ORAL ARGUMENT NOT YET SCHEDULED

No. 25-5027

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER
and CATHERINE HINCKLEY KELLEY,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

HILLARY FOR AMERICA and CORRECT THE RECORD,
Intervenors.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-02336-JEB
Before the Honorable James E. Boasberg

PLAINTIFFS-APPELLANTS' MOTION TO HOLD APPEAL IN ABEYANCE

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GLOSSARY OF ABBREVIATIONS

CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

Plaintiffs-Appellants Campaign Legal Center and Catherine Hinckley Kelley (collectively, "CLC") respectfully move this Court to hold their appeal in abeyance pending the resolution of the en banc proceedings in *End Citizens United PAC ("ECU") v. Federal Election Commission ("FEC")*, 2024 WL 4524248 (D.C. Cir. Oct. 15, 2024) (vacating *ECU v. FEC*, 90 F.4th 1172 (2004), and granting rehearing en banc). The issues under consideration in *ECU* are also central to this case—namely, whether decisions by Defendant-Appellee FEC to dismiss citizen complaints on grounds of prosecutorial discretion are subject to judicial review, and if so, the standards under which such decisions should be reviewed.

Appellee FEC does not oppose this motion; Intervenors Correct the Record and Hillary for America oppose this motion.

SUMMARY OF ARGUMENT

CLC appeals the final order of the district court below denying plaintiffs' motion for a declaration that the Commission had failed to conform to the court's remand order directing the Commission to take action "in accordance with the opinion of the D.C. Circuit," on CLC's administrative complaint against respondents Correct the Record and Hillary for America for illegal campaign coordination. Add. 18-19; *see also* Add. 21-56.[1] On this basis, the district court also ruled that CLC's

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[1] The order and opinion of the district court is appended hereto in an Addendum ("Add."), along with the opinion of the D.C. Circuit guiding the remand, *see* Op., *CLC v. FEC*, No. 22-5336 (D.C. Cir. July 9, 2024).

related private action against respondents under 52 U.S.C. § 30109(a)(8)(C) could not "go forward." Add. 18. *See also CLC v. Correct the Record, et al.*, No. 23-cv-0075 (D.D.C., Compl. filed Jan. 10, 2023).

In so holding, the district court found that the FEC's decision on remand to dismiss CLC's complaint as an exercise of its prosecutorial discretion had "timely conformed" with its remand order, at least under "the regime that FECA, the FEC, and the D.C. Circuit have fashioned." *See* Add. 19. As the district court noted, the question of whether and how Commission dismissals based on discretionary grounds are reviewed by the courts has received significant—but still evolving—consideration by this Court in recent years. Add. 10. Starting with *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*Commission for Hope*") and continued in *CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*") (collectively, the "*CREW* decisions"), several panels of the D.C. Circuit have ruled that Commission non-enforcement decisions on discretionary grounds are "virtually unreviewable." Add. 10.

But the district court also acknowledged that this regime—and the *CREW* decisions upon which it rests—are now being reconsidered by the en banc Court of Appeals. *See* Add. 19 (noting that FEC dismissals based on "considerations of prosecutorial discretion" were unreviewable—"at least for now") (citing *ECU*, 2024 WL 4524248)). The *ECU* en banc proceedings are thus likely to shed light on key

questions in this case, including the extent to which the FEC can exercise absolute and/or unreviewable discretion at various stages in the citizen complaint process as set forth in the Federal Election Campaign Act ("FECA"). 52 U.S.C. § 30109(a)(1)-(8).

Holding this appeal in abeyance pending resolution of *ECU* will thus conserve the resources of both the Court and the parties in light of this shifting legal landscape. Indeed, this Court has already held in abeyance other FEC-related litigation involving dismissals on discretionary grounds pending the disposition of *ECU*. *See, e.g.*, Order, *CREW v. Am. Action Network*, No. 22-7038 (D.C. Cir. Oct. 24, 2024). Awaiting the resolution of the en banc proceedings will ensure that consideration of this case will benefit from guidance from the en banc Court and prevent the possibility that the parties will need to amend or rebrief arguments if the *CREW* decisions are reconsidered or reversed.

BACKGROUND

I. Statutory and Regulatory Background

Any person may file an administrative complaint with the Commission alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). After receiving a complaint, the FEC votes on whether there is "reason to believe that a person has committed, or is about to commit" a FECA violation. *Id.* § 30109(a)(2). If four or more

Commissioners vote to find that there is reason to believe, the "Commission shall make an investigation of such alleged violation." *Id.*

The Commission may "dismiss a complaint" at any juncture by the vote of four or more Commissioners. *CLC v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024). To "allow meaningful judicial review" of a dismissal, the Commissioners who vote against the recommendation of the FEC's Office of General Counsel to move forward must issue statements of reasons explaining their votes. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). Any administrative complainant "aggrieved by an order of the Commission dismissing a complaint" may seek review in the U.S. District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A); *see also id.* § 30109(a)(8)(B).

