IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *Plaintiff*, v. FEDERAL ELECTION COMMISSION, *Defendant*.	Civil Action No. 1:21-cv-406 (TJK)

***AMICUS CURIAE* BRIEF OF HERITAGE ACTION FOR AMERICA REQUESTING ABEYANCE IN LIGHT OF PENDING REQUEST FOR MATERIAL INFORMATION FROM THE FEDERAL ELECTION COMMISSION**

CORPORATE DISCLOSURE STATEMENT
AND
LCvR 7(o)(5) & FRAP 29(a)(4)(E) STATEMENT

Counsel for *amicus curiae* certify that Heritage Action for America is a 501(c)(4) nonprofit organization, has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

No counsel for a party authored any part of this brief. No one other than *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASE

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

Heritage Action for America ("Heritage Action") is a social welfare organization tax exempt under section 501(c)(4) of the Internal Revenue Code. Heritage Action was established to promote and advocate for conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. Heritage Action is interested in this case because it is the respondent to an administrative complaint filed by Plaintiff Campaign Legal Center with Defendant Federal Election Commission ("FEC" or "Commission"), designated Matter Under Review 7516 ("MUR 7516"), which is the basis for this lawsuit.

Heritage Action seeks to participate as *amicus curiae* because, promptly upon the Court's entry of default judgment against the FEC on March 25, 2022—when it became clear that the FEC would likely never appear to defend this case—Heritage Action submitted a Freedom of Information Action ("FOIA") request to the FEC for the purpose of determining whether the Commission had previously acted on Plaintiff's administrative complaint in MUR 7516. Heritage Action's FOIA request seeks any vote certifications and commissioner Statements of Reasons reflecting votes taken by the Commission on whether to undertake enforcement action on the underlying administrative complaint—records which would bear directly on this case alleging that the FEC has failed to act on that complaint. The FEC's response date under FOIA was set for April 22, 2022, but the Commission invoked a ten working day extension to May 6, 2022.

Heritage Action has reason to believe that voting records responsive to its FOIA request exist and that the FEC has been withholding those records from the Court, Plaintiff, and public at large. Indeed, the FEC indicated as much by invoking the extension for its response to the FOIA request. The FEC's stated basis for the extension is to allow for "consultation . . . with two or more

components of the Commission which have a substantial subject matter interest" in the request. 11 C.F.R. § 4.7(c)(3). Such consultation would be unnecessary if responsive records do not actually exist, which should be readily apparent to the agency given the limited scope of Heritage Action's FOIA request for records the FEC makes public as a matter of regular practice. *See Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702, 50,703 (Aug. 2, 2016) (listing categories of documents placed on the public record with respect to enforcement matters, including "Certifications of Commission votes" and "Statements of Reasons issued by one or more Commissioners"). In fact, in response to a near verbatim FOIA request in connection with a similar case in this Court, the FEC invoked the same extension days before producing a heavily redacted vote certification and admitting to the existence of other responsive voting records. *See Amicus Brief*, ECF 28-1, *Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 20-cv-00809-ABJ (D.D.C. Jan. 7, 2022).

Heritage Action's *amicus curiae* brief will inform the Court of a pending request for undisclosed information that is essential and directly relevant to the Court's resolution of this case. If the FEC has already acted on Plaintiff's administrative complaint, that would mean that the FEC has not acted "contrary to law," that this case is moot, and that the Court was led to issue inadvertently an advisory opinion based on a mistaken premise that the FEC had not acted on the administrative complaint. Considering the significance of the requested records to a proper determination in this case, Heritage Action respectfully requests that the Court hold this case in abeyance until the FEC fully responds to Heritage Action's FOIA request and, in the meantime, order the FEC to submit any records relating to votes on the administrative complaint in MUR 7516 for *in camera* review within seven days.

