

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAMPAIGN LEGAL CENTER,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

HERITAGE ACTION FOR AMERICA,

Proposed Intervenor-Defendant.

Case No. 1:21-cv-0406 (TJK)

NOTICE OF FEDERAL ELECTION COMMISSION ACTIONS

Proposed Intervenor-Defendant Heritage Action for America (“Heritage Action”) respectfully notifies the Court that on May 13, 2022, Defendant Federal Election Commission (“FEC”) released two documents that support Heritage Action’s expedited motion to intervene for the purpose of reconsideration or appeal. Dkt. No. 24.

1. In response to Heritage Action’s FOIA request, the FEC released three pages of heavily redacted vote certifications related to CLC’s administrative complaint against Heritage Action in Matter Under Review (“MUR”) 7516. *See* Exhibit A, attached. For the reasons explained in Heritage Action’s *amicus* brief and motion to intervene, the certifications confirm that the FEC voted (*i.e.*, acted) on CLC’s administrative complaint on April 6, 2021, and January 14, 2022. *See Amicus Curiae Br.* 4–7, 10–11, Dkt. No. 17-3; Mem. of Points & Authorities in Support of the Expedited Mot. to Intervene 4–5, Dkt. No. 24-1. Heritage Action has already filed an administrative appeal challenging the FEC’s improper redactions of the vote certifications. Mem. of Points & Authorities Ex. 2, Dkt. No. 24-3.

2. The FEC's Chairman and two other Commissioners issued a Statement "Regarding Concluded Enforcement Matters" ("Statement"), explaining that the FEC has taken "action" on the administrative complaint in enforcement matters, such as MUR 7516, when the FEC has voted on the merits of the complaint but not ministerially closed the administrative file for public release of its action. *See* Exhibit B, attached.

The Commissioners explain, among other things, that:

- "In eight enforcement matters presently before the Commission, [some Commissioners] have made the unprecedented decision to refuse to close the file—even though the Commission took final votes on the merits of these complaints more than a year ago." *Id.* at 1.
- "[T]he unprecedented decision to refuse to close the file" in these terminated matters "is premised on the thin fiction that a deadlocked vote to close the file in a particular [MUR] keeps the matter open perpetually—even where the Commission has voted on all the underlying merits. This assertion is unsupportable." *Id.* at 1–2.
- These matters "have . . . long concluded" because "votes have been taken as to all parties and statements of reasons have been included in the file by the commissioners declining to move forward," meaning "there is no basis for claiming that the Commission is continuing to deliberate. In these cases, [the Commission's] work is done and a vote to close the file, while welcome and administratively convenient, is legally immaterial." *Id.* at 2.
- In connection with these matters, lawsuits like this one "have been filed against the Commission for 'failing to act' even though [it has], in fact, acted." *Id.* at 1.
- By refusing to close the file, some Commissioners "are weaponizing a nominal housekeeping act, not to allow future action, but to create the public impression that [the

Commission has] not started [its] work, even though [the FEC has] actually finished it.” *Id.* at 4 (footnotes omitted).

- This gamesmanship “prejudices respondents” like Heritage Action “who are entitled to learn when the Commission has voted not to pursue enforcement in connection with a complaint about their (often constitutionally protected) activity.” *Id.* at 5.
- Instead, respondents like Heritage Action have been exposed to civil lawsuits because the FEC has “affirmatively misled respondents by claiming these matters remain pending when they are concluded. And [the FEC’s] actions have been intentionally shielded from both judicial and public review.” *Id.* at 1.
- “Closing the file,” in sum, “has no legal significance where the Commission has fully decided the merits of a MUR. Rather, in the matters [some Commissioners] continue to hold open—where the Commission has voted and chosen not to proceed with enforcement, and commissioners rejecting OGC’s enforcement recommendation have provided statements of reasons explaining their votes—the Commission has concluded its deliberations.” *Id.* at 6.

In deciding this case challenging the FEC’s purported failure to act (*i.e.*, vote) on the merits of the administrative complaint in MUR 7516, the Court never had the benefit of the FEC’s voting records in MUR 7516, as explained in Heritage Action’s motion to intervene, or the Commissioners’ Statement. Nor did Heritage Action know about the FEC’s action in MUR 7516 until the FEC confirmed the existence of voting records on May 6, 2022, and finally released them on May 13, 2022 (in heavily redacted form). Heritage Action respectfully requests that the Court afford Heritage Action an opportunity to seek reconsideration or appeal on the basis of these newly discovered records by granting the motion to intervene.

Respectfully submitted, on May 16, 2022.

/s/ Brett A. Shumate

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 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