IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 20-cv-0809-ABJ

PLAINTIFF CAMPAIGN LEGAL CENTER'S OPPOSITION TO 45COMMITTEE, INC.'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Plaintiff Campaign Legal Center ("CLC") opposes the motion of 45Committee, Inc., the respondent in the administrative matter at issue in this case, for leave to file an *amicus curiae* brief in support of Defendant Federal Election Commission ("FEC"). The motion should be denied because 45Committee's proposed brief fails to satisfy the requirements of Local Civil Rule 7(o)(2) that an *amicus curiae* brief be (1) "relevant to the disposition of the case" and (2) "desirable."

First, the information provided in 45Committee's proposed brief is irrelevant to the disposition of this case. The brief merely confirms that the FEC has failed to conform to the Court's Default Judgment Order and does not support movant's claim that the FEC has mooted this case by dismissing the underlying enforcement action. The very fact that 45Committee had to resort to a Freedom of Information Act ("FOIA") request to obtain information about the underlying enforcement action shows that the FEC has not dismissed the matter, since otherwise such information would be publicly available, as required by law. And the FEC's response to that FOIA request shows not a dismissal, but only that the FEC decided not to appear in this litigation and defend its ongoing delay 19 months ago.

Second, 45Committee's brief is undesirable. It belatedly submits a meritless argument which 45Committee could have asserted at any time from the start of this lawsuit nearly two years ago, which has already been made by a previous *amici*, and which this Court has already declined to credit. Not only that, but the brief proposes needlessly delaying this case for an indefinite period pending 45Committee's irrelevant FOIA appeal and possible litigation. Meanwhile, granting the motion would prejudice Plaintiff by delaying its private right of action against 45Committee and further extending the informational injuries Plaintiff is suffering because of the FEC's delay and 45Committee's campaign finance violations. It would also prejudice the public by continuing the ongoing harm to the public's confidence in the electoral process caused by the FEC's inaction.

For each of these reasons, 45Committee's motion should be denied, and the Court should grant Plaintiff's pending motion for an order declaring the FEC failed to conform with this Court's November 8, 2021 default judgment order, *see* ECF 26, 26-1.

LEGAL BACKGROUND

Any person may file a complaint with the Commission alleging a violation of the Federal Election Campaign Act ("FECA" or "the Act"). 52 U.S.C. § 30109(a)(1). If, at any stage of the FEC's enforcement process, fewer than four Commissioners vote to proceed, Commissioners may vote to dismiss the complaint. *See, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). "Any party aggrieved" by dismissal of its complaint or "by a failure of the Commission to act on such complaint" may seek review in this Court. 52 U.S.C. § 30109(a)(8). For the FEC to defend such a lawsuit, at least four Commissioners must vote to authorize the defense. *See id.* §§ 30106(c), 30107(a)(6). In a suit challenging FEC delay, a plaintiff is entitled to relief where the undisputed facts show that the FEC has acted "contrary to law" by unreasonably delaying action on the underlying complaints. *Id.* § 30109(a)(8)(C). "Where the issue before the Court is whether

the agency's failure to act is contrary to law, the Court must determine whether the Commission has acted 'expeditiously.'" *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980).

In matters where the FEC has "ma[de] a finding of no reason to believe or no probable cause to believe or otherwise terminates it proceedings," the agency must "make public such action and the basis therefor no later than thirty (30) days" after the FEC notifies the complainant and respondent. 11 C.F.R. § 111.20(a).

PROCEDURAL BACKGROUND

Three-and-a-half years ago, on August 23, 2018, CLC filed an administrative complaint with the FEC alleging that 45Committee, a tax-exempt 501(c)(4) corporation, had violated FECA by failing to register as a political committee and file reports disclosing its contributors, expenditures, and debts. ECF No. 1. Almost two years ago, on March 24, 2020, CLC filed this lawsuit against the FEC due to the agency's failure to take action on its administrative complaint. *Id.* ¶¶ 3, 32. To date, the FEC has failed to answer or otherwise defend itself in this action.

CLC moved for default judgment against the FEC on June 1, 2020, ECF No. 11, and filed a renewed motion for default judgment on May 5, 2021, ECF No. 18. On November 8, 2021, the Court granted CLC default judgment. ECF No. 25. The Court found that the FEC's delay was contrary to law, and ordered the agency to "act on the complaint within thirty days [*i.e.*, by December 8, 2021] pursuant to 52 U.S.C. § 30109(a)(8)(C)." *Id.* The FEC failed to conform by December 8, 2021 (or by any other date). Accordingly, on December 9, 2021, CLC filed a pending motion requesting an order declaring that the FEC has failed to conform to the Court's Order and authorizing CLC to bring a civil action against 45Committee to remedy the violation described in CLC's administrative complaint. *See* ECF No. 26.