BACKGROUND

A. Processing Administrative Complaints under the Federal Election Campaign Act

Under the Federal Election Campaign Act of 1971 ("FECA"), "[a]ny person . . . may file a complaint with the Commission." 52 U.S.C. § 30109(a)(1). When such an administrative complaint has been filed, the bipartisan, six-member Commission's only action to take on the complaint is to hold a "vote" on whether, based on the complaint and any responses, the Commission "has reason to believe" a respondent has committed or is about to commit a violation of FECA. *Id.* § 30109(a)(2). Only when an "affirmative vote of 4" commissioners finds "reason to believe" may the FEC initiate an enforcement action and investigate an alleged violation. *Id.*; *see also* 11 C.F.R. § 111.9(a). Alternatively, a majority of the Commission may vote to dismiss an administrative complaint outright, either because there is no "reason to believe" a violation occurred or simply as a matter of prosecutorial discretion. 52 U.S.C. § 30109(a)(2).

The bipartisan FEC, however, often splits in its vote on whether to proceed with an enforcement action, regularly failing to garner the four votes necessary to undertake an investigation of the allegations in the administrative complaint or affirmatively dismiss the complaint. A split vote on the merits of the complaint, in practical terms, results in an agency "action" terminating the complaint, as there are not enough votes to proceed with enforcement under FECA. *See In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000) (a "no-action decision . . . [is] made by the Commission itself, not the staff, and precludes further enforcement"); *see also Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 923 F.3d 1141, 1142 (D.C. Cir. 2019) (Griffith, J., concurring in the denial of rehearing en banc); *Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (Ginsburg, J.) (recognizing deadlock dismissal as judicially reviewable action); *Statement of Policy Regarding Commission*

Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) ("[T]he Commission will dismiss a matter . . . when the Commission lacks majority support for proceeding with a matter."). Accordingly, such split votes among the FEC have been deemed "deadlock dismissals" of the administrative complaint—i.e., a "dismissal[] resulting from the failure to get four votes to proceed with an enforcement action." *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 993 F.3d 880, 891 (D.C. Cir. 2021).

Whenever the Commission has "ma[de] a finding of no reason to believe . . . or otherwise terminates its proceedings, *it shall make public such action* and the basis therefor no later than thirty (30) days" after first providing notice to the complainant and respondent of its vote. 11 C.F.R. § 111.20(a) (emphasis added); *accord* 52 U.S.C. § 30109(a)(4)(B)(ii) ("If the Commission makes a determination that a person has not violated [FECA] . . . the Commission shall make public such determination."). Although this disclosure of the FEC's terminating "action" is worded as nondiscretionary by statute and regulation, in all enforcement matters resulting in dismissals—even those where there is majority agreement on dismissal—the Commission votes whether to authorize its Office of General Counsel to "[c]lose the file" for release. *See, e.g.*, Fed. Election Comm'n Vote Certification of Mar. 22, 2022 Meeting, MUR 7573 (Mar. 22, 2022), *available at* https://www.fec.gov/files/legal/murs/7573/7573_16.pdf (voting 5-1 to find "no reason to believe" the complaint and to "[c]lose the file"). Therefore, when the FEC splits on the merits of an administrative complaint, resulting in a deadlock dismissal, the Commission simply holds this ministerial vote to close the file, and nothing more. When the file is released, the commissioners who vote against enforcement generally include in the file one or more Statements of Reasons explaining their dismissal vote. *See, e.g.*, *End Citizens United PAC v. Fed. Election Comm'n*, No. 21-cv-01665, 2022 WL 1136062, at *2 (D.D.C. Apr. 18, 2022); *Common Cause v. Fed. Election*

Comm'n, 842 F.2d 436, 449 (D.C. Cir. 1988). The rationale of these so-called "controlling commissioners" is treated as "expressing the Commission's rationale for dismissal," *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 892 F.3d 434, 437–38 (D.C. Cir. 2018), and depending on the basis of their vote, may not be subject to judicial review. *See End Citizens United PAC*, 2022 WL 1136062, at *3.

