proceed further with investigation or enforcement. *Id.*; *see id.* §§ 30106(c), 30107(a)(9).

Instead, when "there are fewer than four votes" to proceed, the FEC "dismisses the administrative complaint." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015). That remains true in the context of so-called "deadlock dismissals"—situations where the Commission splits in its vote (typically on a 3-3 basis) on whether to find reason to believe a violation has occurred and lacks the four votes necessary to proceed any further. *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988); *see, e.g.*, *CREW*, 993 F.3d at 882-83; *Crossroads*, 788 F.3d at 315.

When the Commission dismisses an administrative complaint—or fails to act on it within 120 days after the complaint has been filed—the private party that sought the agency's enforcement may sue the FEC in the D.C.

district court. 52 U.S.C. § 30109(a)(8)(A). If the court declares that the Commission's dismissal or failure to act was "contrary to law," then the FEC has 30 days "to conform with such declaration." *Id.* § 30109(a)(8)(C). If—but only if—the Commission fails to conform by that deadline, the private party may bring its own "civil action to remedy" the alleged statutory violation involved in the administrative complaint. *Id.*

b. When a deadlock dismissal occurs, the Commission must publicly disclose that fact. Congress directed that "[i]f the Commission makes a determination that a person has not violated [the] Act … the Commission shall make public such determination." *Id.* § 30109(a)(4)(B)(ii). And FEC regulations provide that "[i]f the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter," 11 C.F.R. § 111.9(b), and "make public such action and the basis therefor" within 30 days of that letter, *id.* § 111.20(a).

In addition, "[w]hen the Commission lacks four votes to proceed, the commissioners who voted against enforcement must state their reasons why," which are "then treated as if they were expressing the Commission's rationale for dismissal." *CREW*, 993 F.3d at 883 n.3 (cleaned up). Such statements allow reviewing courts to determine "whether reason or caprice" drove the agency's

decision. *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (R.B. Ginsburg, J.). If a deadlock dismissal is "based even in part on prosecutorial discretion," however, it is "not reviewable" under the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985). *CREW*, 993 F.3d at 882.

In light of these requirements, the Commission for decades addressed deadlock dismissals through a policy of administratively closing the enforcement-matter file, notifying the parties, and releasing the voting records as well as any statements of reasons. *See, e.g.*, FEC's Partial Mot. to Dismiss at 12, *Citizens for Resp. & Ethics in Wash. v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017) (No. 16-cv-259), Dkt. 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, *Citizens for Resp. & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015) (No. 14-cv-1419), Dkt. 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."); Matter Under Review 5024 (Nov. 4, 2003) (deciding by a 6-0 vote to close the file and send the appropriate notices after splitting 3-3 on whether there was reason to believe a violation had occurred).

This public release then allows the aggrieved administrative complainant to challenge the FEC's deadlock dismissal in court under 52 U.S.C. § 30109(a)(8).

Recently, however, the FEC—at the behest of Commissioners Walther, Broussard, and Weintraub—has adopted a new policy. As the New York Times reported in 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." Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021), https://tinyurl.com/3zdp9sej. 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" through this new policy, these three Commissioners are trying to "open the door for outside advocacy groups to directly sue … in federal court." *Id.*

On May 13, 2022, the FEC's other three Commissioners—Chairman Dickerson and Commissioners Cooksey and Trainor—issued a statement

condemning this new policy. 1:22-cv-1115 Dkt. 17-3.[2] As they explained, the FEC—acting through Commissioners Walther, Broussard, and Weintraub—has "weaponiz[ed] a nominal housekeeping act," "affirmatively misled respondents," and "intentionally shielded" its actions "from both judicial and public review." *Id.* at 2, 5. They also revealed that this policy had been applied to "eight enforcement matters" before the FEC at that time, even though "votes have been taken" and "statements of reasons have been included in the file by the commissioners declining to move forward." *Id.* at 2-3.