Historically, courts had reviewed whether Commission dismissals were contrary to law even when those dismissals invoked the agency's prosecutorial discretion. *See, e.g.*, *Akins v. FEC*, 66 F.3d 348, 355 (D.C. Cir. 1995) (rejecting plaintiffs' claim that "the Commission failed to investigate adequately the administrative complaint" under abuse of discretion standard), *rev'd on other grounds*, 101 F.3d 731 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998). But in 2018, a divided panel of the D.C. Circuit reversed course, and held that a controlling statement of reasons that rests even in part on considerations of "prosecutorial discretion" is not reviewable by a court of law. *Commission for*

Hope, 892 F.3d at 440-42. *See also New Models*, 993 F.3d at 885-886; *CLC v. FEC*, 89 F.4th 936, 941 (D.C. Cir. 2024) ("*Make America*"). *But see CLC v. FEC*, 952 F.3d 352, 361 (D.C. Cir. 2020) (Edwards, J., concurring) (noting that "Commission decisions not to prosecute, unlike those of most agencies, remain subject to judicial review"). The *CREW* cases, however, are currently being reconsidered by the en banc D.C. Circuit Court of Appeals. *ECU*, 2024 WL 4524248 (oral argument scheduled for Feb. 25, 2025).

Following review under Section 30109(a)(8)(A), if the district court declares that a dismissal is contrary to law, it "may direct the Commission to conform with [that] declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If the FEC fails to conform, the complainant may file a private action, *i.e.*, "a civil action to remedy the violation involved in the original complaint." *Id.* If, as was the case here, the FEC chooses to appeal the district court's contrary-to-law judgment while a duly-filed private action is pending, the complainant can "maintain its private suit" following the appeal provided that (1) the Court of Appeals "affirm[s] that the Commission's dismissal was 'contrary to law,'" and (2) "the Commission fails to conform with such declaration on remand." Add. 44.

II. Procedural History

On October 6, 2016, CLC filed an administrative complaint with the FEC alleging that Correct the Record made, and Hillary for America accepted, unreported

in-kind contributions in the form of coordinated expenditures, in violation of FECA's reporting requirements and contribution restrictions. Add. 31. In particular, CLC argued that much of respondents' coordinated spending did not pay for the type of internet communications that are exempt from the FEC's coordination regulations and should consequently be reported as contributions under FECA. The Commission ultimately voted to dismiss the matter, and CLC challenged this dismissal of its FEC complaint under 52 U.S.C. § 30109(a)(8). Add. 38.

On December 8, 2022, the district court ruled that the FEC's rationale for its dismissal of CLC's complaint was "contrary to law" and remanded the matter to the Commission "to conform with this decision within 30 days." Add. 39-40. Instead of taking action on the remanded matter, the FEC appealed. Accordingly, CLC initiated a private action pursuant to 52 U.S.C. § 30109(a)(8)(C) against respondents Correct the Record and Hillary for America three days after the 30-day conformance period elapsed. *See* Compl., *CLC v. Correct the Record & Hillary for America*, No. 23-cv-00075 (D.D.C. Jan. 10, 2023), ECF No. 1. The private action, however, was stayed pending the resolution of the FEC appeal. Add. 40.

The Commission did not prevail on appeal, and instead this Court affirmed the contrary-to-law ruling and directed the district court to again remand the case back to the Commission so it could address "the bounds of the internet exemption" and "the facts before it" in a manner consistent with its opinion. Add. 56 (internal

quotation marks omitted). Accordingly, the district court remanded the matter to the FEC "consistent with 52 U.S.C. 30109(a)(8)(C), [and] in accordance with the opinion of the D.C. Circuit." Minute Order, *CLC v. FEC*, No. 19-cv-2336 (dated Sept. 20, 2024).

On remand, the Commission failed to muster a majority to find "reason to believe" that respondents had violated FECA, and ultimately on October 10, voted 5-1 to dismiss the matter. Add. 5. Several weeks later, after the 30-day conformance period had elapsed, several of the Commissioners who voted to dismiss the matter issued a statement of reasons explaining their votes as an exercise of prosecutorial discretion. Add. 6; *see also* Statement of Reasons of Commissioners Broussard, Dickerson, Lindenbaum, and Trainor at 5 (Nov. 5, 2024), https://www.fec.gov/files/legal/murs/7146R/7146R_21.pdf ("Majority Statement").