Nearly a month later, on January 7, 2022, 45Committee moved for leave to file an *amicus curiae* brief presenting information it received in response to a FOIA request it submitted to the FEC on November 19, 2021, eleven days after the Court's Default Judgment Order. *See* ECF No. 28-1 at 4. The proposed brief requests that the Court find that this case is moot, or, in the alternative, hold the case in abeyance pending 45Committee's intention "to exhaust its administrative remedies under FOIA, and if necessary, pursue [FOIA] litigation in this Court" against the FEC. ECF No. 28-1 at 5.

LEGAL STANDARD

An *amicus curiae* brief must be, among other things, "relevant to the disposition of the case" and "desirable." LCvR 7(o)(2). This Court has "wide discretion" to dictate the participation of an *amicus curiae*, *Matter of 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), and "should be assiduous to bar the gates to amicus curiae briefs that" compound the "delays and expense of litigation," *see United States v. Microsoft Corp.*, No. 98-cv-1232-CKK, 2002 WL 319366, at *2 (D.D.C. Feb. 28, 2002) (citation omitted); *see e.g.*, *Wilderness Soc'y v. Trump*, No. 17-cv-02587-TSC, 2019 WL 11556601, at *2 (D.D.C. Mar. 20, 2019) (denying leave for *amicus* brief that "present[ed] arguments . . . not relevant to the stage of the litigation"); *United States v. Microsoft Corp.*, No. 98-cv-1232-CKK, 2002 WL 649383, at *1 (D.D.C. Mar. 25, 2002) (denying leave because "further participation by movants as amici curiae will serve only to delay proceedings," while "echo[ing] arguments that have been briefed already for the Court by other entities").

ARGUMENT

I. THE PROPOSED BRIEF IS IRRELEVANT TO THE DISPOSTION OF THE CASE

The Court should deny 45Commitee's motion because the matters asserted in the proposed *amicus* brief are not "relevant to the disposition of the case," as required by LCvR 7(o)(2).

A. The Proposed Brief Confirms that the FEC Has Failed to Conform to the Court's November 8, 2021 Default Judgment Order

45Committee's proposed filing is irrelevant to the disposition of this case because it only further confirms what CLC has already demonstrated in its pending motion (ECF No. 26) for an order declaring CLC's right to file a civil action against 45Committee: the FEC's delay has not ceased, the FEC's continuing delay remains contrary to law, and the FEC has not conformed with the Court's November 8, 2021 Default Judgment Order.

First, the FEC's delay continues: The very fact that 45Committee sought information regarding the agency's handling of the complaint at issue (designated Matter Under Review ("MUR") 7486 by the FEC) via a FOIA request confirms that the FEC has yet to "terminate[] its proceedings," since otherwise such information would be publicly available, as required by 11 C.F.R. § 111.20(a). *See also Doe v. FEC*, 920 F.3d 866, 874 (D.C. Cir. 2019) (describing how "[i]n closing [an enforcement matter], the Commission plans to make public its investigative files" in accord with 11 C.F.R. § 111.20(a)); Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702 (Aug. 2, 2016) (identifying 21 "categories of documents integral to [the FEC's] decisionmaking process that will be disclosed upon termination of an enforcement matter"). Indeed, a search for "MUR 7486" on the FEC's enforcement query system continues to yield no documents as of this filing. *See* FEC, Enforcement Query System, https://eqs.fec.gov/eqs/searcheqs. And 45Committee does not claim the FEC has sent it any notification that MUR 7486 has been dismissed, as would be required by 11 C.F.R. § 111.20(a).

Second, the FEC's continued delay remains contrary to law: On November 8, 2021, the Court concluded that the FEC's delay is contrary to law, in part, due to "the fully constituted agency's utter failure to step up and offer any explanation in its own defense after it was given an extended period in which to do so." ECF No. 24 at 15. The FEC vote certification that 45Committee proposes to submit with its *amicus* brief demonstrates that, in June 2020, the agency made a *deliberate choice* not to defend this lawsuit, ECF 28-3 at 5, and the agency has stuck to that decision for the last 19 months.

