

No. 20-5159

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**MOTION OF AMICUS CURIAE
GEO CORRECTIONS HOLDINGS, INC.
TO PARTICIPATE IN ORAL ARGUMENT**

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Pursuant to D.C. Circuit Rule 34(e), *amicus curiae* Geo Corrections Holdings, Inc. (“GCH”) respectfully moves this Court for leave to participate in oral argument in the above captioned matter. GCH is the respondent in the underlying complaint before the Federal Election Commission (“FEC” or the “Commission”) in this matter. As such, GCH has a unique perspective and interest in the outcome of this appeal that is not typically shared by an *amicus*. Cf. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 314 (D.C. Cir. 2015) (recognizing that government agencies do not often represent the interests of intervenors).

The FEC has operated without meaningful oversight for over a year, just recently attaining a quorum of active commissioners that can properly direct the agency. It is uncertain, even at this late date, what the position of the Commission is—now that it is properly formed—with respect to this litigation and if the FEC will fully defend the district court’s ruling correctly dismissing the underlying case for lack of subject matter jurisdiction.

Counsel for *amicus curiae* contacted counsel for both Appellant, the FEC, and Appellee, Campaign Legal Center. Appellee takes no position with respect to GCH’s request to participate, except that any time allotted for GCH be either: (1) taken from the FEC’s time, or (2) that the Campaign Legal Center be given time

equal to that of the FEC and GCH combined. Appellant does not consent to this request and intends to oppose this request.

For the foregoing reasons, GCH respectfully requests 5 minutes of oral argument time to represent its unique interests in this appeal.

BACKGROUND

The Campaign Legal Center originally brought a challenge regarding the FEC's failure to act on an administrative complaint pursuant to 52 U.S.C. § 30109(a)(8)(A). The underlying administrative complaint was directed at GCH for contributions alleged to be in violation of the provisions of the Federal Election Campaign Act of 1971 ("FECA").¹

"The FEC is an independent agency established by Congress to 'administer, seek to obtain compliance with, and formulate policy' with respect to the Federal Election Campaign Act of 1971...." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 91 (1994) (quoting 52 U.S.C. § 30106(b)(1)). The FEC is composed of six members appointed by the President with the advice and consent of the Senate. 52 U.S.C. § 30106(a)(1). A majority of the commission is required for any action of the commission, with a minimum of four commissioners needed to form a quorum. 52 U.S.C. § 30106(c). Until very recently, the Commission has not had a quorum—except for a less than two-month period from mid-May to early July last

¹ GCH contends that the underlying administrative complaint is meritless.

year—since August 2019.² Only recently has there been six active commissioners serving simultaneously.³

With that background in mind, it is easy to see why *amicus* is uneasy with relying on the FEC’s Office of General Counsel (“OGC”) to take action when they have lacked any meaningful supervision—save for a two-month interlude—for a period extending over sixteen months.

ARGUMENT

“Aesop, an Ancient Greek famous for his fables, once wrote, ‘a doubtful friend is worse than a certain enemy.’” *Crossroads Grassroots Policy Strategies*, 788 F.3d at 314. In similar contexts, this Circuit has recognized that “doubtful friends may provide dubious representation. . . .” *See id.* (noting that the D.C. Circuit has “often concluded that governmental entities do not adequately represent the interests of aspiring intervenors” (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003))). For that or similar reasons, an *amicus curiae* may participate in oral argument with the Court’s permission. Fed. R. App. P.

² Fed. Election Comm’n, *Updates* (June 5, 2020), <https://www.fec.gov/updates/week-june-1-5-2020/> (T. Trainor sworn in); Fed. Election Comm’n, *Updates* (Aug. 30, 2019) <https://www.fec.gov/updates/week-august-26-30-2019/> (resignation of M. Peterson); Fed. Election Comm’n, *Updates* (June 26, 2020) <https://www.fec.gov/updates/week-june-22-26-2020/> (resignation of C. Hunter); Fed. Election Comm’n, *Updates* (Dec. 18, 2020) <https://www.fec.gov/updates/week-december-14-18-2020/> (swearing in of S. Cooksey, S. Broussard, and A. Dickerson as commissioners).

³ Fed. Election Comm’n, *Updates* (Dec. 18, 2020), <https://www.fec.gov/updates/week-december-14-18-2020/>.