On October 30, 2024, after the conformance period had expired but before the Majority Statement had issued, CLC moved the district court to declare that the Commission had failed to conform with its remand order. *See* Sealed Mot. for Declr'n of Nonconformance, *CLC v. FEC*, No. 19-cv-2336 (D.D.C. Oct. 30, 2024), ECF No. 89. CLC's principal arguments were, first, that the FEC had failed to timely provide *any* explanation for its dismissal of the remanded matter; and second, that the untimely Majority Statement did not conform to the remand order because, by

resting entirely on prosecutorial discretion, it failed to address either of the two merits issues the D.C. Circuit had identified for Commission analysis.

The FEC argued that its actions on remand were sufficiently timely and conforming, and further that the Majority Statement's "reliance on prosecutorial discretion in dismissing the administrative complaint" was not "subject to further review" pursuant to *CREW* decisions of this Court. FEC Opp'n at 12, *CLC v. FEC*, No. 19-cv-02336 (D.D.C. Nov. 25, 2024), ECF No. 94.

The district court denied plaintiffs' motion. It found that the FEC "is free to make nonenforcement decisions based on prudential considerations" at any juncture in the citizen complaint process and these grounds are "virtually unreviewable"—at least under the *CREW* decisions and their progeny. Add. 11 (quoting *Make America*, 89 F.4th at 941); *see also* Add. 10. The court explained that it was reluctant at this time to deviate from this "as-yet well-established principle" or to question whether the FEC could lawfully "rely[] on discretionary concerns on remand." Add. 11. It recognized that these questions were currently under reconsideration, *see* Add. 10 (citing *ECU*, 2024 WL 4524248), but ultimately held that it was "constrained by the regime that FECA, the FEC, and the D.C. Circuit have fashioned," and therefore "must conclude that the FEC has timely conformed with the contrary-to-law declaration and consequently that the citizen suit cannot proceed," Add. 19.

ARGUMENT

An order of abeyance is appropriate when there are "other pending proceedings that may affect the outcome of the case before" the Court. *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (collecting cases). Here, the district court itself acknowledged the potential impact of the *ECU* en banc proceedings on this case. Add. 10. This Court, too, has held in abeyance other FEC-related litigation involving the agency's prosecutorial discretion in light of the en banc proceedings. *See Am. Action Network* Order *supra* at 3.

I. An Order of Abeyance Will Conserve Resources and Prevent Futile Briefing Based on Potentially Changing Circuit Precedents.

Holding this appeal in abeyance will not only "conserve judicial resources," *United States v. Quinn*, 475 F.3d 1289, 1291 (D.C. Cir. 2007), but also those of the parties.[2]

First, the *ECU* proceedings "may affect the outcome of the case." *Basardh*, 545 F.3d at 1069. The central focus of the en banc Court is the reviewability of FEC dismissals based on prosecutorial discretion, and it is reconsidering the recent *CREW* decisions that currently govern this question. *See* Appellant's En Banc Br. at *5, *ECU v. FEC*, No. 22-5277, 2024 WL 4826039 (D.C. Cir. Nov. 18, 2024). As the district court acknowledged, this was the legal framework that guided and

[2] *See also Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012); *Devia v. Nuclear Regul. Comm'n*, 492 F.3d 421 (D.C. Cir. 2007).

"constrained" its decision under appeal here. Add. 19. And the *ECU* proceedings also more broadly address the entire "regime" of the citizen complaint process under 52 U.S.C. § 30109(a), including the scope of the FEC's discretion, judicial review of FEC enforcement actions, and the availability of private actions where the FEC declines to enforce. *See, e.g.*, *ECU*, 2024 WL 4524248 (directing parties to also address "arbitrary and capricious" standard of review under *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986)). These issues also bear upon the instant appeal.

Second, holding this case in abeyance will avoid the waste of resources that will likely result if the parties attempt to brief arguments in a legal landscape potentially subject to imminent, material change. Awaiting resolution of the *ECU* proceedings will save both CLC and the FEC from litigating this case based on D.C. Circuit precedents that are being reconsidered and possibly reversed, and thus from the specter of needing to alter or rebrief their legal arguments mid-course in these proceedings. *See, e.g.*, *Westphal v. U.S. Dep't of Com.*, 18 F.3d 950, 951 (D.C. Cir. 1994) (noting that "motion was held in abeyance pending disposition of a case raising related issues").

CONCLUSION

For the foregoing reasons, the appeal should be held in abeyance.

Dated: February 13, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 27(d)(1)(E)(2) because the brief contains 2297 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2025, I electronically filed this motion and accompanying addendum with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

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