Finally, the FEC has not conformed with the Court's November 8, 2021 Default Judgment Order: 45Committee's FOIA request sought "[a]ny" FEC vote certifications for MUR 7486, and the FEC produced a lone certification reflecting a vote on June 23, 2020. ECF No. 28-3. The production therefore confirms that the FEC has not voted on the administrative complaint for the last 19 months, including during the 30 days (from Nov. 8 to Dec. 8, 2021) in which the FEC was ordered to conform with the Court's judgment finding its delay contrary to law. *See* ECF No. 25. The FEC has not informed the Court of any action either.

Accordingly, the proposed brief is irrelevant to the disposition of this case because it would serve only to confirm that the FEC has not taken any action that could possibly have ended its more-than-three-year delay or rendered that delay reasonable.

B. The Proposed Brief Contains No Evidence that This Case Is Moot

None of the information proffered in 45Committee's proposed filings even suggests that this case is moot, as 45Committee claims. The movant's assertion of mootness hinges on its incorrect claim that the FEC's response to its FOIA request shows that the FEC *dismissed* CLC's administrative complaint in June 2020. *See* ECF No. 28 at 1, 3; ECF No. 28-1 at 4. But the agency's FOIA response shows nothing of the sort. By 45Committee's own admission, the FEC's FOIA

response consists of five fully withheld pages and one "heavily redacted" vote certification that discloses a single Commission vote. ECF No. 28-1 at 4-5. That vote, 45Committee further admits, "is not even responsive to 45Committee's FOIA request" because it reflects an FEC vote on this litigation, not CLC's administrative complaint. *Id.* at 4.

Because the June 2020 vote certification does not actually reveal any Commission votes on MUR 7486, 45Committee speculates that the redacted votes "*likely* reflect a dismissal." ECF No. 28-1 at 4 (emphasis added); *see also* ECF No. 28 at 1, 3. But this speculation is both baseless and manifestly wrong. 45Committee's FOIA request sought "[*a*]*ny* vote certifications reflecting votes" on MUR 7486, not just votes to dismiss the MUR. ECF No. 28-2 at 2 (emphasis added). There are several different motions upon which the Commissioners could have voted. *See* FEC Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545-01, 12545-46 (Mar. 16, 2007). The fact that "there has been no further enforcement" by the FEC against 45Committee since June 2020 (or at any other time), is not evidence of a dismissal, as 45Committee claims, ECF No. 28 at 3, but rather of the unreasonable delay that this Court has already declared contrary to law, *see* ECF No. 24 at 18 (explaining how the "languishing of plaintiff's complaint" is a "disturbing sign[]" that the agency is "broken").

In fact, the one thing that is certain about the redacted June 2020 votes is that they could *not* have resulted in a dismissal of the MUR. *See* ECF No. 28-1 at 7. As noted above, had the FEC dismissed the administrative complaint, it would have been required, under 11 C.F.R. § 111.20(a), to notify the complainant and respondent of the dismissal, and to make the MUR file public. And yet CLC has received no such notification, and 45Committee does not claim that it has received any such notification or that the FEC has made the MUR file public in the 19 months

since June 2020. 45Committee instead suggests that had the FEC "merely entered an appearance and disclosed its voting record" in this litigation, the alleged dismissal would have been revealed. ECF No. 28 at 1. But the Commission's power to appear to defend this lawsuit, *see* 52 U.S.C. §§ 30106(c), 30107(a)(6), which it declined to exercise, ECF No. 28-3 at 5, is distinct from the requirement that, when the FEC "terminates its proceedings, it shall make public such action," 11 C.F.R. § 111.20(a). Because the FEC has not notified the administrative parties of any dismissal or made MUR 7486's record public, there has been no dismissal, and this case is not moot.[1]

C. 45Committee's Request for Further Delay Is Unwarranted

The Court should also decline to allow 45Committee's irrelevant FOIA appeal and the subsequent FOIA litigation it intends to pursue to delay this case. Absent any evidence of an actual dismissal, 45Committee speculates that the redacted June 2020 certification may reflect a split vote by the Commission on whether to proceed with enforcement. ECF No. 28-1 at 2. 45Committee asserts that such a "split vote," if it occurred, would constitute "a dismissal," *id.* at 4, and thus the Court should hold this case in abeyance while it seeks to obtain the vote record via FOIA. As discussed above, however, if the Commission had dismissed CLC's administrative complaint, that information would already be public, and 45Committee's FOIA request (and any appeal) would be unnecessary.