2.a. These appeals concern one of those eight enforcement matters. On August 23, 2018, the Center, along with an individual named Margaret Christ, lodged an administrative complaint with the FEC alleging that 45Committee had violated the Act by failing to disclose the identities of its contributors. Dkt. 1-1. Within a week, the Commission acknowledged receipt and designated the matter as Matter Under Review 7486. Dkt. 11-4.

On March 24, 2020, the Center sued the Commission in district court, alleging that the FEC had failed to act on the Center's administrative complaint and that this inaction was contrary to law under 52 U.S.C.

[2] "Dkt." refers to district-court docket entries in the case below, whereas entries in related cases are designated by the case number before "Dkt."

§ 30109(a)(8)(A). Dkt. 1. When the Commission failed to enter an appearance or otherwise defend against the lawsuit, the clerk of court entered default against the FEC on May 28, 2020. Dkt. 10. The Center later moved for a default judgment days, on June 1, 2020. Dkt. 11.

On November 8, 2021, the court issued an order granting the Center's motion. Dkt. 25. The court found that "the FEC has not taken any action on the administrative complaint," and that this "failure to act is contrary to law." Dkt. 24 at 5, 18. It therefore directed the Commission to "act on the complaint within thirty days pursuant to 52 U.S.C. § 30109(a)(8)(C)." Dkt. 25 at 1.

On December 9, 2021, the Center sought a declaration that the Commission had failed to conform to the default-judgment order. Dkt. 26. The court granted the request on April 21, 2022, ruling that the Commission "has not taken any action on the complaint" since the default-judgment order entered over "five months" before and that the Center may therefore "bring an action to enforce the FECA against" 45Committee under 52 U.S.C. § 30109(a)(8)(C). Dkt. 32 at 1, 6. The next day, April 22, the Center filed a citizen lawsuit against 45Committee. No. 1:22-cv-1115 (D.D.C.) (Mehta).

b. Within a week, 45Committee moved to intervene before Judge Jackson on April 28 in order to appeal the court's April 22 final judgment. Dkt.

33. As 45Committee explained, the Commission had responded to a FOIA request by producing a heavily-redacted vote certification confirming that the FEC had in fact acted on the Center's administrative complaint by voting on it on June 23, 2020—well over a year before Judge Jackson's December 8, 2021 deadline. Dkt. 33-1 at 7-8; *see* Dkt. 31-2. And given that the Commission has not taken any further action on the administrative complaint since June 23, 2020, it evidently voted to dismiss it on that date.

On May 13, Judge Jackson denied the motion to intervene on the premise that it was not timely. Dkt. 37. On June 6, 45Committee filed notices of appeal of the final judgment authorizing the citizen suit and the denial of the intervention motion. Dkts. 39-40. This Court consolidated the appeals.

c. Since filing these appeals, 45Committee has been pursuing two lawsuits seeking further confirmation that the Commission dismissed the Center's administrative complaint on June 23, 2020.

First, after the FEC denied 45Committee's administrative appeal requesting unredacted voting records and any statements of reasons, 45Committee filed a FOIA lawsuit against the Commission on February 25, 2022. No 1:22-cv-502 (D.D.C.) (Jackson, J.). In that case, the FEC has "admit[ted] that the Commission has taken previous votes on the

administrative complaint against 45Committee." 1:22-cv-502 Dkt. 12 at 2. Briefing on cross-motions for summary judgment is scheduled to conclude on August 26, 2022.

Second, 45Committee filed an APA action against the Commission on June 17, 2022, challenging its concealment policy and seeking an order compelling the FEC to release the unredacted voting records and any statements of reasons. No. 1:22-cv-1749 (D.D.C.) (Mehta, J.). The APA complaint was served on June 21, 2022, and the FEC must respond by August 22, 2022.

Meanwhile, 45Committee has asked Judge Mehta to stay proceedings in the Center's direct lawsuit pending resolution of its FOIA action, APA challenge, and these appeals. 1:22-cv-1115 Dkt. 17-1 at 26. If 45Committee obtains the relevant materials from the FEC, it intends to move to dismiss the Center's direct lawsuit, just as Heritage Action for America did in a similar case last week. *See* 1:22-cv-1248 Dkt. 20.