A recent illustration of this process played out in the administrative matter underlying *Campaign Legal Center v. Federal Election Commission*, No. 21-5081, slip op. (D.C. Cir. Apr. 19, 2022). At the time of the Commission's vote on the administrative complaint, there were only four commissioners and they had "deadlocked two-two along party lines on the vote to decide whether there was 'reason to believe' that illegal coordination had occurred. As a result, the Commission failed to achieve the four votes necessary to proceed" with enforcement. *Id.* at 9. "The two Republican Commissioners voted against finding there was reason to believe a violation occurred and issued a Statement of Reasons explaining their controlling decision," and "[t]he Commission therefore dismissed the administrative complaint." *Id.* at 9–10. As reflected in the FEC's official vote certification, the Commission did not garner four votes in support of any position on the merits of the administrative complaint, leading to a deadlock dismissal, so the Commission simply closed the file for public disclosure of that "action." *See* Fed. Election Comm'n Am. Vote Certification of June 4, 2019 Meeting, MURs 6940, 7097, 7146, 7160 and 7193 (June 13, 2019), *available at* https://www.fec.gov/files/legal/murs/6940/19044471800.pdf. The same is reflected in the two official vote certifications in the administrative matter that gave rise to *End Citizens United PAC*, which this Court recently decided. *See* Fed. Election Comm'n Vote Certification of Apr. 22, 2021 Meeting, MURs 7340 and 7609 (May 5, 2021), *available at* https://www.fec.gov/files/legal/murs/7340/7340_45.pdf (reflecting split vote to affirmatively

dismiss complaint and majority vote to close file); Fed. Election Comm'n Vote Certification of Apr. 20, 2021 Meeting, MURs 7340 and 7609 (May 5, 2021), *available at* https://www.fec.gov/files/legal/murs/7340/7340_44.pdf (reflecting two split votes on the merits of the complaint at executive session meeting two days earlier).

While the Commission has operated in this fashion for 40 years, as described in the *amicus curiae* brief submitted in this case by the Institute for Free Speech, recently some "Commissioners . . . have adopted [a] tactic to deny meaningful judicial review of" certain matters that have resulted in deadlock dismissals, by "refusing to vote to close the file." *Amicus Brief*, ECF 14, at 6–7 (quoting Statement of FEC Chair James E. "Trey" Trainor III, § II.B (Aug. 28, 2020), https://tinyurl.com/5fced68j). In such matters, the required action on the administrative complaints—i.e., the vote whether to proceed with enforcement—has already occurred and failed to garner majority support. Yet, by commissioners' own admissions (including in interviews with the *New York Times*), some commissioners are willfully obstructing disclosure of the Commission's action on the complaint from the parties to the administrative proceeding, the judiciary, and the general public by failing to authorize release of the file in the otherwise terminated proceeding. *See* Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. Times (June 8, 2021) ("Democrats are declining to formally close some cases after the Republicans vote against enforcement. That leaves investigations officially sealed in secrecy and legal limbo.").

B. The Court's Default Judgment Order Against the FEC

In the present case, Plaintiff filed an administrative complaint against Heritage Action in MUR 7516, but Plaintiff alleges that the FEC has "failed to act" on its administrative complaint. The FEC has never made an appearance in this case, and on March 25, 2022, the Court entered

default judgment against the Commission. The Court's March 25 order found that "the FEC has taken no action on CLC's complaint," ECF 16, at 1, and, consistent with the relief requested by Plaintiff, compelled the Commission to "conform to this Court's Order within 30 days by acting on CLC's administrative complaint, MUR 7516." *Id.* at 2. Thereafter, on March 29, 2022, the Court issued a Minute Order requiring that Plaintiff file a status report on April 26, 2022, addressing whether the FEC has taken action on the administrative complaint.

In light of the FEC's approach to this case to date, Heritage Action anticipates that the Commission will remain silent. If so, and if this Court rules that the FEC has failed to conform with the March 25 order, Plaintiff will be authorized to bring a direct lawsuit against Heritage Action based on its administrative complaint, 52 U.S.C. § 30109(a)(8)(C), without any prior input from the agency delegated exclusive civil enforcement authority for FECA violations, *id.* §§ 30106(b)(1), 30107(e).

C. Heritage Action's FOIA Request

Once the Court entered its default judgment order on March 25, 2022, it became clear that the FEC would never appear in this case. That same day, Heritage Action submitted a FOIA request to the FEC seeking the following records:

1. Any vote certifications reflecting votes taken by the Federal Election Commission on the complaint against Heritage Action in MUR 7516; and

2. Any Statements of Reasons or other Commissioner opinions concerning the complaint against Heritage Action in MUR 7516.

Exhibit 1. The Commission acknowledged receipt effective March 25, 2022. Exhibit 2. Thus, under FOIA, the FEC's response date was set for April 22, 2022. *See* 11 C.F.R. § 4.7(c) ("The Commission shall determine within twenty working days after receipt of a request, or twenty working days after an appeal is granted, whether to comply with such request.").