Further, this Court has already heard and implicitly rejected 45Committee's argument that a split vote constitutes dismissal. During the Court's consideration of Plaintiff's Renewed Motion

[1] In contrast, in a similar recent suit, CLC challenged the FEC's delay in a different enforcement matter, and because the FEC failed to defend the suit, the Clerk entered default against the agency. FEC Resp. to Ord. to Show Cause at 1-2, *Campaign Legal Ctr. v. FEC*, No. 20-cv-588-BAH (July 20, 2020), ECF No. 19. Several weeks later, however, the agency "voted four-to-zero to dismiss CLC's administrative complaint" and—even though the agency still had not appeared in the litigation—it posted the MUR file on its website and "CLC received notification of the Commission's dismissal decision." *Id.* at 3. CLC then voluntarily dismissed its case. *Id.*

for Default Judgment, the Institute for Free Speech ("IFS") filed a brief as *amicus curiae*. *See* ECF No. 23. In that brief, IFS conceded that "[n]either FECA nor the Commission's regulations specify that a matter terminates when commissioners tie 3-3 on whether reason exists to believe the respondent violated the Act." ECF No. 23 at 4. IFS further admitted that until four Commissioners vote to close the MUR file, "the case is not officially closed," and thus could be reconsidered by the Commission after attempts to build consensus. ECF No. 23 at 7, 9-10. Nevertheless, IFS also incorrectly claimed, as 45Committee does here, that "a tie vote . . . ends the complaint's adjudication" as "a *practical* matter." *Id.* at 4 (emphasis added); *cf.* ECF No. 28-1 at 2 (claiming that "a split vote . . . in *practical* terms . . . terminat[es] the complaint") (emphasis added). To determine if there had in fact been a tie vote in this MUR, IFS argued that "the Court should order the FEC to produce its administrative record in this case before even considering a default judgment." ECF No. 23 at 13. Yet, after considering IFS's brief, ECF No. 24 at 2 n.1, the Court entered default judgment against the FEC without ordering the agency to disclose any votes. *See* ECF Nos. 24-25.

Finally, to the extent the FEC's FOIA response indicates that the agency might have taken *some* action short of a dismissal on CLC's administrative complaint 19 months ago, such action does not moot this case. *Contra* ECF No. 28-1 at 6. As this Court has recognized, "[w]here the issue before the Court is whether the agency's failure to act is contrary to law, the Court must determine" not whether the FEC acted *at all*, but "whether the [FEC] has acted 'expeditiously.'" ECF No. 24 at 14 (quoting *Common Cause*, 489 F. Supp. at 744). Courts have therefore found FEC delays to be both justiciable and contrary to law "even when the agency took some action." *Id.* (citing cases). This is true even where the "some action" was a split vote on whether to find reason to believe. *See, e.g.*, *id.* (citing *Giffords v. FEC*, No. CV 19-1192-EGS (D.D.C.)).

For example, in *Giffords v. FEC*, a court in this District recently held that the FEC's three-year delay in adjudicating the plaintiff's administrative complaints was contrary to law (and thus, justiciable), even though the unredacted record revealed *four* split Commission votes on whether to find reason to believe. *See* Unredacted Mem. Op. at 9-10, 31, *Giffords v. FEC*, No. 19-cv-1192-EGS (D.D.C. Oct. 14, 2021), ECF No. 88. In addition to these failed votes, the FEC had also "rejected a motion to close the enforcement matters, and thereby dismiss Plaintiff's administrative complaints." *Id.* at 10; *see also id.* 30 (same). Accordingly, the district court found that the FEC's "failure to take any action on the matters during the past 7 months" was contrary to law, retained jurisdiction until the FEC "takes *final* agency action with respect to Plaintiff's administrative complaints," and ordered the FEC to conform with its judgment within 30 days. *Id.* at 30-31 (emphasis added). The FEC failed to do so, and the court then issued an order confirming the plaintiff's right to sue the administrative respondents pursuant to 52 U.S.C. § 30109(a)(8)(C), *see* Order, *Giffords v. FEC*, No. 19-cv-1192-EGS (D.D.C. Nov. 1, 2021), ECF No. 75. Here, even assuming the Commission held a split vote in June 2020, the response to 45Committee's FOIA request demonstrates that it has taken no additional action since. Far from being moot, this case, like *Giffords*, is ripe for an order declaring CLC's right to sue 45Committee.

