

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)

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

Pursuant to Local Civil Rule 7(o), Heritage Action for America (“Heritage Action”) respectfully seeks leave to file an *amicus curiae* brief requesting that the Court hold this case in abeyance in light of a pending request by Heritage Action for material information from Defendant Federal Election Commission (“FEC” or “Commission”). For the reasons set forth below, the Court should grant Heritage Action leave to file the proposed *amicus curiae* brief, which “will assist the [Court]” in resolving this case “by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” *In re Search of Info. Associated with [redacted]@mac.com that is Stored at Premises Controlled by Apple, Inc.*, 13 F. Supp. 3d 157, 167 (D.D.C. 2014) (“*In re Search of Info.*”). Heritage Action’s proposed *amicus* brief is attached to this motion, along with a proposed order.

INTEREST OF *AMICUS CURIAE*

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 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 Commission 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.

POSITION OF THE PARTIES

Counsel for Heritage Action sought Plaintiff’s consent, but Plaintiff’s counsel stated that Plaintiff opposes the filing of Heritage Action’s *amicus curiae* brief.

On April 19, 2022, in an effort to avoid filing this motion for leave to file an *amicus curiae* brief, Heritage Action’s counsel emailed Plaintiff’s counsel requesting that Plaintiff agree to include an update to the Court on Heritage Action’s pending FOIA request in Plaintiff’s April 26 status report. Exhibit 1. Heritage Action proposed that Plaintiff’s report include language that

would have informed the Court that Heritage Action had submitted its “FOIA request to the FEC for the purpose of determining whether the FEC had previously acted on Plaintiff’s administrative complaint against Heritage Action,” and that the FEC had responded to the FOIA request by extending the processing period to respond to the request by ten working days to May 6, 2022, and the basis for the FEC’s extension. *Id.* Moreover, the proposed update would have informed the Court of Heritage Action’s intention to submit a motion for leave to file an *amicus curiae* brief at later date, in the event the FEC produces responsive records on or after May 6, 2022, with such brief informing the Court that the FEC had previously taken final agency action with respect to Plaintiff’s administrative complaint against Heritage Action, meaning the FEC has not acted contrary to law and suggesting that this lawsuit is moot. *Id.* (citing *Amicus Brief*, ECF 28-1, *Campaign Legal Ctr.*, No. 20-cv-00809-ABJ, *supra*).

On April 20, 2022, Plaintiff’s counsel responded to Heritage Action’s counsel, stating that “Plaintiff neither agrees to include the requested text nor consents to the proposed motion for leave.” Exhibit 2.

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 Heritage Action contacted Defendant’s Office of General Counsel by email on April 25, 2022, informing the FEC of Heritage Action’s intention to file this motion and its *amicus curiae* brief.

BACKGROUND

Under the Federal Election Campaign Act (“FECA”), the only action for the six-member FEC to take on an administrative complaint is to vote whether it has sufficient “reason to believe” a violation of FECA has occurred warranting an investigation of the complaint’s allegations. 52 U.S.C. § 30109(a)(2). Alternatively, a majority of the Commission may vote to dismiss an

administrative complaint outright. *Id.* § 30109(a)(1). Either of these actions requires that at least four commissioners vote in support. *Id.*

A third outcome, however, routinely arises at the bipartisan FEC. If the Commission splits in its vote on the merits of the administrative complaint, it results in a so-called “deadlock dismissal[]”—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). This, in practical terms, results in agency “action” terminating the proceeding because there are not enough votes to proceed with enforcement on the complaint under FECA. *See, e.g., 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.”).

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.”). The Commission authorizes this required disclosure of its “action” by voting to “close the file” in its enforcement matters.