ARGUMENT

This Court should place these appeals into abeyance pending the disposition of 45Committee's FOIA lawsuit in No. 1:22-cv-502 before Judge Jackson and its APA challenge in No. 1:22-cv-1749 before Judge Mehta. This

Court "[o]ften" issues abeyance "orders in light of other pending proceedings that may affect the outcome of the case before" it. *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (collecting cases addressing petitions for review). The "prospect" that "[r]esolution of" another proceeding "may entirely, or partially, moot" the case before this Court "militates in favor of holding" it in "abeyance," given the "'longstanding policy of the law to avoid duplicative litigative activity.'" *Id.*

This Court should follow that practice here. If 45Committee obtains the unredacted voting records and any Commissioner statement of reasons through its FOIA or APA lawsuits, it plans to move to dismiss the Center's direct lawsuit pending before Judge Mehta. Those materials will likely confirm that, as in the case of Heritage Action for America, the June 23, 2020 vote on the Center's administrative complaint resulted in a deadlock dismissal based at least in part on prosecutorial discretion. At that point, Judge Mehta will be compelled to dismiss the Center's citizen suit. *See CREW*, 993 F.3d at 882. And if that dismissal is not appealed, this Court will never have to resolve these appeals. Accordingly, if this Court does "not decide the merits of appellants' challenge … now," it "may never need to." *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (cleaned up).

That is a paradigmatic basis for abeyance. This Court routinely holds cases in abeyance to "conserve judicial resources." *United States v. Quinn*, 475 F.3d 1289, 1291 (D.C. Cir. 2007); *see, e.g.*, *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87, 390 (D.C. Cir. 2012); *Devia v. Nuclear Regul. Comm'n*, 492 F.3d 421, 426 (D.C. Cir. 2007). There is no reason to take a different approach here. Holding these appeals in abeyance will not materially prejudice the Center, which has already filed its citizen suit and should be content to leave the rulings below undisturbed for as long as possible. To the contrary, granting abeyance here would save the Center and 45Committee, both nonprofit organizations, from the burden of having to needlessly litigate "issues on appeal that may ultimately be mooted by" events elsewhere. *Quinn*, 475 F.3d at 1291.

CONCLUSION

This Court should place these appeals into abeyance pending the disposition of the FOIA lawsuit in *45Committee, Inc. v. FEC*, No. 1:22-cv-502 (D.D.C.) (Jackson, J.), and the APA challenge in *45Committee, Inc. v. FEC*, No. 1:22-cv-1749 (D.D.C.) (Mehta, J.).

Dated: July 11, 2022

Respectfully submitted,

/s/ Brett A. Shumate
Brett A. Shumate
E. Stewart Crosland
Brinton Lucas
Stephen J. Kenny
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
bshumate@jonesday.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 2911 words.

2. This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Expd BT typeface.

/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 11th day of July 2022, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate

ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER, *Plaintiff-Appellee*, v. FEDERAL ELECTION COMMISSION, *Defendant-Appellee*, 45COMMITTEE, INC., *Movant-Appellant*.	Nos. 22-5164, 22-5165

CERTIFICATE OF PARTIES AND DISCLOSURE STATEMENT

A. Parties and Amici

The appellant in this Court and the movant in the district court is 45Committee, Inc. (45Committee).

The appellee in this Court and plaintiff in the district court is the Campaign Legal Center. The appellee in this Court and defendant in the district court is the Federal Election Commission.

The New Civil Liberties Alliance and Institute for Free Speech appeared as *amici curiae* in the district court.

B. Disclosure Statement

45Committee, Inc. is a 501(c)(4) nonprofit organization, has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Dated: July 11, 2022

Respectfully submitted

/s/ Brett A. Shumate

Brett A. Shumate
E. Stewart Crosland
Brinton Lucas
Stephen J. Kenny
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
bshumate@jonesday.com

Counsel for Appellant