In sum, 45Committee's proposed *amicus* brief is irrelevant because it merely confirms what CLC has already demonstrated: that the FEC has failed to conform to the Court's Default Judgment Order, and that CLC is entitled to a private right of action under 52 U.S.C. § 30109(a)(8)(C). The matters asserted therein do not show that this case is moot, as movant claims, nor do they justify any further delay.

II. THE PROPOSED BRIEF IS UNDESIRABLE BECAUSE ITS BELATED TIMING PREJUDICES CLC AND THE PUBLIC WITH FURTHER DELAY

45Committee's motion fails to satisfy LCvR 7(o)(2) for the independent reason that it is not "desirable." If granted, 45Committee's belated requests to file an *amicus* brief (which rehashes failed arguments made by previous *amici*), and for this case to be held in abeyance pending an irrelevant FOIA appeal and FOIA litigation, would prejudice CLC and the public through unnecessary delay. *See, e.g.*, *Microsoft Corp.*, 2002 WL 649383, at *1 (denying leave because "further participation by movants as amici curiae will serve only to delay proceedings," while "echo[ing] arguments that have been briefed already for the Court by other entities").

45Committee's proposed *amicus* brief is a delayed response to issues that have been ripe since the outset of this case. Under 45Committee's (incorrect) theory of mootness, this case would have been mooted by any vote held by the FEC during the three-and-a-half years since CLC first filed its administrative complaint, regardless of the outcome, and in fact became moot "19 months ago" at the same time that the FEC declined to defend this lawsuit. ECF No. 28 at 1. At that time, in June 2020, CLC had a pending motion for default judgment, ECF No. 11, which 45Committee did not attempt to oppose. After being denied without prejudice in March 2021, ECF No. 17, CLC renewed its default judgment motion in May 2021, ECF No. 18, and 45Committee also did not attempt to oppose that motion. Instead, 45Committee waited until 11 days after the Court granted default judgment against the Commission on November 8, 2021, ECF No. 24, to finally file the FOIA request that spurred its filing of the instant *amicus* motion. 45Committee offers no explanation for this egregious delay.

While 45Committee offers no justification for its delay, its belated motion and requested abeyance (which could run years pending movant's planned FOIA litigation), if granted, would prejudice CLC and the public in at least four ways. First, this Court has already determined that

the FEC's three-year delay in acting on CLC's complaint is contrary to law. But placing this case in abeyance would not only allow the FEC to continue to delay in acting on CLC's administrative complaint, it would also incentivize 45Committee to drag out the FOIA litigation indefinitely to preclude CLC from exercising its private right of action.

Second, further delay would only compound the harm to the public caused by the FEC's existing delay. As the Court has explained, one of the reasons why the FEC's delay is contrary to law is that "public confidence in our electoral system can also be undermined when alleged violations of law remain unaddressed" particularly where "problems alleged in connection with one Presidential election were not looked into before the next." ECF No. 24 at 17.

Third, 45Committee's requests would further extend the informational injuries CLC is suffering because of the FEC's delay and 45Committee's refusal to comply with federal registration and reporting requirements for political committees. *See* ECF No. 24 at 6-9.

Finally, allowing 45Committee to delay CLC's private right of action indefinitely would damage CLC's ability to successfully prosecute the civil action it is statutorily entitled to bring against 45Committee to enforce campaign finance laws, given the risk that, with the passage of yet more time, evidence will spoil and witness recollections will fade. *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982) (explaining that "delay in filing suit may have resulted in a loss of evidence or witnesses").

For these reasons, the proposed brief is undesirable under LCvR 7(o)(2), and the motion for leave to submit that brief should be denied on this ground alone.

CONCLUSION

For the foregoing reasons, the Court should deny 45Committee's motion for leave, and grant Plaintiff's motion for an order declaring the FEC failed to conform, *see* ECF 26, 26-1.

Dated: January 21, 2022

Respectfully submitted,

/s/ *Kevin P. Hancock*

Adav Noti (DC Bar No. 490714)
Mark P. Gaber (DC Bar No. 988077)
Kevin P. Hancock*
Molly E. Danahy (DC Bar No. 1643411)
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200
anoti@campaignlegalcenter.org
mgaber@campaignlegalcenter.org
khancock@campaignlegalcenter.org
mdanahy@campaignlegalcenter.org

* *Admitted* pro hac vice. *Barred in the State of New York. Not admitted to the D.C. Bar. Practicing under the supervision of Adav Noti, member of the D.C. Bar*.