However, on April 18, 2022, the FEC's FOIA Office emailed counsel to Heritage Action stating that, "in accordance with 5 U.S.C. § 552(a)(6)(B)(i) and 11 C.F.R. § 4.7(c)," the Commission would be "extending the processing period to respond to [the] request by ten (10) working days to **May 6, 2022**." Exhibit 3 (bold in original). Signaling that some responsive documents likely exist, the FEC's FOIA Office asserted that "[t]his extension is necessary because [Heritage Action's] request requires consultation with two or more components of the Commission which have a substantial subject matter interest in the request. 11 C.F.R. § 4.7(c)(3)." *Id.* In the event that the FEC refuses to produce any responsive records without redaction by May 6, Heritage Action intends to exhaust its administrative remedies under FOIA, and if necessary, pursue litigation in this Court to obtain full and complete copies of any responsive records withheld by the FEC. *See, e.g.*, Complaint, ECF 1, *45Committee, Inc. v. Fed. Election Comm'n*, No. 22-cv-00502-ABJ (D.D.C. Feb. 25, 2022).

ARGUMENT

The Court should hold this case in abeyance until the FEC fully responds to Heritage Action's FOIA request so that the Court may have an opportunity to review any responsive records relating to Commission votes on the administrative complaint in MUR 7516. Heritage Action has reason to believe that the FEC possesses responsive voting records showing that the Commission split in its vote on the merits of Plaintiff's administrative complaint, but those records are not yet public because the FEC has refused to take the ministerial step of closing the file. Such voting records are essential and directly relevant to the Court's resolution of this case in which the FEC has failed to appear and inform the Court of any actions it has taken on the administrative complaint.

Abeyance is appropriate here because a finding that the FEC has not conformed to the Court's March 25 order would have immediate consequences for Heritage Action—CLC could

sue Heritage Action directly on the theories in CLC's administrative complaint. Yet "a court may not authorize a citizen suit unless it first determines that the Commission acted 'contrary to law' under FECA or under the [Administrative Procedure Act's] equivalent 'not in accordance with law.'" *Citizens for Resp. & Ethics in Wash.*, 892 F.3d at 440 (quoting 52 U.S.C. § 30109(a)(8)(C); 5 U.S.C. § 706(2)(A))). Under FECA, the only action that the FEC can take on an administrative complaint is to hold a vote whether to proceed with enforcement based on the complaint. 52 U.S.C. § 30109(a)(2). If the FEC possesses responsive records showing that the FEC previously voted whether to proceed on Plaintiff's administrative complaint against Heritage Action in MUR 7516, then the FEC has already acted on the complaint and thus has not acted contrary to law. Those undisclosed voting records are essential to this case because their release could materially impact the Court's adjudication of this case.

Indeed, if FEC voting records reflect that the Commission has already acted on Plaintiff's administrative complaint, then this case is moot and the Court's March 25 order should be vacated, as it would appear to have been issued on the mistaken premise (caused by the FEC's failure to appear and properly inform the Court) that the FEC had not acted on the administrative complaint. *See Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." (quoting *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983))). "The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp*., 546 U.S. 500, 506 (2006) (citation omitted).

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Mootness

occurs "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (quotation marks omitted). In this case, Plaintiff requested two forms of relief from this Court: (1) a declaration that the FEC had not acted on its administrative complaint and (2) an order compelling FEC to act. If the FEC has already acted on the administrative complaint, however, the Court cannot award any effectual relief requested by Plaintiff, meaning this case is moot—and has been since the FEC voted whether to proceed with enforcement on Plaintiff's administrative complaint. *See* 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." (emphasis added)).