29(a)(8); *see also* D.C. Cir. Rule 34(e) (permitting *amici* to participate in oral argument for “extraordinary reasons.”). As the FEC is, at best, a “doubtful friend” who has been acting without executive oversight, the Court should grant this request for a modest amount of time for oral argument.

I. *AMICUS CURIAE* HAS A UNIQUE INTEREST IN THIS CASE WORTHY OF TIME AT ORAL ARGUMENT.

FECA sets forth two limited situations in which administrative complainants, such as the Campaign Legal Center, may challenge the FEC’s handling of their complaints:

Any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

52 U.S.C. § 30109(a)(8)(A) (emphasis added). This 120-day period for a non-action lawsuit is a jurisdictional threshold before which suit may not be brought, and not a timetable within which the Commission must resolve an administrative complaint. *See FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986) (rejecting contention that FECA requires “the Commission to act within 120 days or within an election cycle”).

After a petition is filed, “the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days.” 52 U.S.C. § 30109(a)(8)(C). If

the Commission fails to conform within that time period, “the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.” *Id.* In other words, should the Campaign Legal Center have standing against the FEC, the next step in the proceedings after the expiration of thirty days is for the Campaign Legal Center to bring suit against GCH directly. *See id.*

Actions arising under the enforcement provisions of FECA are unique because while the specific issue to be reviewed by the district court is the FEC’s failure to act, the action requested by the complainant is enforcement against a third party. Here, if the FEC fails to act against the third party after being ordered to do so, the complainant then has a right to seek to enforce the provisions of FECA against GCH. Therefore, in every respect, the action (or inaction as the case may be) of the FEC directly impacts GCH in a way that is different in kind than that experienced by *amici* generally. This difference certainly justifies the allotment of a modest amount of time for GCH to participate in oral argument.

II. THE RECENT LACK OF OVERSIGHT OF FEC PERSONNEL IS AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING GCH’S REQUEST.

“[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (quoting 1

Annals of Cong. 463 (1789)). For executive officials it is “only the authority that can remove such officials that they must fear and, in the performance of their functions, obey.” *Id.* (internal alteration and quotation omitted). “[L]esser officers must remain accountable to the President, whose authority they wield.” *Id.* For an independent agency such as the FEC, it is the President’s authority to appoint those who oversee the agency that allows their unique construction to survive. The bureaucratic representatives of the FEC have been acting with questionable authority and no oversight for months. This state of affairs raises substantial questions as to the FEC’s ability and authority to properly defend this action at the oral argument stage.

The FEC has lacked a quorum for the vast majority of this appeal. This means that the FEC’s Office of General Counsel may have been acting without any Commission oversight in this matter whatsoever. It certainly means that the OGC has been acting without Commission oversight for the vast majority of time that this appeal has been pending. For context, the FEC lacked a quorum—and, therefore, the FEC Office of General Counsel lacked any political oversight—at the time the decision was handed down from the District Court and at the time the FEC filed its principal brief in this case. This state of affairs continued until just days ago, when a quorum was finally established. *See* Fed. Election Comm’n, *Updates* (Dec. 18, 2020), <https://www.fec.gov/updates/week-december-14-18-2020/>.

The fact that a quorum now exists actually creates less certainty surrounding the FEC's actions, not more. It is possible that the Commission, now fully constituted, could either materially change their position in this action or, alternatively, decline to defend itself in this action.⁴ This is a risk that *amicus*—the underlying respondent in the administrative complaint—cannot abide.

CONCLUSION

For the aforementioned reasons, GCH respectfully requests that this Court permit it five minutes of time at oral argument allocated in such a way as the Court deems just and appropriate.

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⁴ This is certainly not uncommon, as the FEC has refused to defend its actions in past litigation with some regularity. *See Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1, 6-7 (D.D.C. 2019); Order Granting Default J., *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 19-cv-2753 (D.D.C. 2020) (ECF No. 9) (Lamberth, J.).

**CERTIFICATE OF COMPLIANCE WITH WORD LENGTH AND
TYPEFACE REQUIREMENTS**

This motion complies with the type-volume limit of Fed. R. App. P. 27(d)(2) and contains 1,564 words.

The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Date: January 8, 2021

/s/ Jason Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below the foregoing was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Date: January 8, 2021

/s/ Jason Torchinsky