Yet, by commissioners’ own admissions (including in interviews with the *New York Times*), some commissioners have recently begun willfully to obstruct disclosure in certain matters where the Commission’s enforcement vote has resulted in a deadlock dismissal, by refusing to take the ministerial step of closing the enforcement file. *See, e.g., Amicus Brief*, ECF 14, at 6–7,

No. 20-cv-00809-ABJ (quoting Statement of FEC Chair James E. “Trey” Trainor III, § II.B (Aug. 28, 2020), <https://tinyurl.com/5fced68j>). In such matters, the statutorily required action on the administrative complaints—i.e., the vote whether to proceed with enforcement—has already occurred and failed to garner majority support. But the obstructing commissioners are withholding this action from the knowledge of 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.”).

In this case, the FEC clearly has not authorized an investigation of Heritage Action or affirmatively dismissed by majority vote Plaintiff’s administrative complaint filed at the FEC in October 2018. Therefore, if the FEC releases voting records responsive to Heritage Action’s requests, those records will almost certainly reflect a deadlock dismissal of the complaint. In that event, the records will establish that the FEC has taken action on the complaint.

Heritage Action now moves to submit the attached *amicus curiae* brief requesting that the Court hold this case in abeyance until the FEC fully responds to the pending FOIA request. If the Court were to find that the FEC has failed to conform to its March 25 order, it would allow Plaintiff to bring a direct lawsuit against Heritage Action based on its administrative complaint, 52 U.S.C. § 30109(a)(8)(C), without input from the agency delegated exclusive civil enforcement authority for FECA violations, *id.* §§ 30106(b)(1), 30107(e). But, as explained in Heritage Action’s *amicus* brief, Heritage Action has reason to believe that the FEC will release records responsive to Heritage Action’s FOIA request reflecting votes on the underlying administrative complaint. If so,

those records likely reflect that the six-member FEC has split in its vote on the merits of Plaintiff's administrative complaint, resulting in a deadlock dismissal. That would necessarily mean that the Commission has not acted "contrary to law," that this case has been moot since it was filed, and that the Court was led to inadvertently issue an advisory opinion through its March 25 order based on a mistaken premise that the FEC had not acted on Plaintiff's administrative complaint.

ARGUMENT

"An *amicus* brief should normally be allowed . . . when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063–64 (7th Cir. 1997)). Courts allow "parties to file *amicus* briefs where the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *In re Search of Info.*, 13 F. Supp. 3d at 167 (quotation marks omitted).

Heritage Action's *amicus* brief provides unique information about Heritage Action's pending FOIA request to the FEC. That information "will benefit the court," *Wilderness Soc'y v. Trump*, Nos. 17-cv-02587, 17-cv-02591, 2019 WL 11556601, at *3 (D.D.C. Mar. 20, 2019), because the FOIA request may result in the FEC releasing records essential and directly relevant to the Court's resolution of this case.

"[T]he procedural posture of the case" is ripe for the submission of Heritage Action's *amicus* brief. *Id.* The brief addresses the only issue before the Court—i.e., whether the FEC has conformed with the Court's March 25 order—and shows why the case should be held in abeyance until the FEC fully responds to Heritage Action's FOIA request and, in the meantime, the Court can review *in camera* unredacted copies of the FEC's voting record in MUR 7516 to determine

whether this case is justiciable. *Id.* The Court has an obligation to assess its subject matter jurisdiction at every stage of the case. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006); Fed. R. Civ. P. 12(h)(3).

Finally, Heritage Action’s “position is not adequately represented by a party.” The FEC has not disclosed any voting records in connection with MUR 7516, nor has the FEC entered an appearance to inform the Court of any votes taken on the underlying administrative complaint in MUR 7516, which benefits Plaintiff. LCvR 7(o)(2).

CONCLUSION

The Court should grant Heritage Action’s motion for leave to file its *amicus curiae* brief, hold this case in abeyance until the FEC fully responds to Heritage Action for America’s FOIA request, order Heritage Action to file a status report every 30 days informing the Court of the status of its FOIA request, and 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.

/s/ Brett A. Shumate

Brett A. Shumate (D.C. Bar No. 974673)

E. Stewart Crosland (D.C. Bar No. 1005353)

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Telephone: (202) 879-3939

Facsimile: (202) 626-1700

Attorneys for Amicus Curiae

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