It is more than speculative that the FEC possesses voting records showing that the Commission has already acted on Plaintiff's administrative complaint. As noted above, the FEC released a heavily redacted vote certification and admitted to the existence of other responsive records reflecting Commission votes previously taken on the underlying administrative complaint in a nearly identical case. *See Amicus Brief*, ECF 28-1, *Campaign Legal Ctr.*, No. 20-cv-00809-ABJ, *supra*. Heritage Action has reason to believe that the FEC will release similar documents in response to its FOIA request given the ongoing consultations within the FEC about whether to release responsive records. This Court should not greenlight CLC's lawsuit against Heritage Action until it has an opportunity to review the FEC's voting records that are essential and material to the resolution of this case.[1]

[1] Last week, Judge Jackson issued an opinion in the case referenced above, finding that the FEC had failed to conform with a prior default judgment order and authorizing CLC to bring a direct lawsuit against the administrative respondent. *See* Order, ECF 32, at 1, *Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 20-cv-00809-ABJ (D.D.C. Apr. 21, 2022). The administrative respondent had filed an *amicus* brief raising similar arguments as this brief and describing its own pending FOIA request—a near mirror-image of Heritage Action's request—to which the FEC had

Judicial economy would be served by holding this case in abeyance for a brief period of time to allow the Court an opportunity to review the FEC's voting records. This Court has "broad discretion to stay proceedings, 'incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *IMAPizza, LLC v. At Pizza Ltd.*, No. 17-cv-2327, 2019 WL 11318342, at *1 (D.D.C. July 15, 2019) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Allowing CLC immediately to sue Heritage Action directly would spawn further litigation in this Court on the basis of an incomplete record, while a brief period of abeyance may allow this Court to dispose of this case as moot based on a complete record that the FEC has refused to provide to the Court through its gamesmanship and failure to enter an appearance in this case. The Court should not allow this case to proceed any further because it may have been moot since its inception. Holding this case in abeyance for a brief period of time to review these important records would not cause

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responded by producing a heavily redacted vote certification while withholding under FOIA Exemption 5 an additional "five pages of materials responsive." Judge Jackson chose not to wait for the release of the FEC's unredacted voting records because the court refused to "speculat[e]" about what the unredacted records might show, *id.* at 4, but this Court need not speculate about the contents of any voting records responsive to Heritage Action's FOIA request if it simply holds this case in abeyance until the FEC fully responds to the pending FOIA request or reviews the unredacted documents *in camera* to assure the Court of its subject matter jurisdiction. There is, after all, no legitimate basis for the FEC to withhold or redact its voting records under the deliberative process privilege. *See* Complaint, ECF 1, *45Committee, Inc.*, No. 22-cv-00502-ABJ, *supra*; *see also* 5 U.S.C. § 552(a)(5), (a)(2)(A) (requiring agencies to "make available for public inspection a record of the final votes of each member in every agency proceeding" and "final opinions"); 11 C.F.R. § 4.4(a)(3) (requiring the FEC to make available for public inspection "[o]pinions of Commissioners rendered in enforcement cases"); *Aug v. Nat'l R.R. Passenger Corp.*, 425 F. Supp. 946, 950–51 (D.D.C. 1976) (rejecting claim that votes, and any explanations of those votes, are subject to FOIA Exemption 5). The subject of the FEC's enforcement action, Heritage Action, has also waived confidentiality protections under FECA with respect to the matter. *See* Exhibit 4 (April 7, 2022 letter from FEC Acting Assistant General Counsel acknowledging waiver of confidentiality in MUR 7516, pursuant to 52 U.S.C. § 30109(a)(12)(A)).

any harm to Plaintiff, which seeks nothing more than to compel Heritage Action to disclose the identities of some of its donors from nearly four years ago.

CONCLUSION

For the foregoing reasons, the Court should hold this case in abeyance until the FEC fully responds to Heritage Action's FOIA request and, in the meantime, order the FEC to submit any records relating to votes on the administrative complaint in MUR 7516 for *in camera* review within seven days.

Respectfully submitted, on April 25, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the filing complies with the Local Civil Rules relating to formatting and page limits, being double-spaced and prepared in 12-point proportionally-spaced font including in the footnotes pursuant to LCvR 5.1(d), and not exceeding the allotted 25-page limit of LCvR 7(o)(4).

/s/*Brett A. Shumate*
Brett A. Shumate

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, 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. Attorneys for Plaintiff are registered users of the CM/ECF System of this Court. Defendant was served a paper copy of this filing via regular United States mail at its address:

Federal Election Commission
1050 First Street NE
Washington, DC 20463

/s/*Brett A. Shumate*
Brett A. Shumate