ORAL ARGUMENT NOT YET SCHEDULED

Nos. 22-5164, 22-5165

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,

Plaintiff-Appellee

v.

FEDERAL ELECTION COMMISSION,

Defendant.

45COMMITTEE, INC.,

Movant-Appellant.

On Appeal from the United States District Court
for the District of Columbia, No. 1:20-cv-00809
Before the Honorable Amy Berman Jackson

PLAINTIFF-APPELLEE CAMPAIGN LEGAL CENTER'S RESPONSE IN OPPOSITION TO MOTION TO HOLD APPEALS IN ABEYANCE

Adav Noti
Kevin Hancock
Molly E. Danahy
Orion de Nevers
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200

mdanahy@campaignlegalcenter.org

Counsel for Plaintiff-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulations, and Constitutional Provisions

Other Authorities

INTRODUCTION

The Court should deny nonparty-Appellant 45Committee, Inc.'s ("45Committee") motion for an abeyance. Nearly four years ago, Appellee Campaign Legal Center ("CLC") filed an administrative complaint with the Federal Election Commission ("FEC" or "Commission") alleging that 45Committee—an organization named explicitly in reference to the 45th President of the United States—spent tens of millions of dollars to elect Donald Trump to the presidency in 2016 but did not register as a political committee, as required by the Federal Election Campaign Act ("FECA"). A year and a half later, after the FEC failed to act on the administrative complaint, CLC sued the FEC for unreasonable delay.

Over the next twenty-one months the FEC failed to appear or defend itself, the Clerk entered default against the FEC, CLC twice moved for default judgment, the Court entered default judgment against the Commission, the Commission failed to act on the complaint within thirty days as ordered by the court, and, having exhausted its remedies against the Commission, CLC moved for an order declaring that the FEC had failed to conform and acknowledging its right to file a citizen suit against 45Committee. Another month passed. Then, 45Committee sought leave to appear for the first time, as *amicus curiae*, and asked the court to dismiss or hold the lawsuit in abeyance based on the same arguments it seeks to raise on appeal here: that the Commission had conformed with the Court's November 2021 order by

holding a vote on the matter in June 2020—a vote that resulted in no action being taken on the administrative complaint. The district court rejected 45Committee's arguments and declared that the FEC had failed to comply with its order to act on the administrative complaint. CLC filed suit against 45Committee the next day.

Another week elapsed. 45Committee then filed a post-judgment motion to intervene for purposes of appeal. Exercising its broad discretion, the district court correctly denied the motion—filed four months after default judgment was entered against the FEC and over two years after the case began—as untimely. 45Committee appealed.

45Committee now seeks to hold its own appeals in abeyance while it pursues two collateral lawsuits against the FEC, based on a legal theory the court below described as "far-fetched." 45Committee contends that if it is successful in its collateral litigation, no appeals are taken therefrom, it obtains the evidence it seeks, and the evidence shows what 45Committee claims it will show, then 45Committee will move for dismissal in CLC's citizen suit. Then, if the citizen suit is dismissed and CLC does not appeal, 45Committee will drop these appeals and this Court will never need to address whether 45Committee's post-judgment attempt to intervene was timely.

The Court should decline to place this case on hold to allow time for 45Committee's quixotic pursuit of a hypothetical future dismissal of these appeals—

an eventuality that is speculative at best and calculated at worst. No ruling in any of the collateral matters referenced by 45Committee in its motion for abeyance could assist this Court in determining whether the district court correctly concluded that 45Committee's post-judgment motion to intervene was untimely. Further, 45Committee is unlikely to succeed on its appeals and thus an abeyance is unwarranted. Finally, while 45Committee will suffer no harm if these appeals proceed, an abeyance would substantially prejudice CLC and the public interest by further delaying a remedy for 45Committee's nearly four-year old violations of federal campaign finance laws.

The motion should be denied.

BACKGROUND

I. Legal Background

A. The FEC's Bipartisan Structure

The FEC administers FECA, which regulates the financing of federal election campaigns. *See* 52 U.S.C. § 30101 *et seq.* By structuring the FEC to have six Commissioners, no more than three of whom may be affiliated with the same political party, *id.* § 30106(a)(1), "Congress designed the Commission to ensure that every important action it takes is bipartisan." *Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). Thus, "[t]he statute clearly requires that for any official Commission decision there must be at least a 4-2

majority vote. To ignore this requirement would be to undermine that carefully balanced bipartisan structure which Congress has erected." *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988).

B. Administrative Complaints Before the FEC

Any person may file a complaint with the FEC alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). At the initial stage of the enforcement process, the Commission may decide, "by an affirmative vote of 4 of its members," to investigate the allegations of an administrative complaint by finding "reason to believe" that a FECA violation has occurred. *Id.* § 30109(a)(2). If at least four Commissioners vote to find reason to believe, the complaint proceeds to the next stage of the enforcement process. *Id.*

If the Commission fails to obtain four votes to find reason to believe, including when the Commission deadlocks 3-3, "such votes do not automatically result in a dismissal or termination of the administrative matter." FEC's Mot. for Summ. J., *45Committee v. FEC*, No. 1:22-cv-00502-ABJ (D.D.C. June 24, 2022), ECF 18 at 10. Instead, the administrative matter remains pending before the Commission for further deliberation until bipartisan consensus to move forward or dismiss is achieved. As the FEC explained, "the Commission has often held one reason-to-believe or probable-cause-to-believe vote that does not pass, only to determine in a later vote that there was in fact reason to believe or probable cause to believe on the

same claim." *Id.* at 11 (citing, *e.g.*, Matters Under Review 7350, 7351, 7357, and 7382 (Cambridge Analytica LLC, *et al.*) (after initially failing to find reason to believe, reversing course more than three months later and finding reason to believe on the same claims)). Thus, "FEC administrative enforcement matters are terminated only through a vote to close the file." *Id*. at 10; *see also id.* ("[O]ther than accepted motions that explicitly close MUR files, other votes have not historically functioned as dismissals or automatically terminated agency proceedings.").

Thus, under FECA, a Commission "vote to dismiss" an administrative complaint, 52 U.S.C. § 30109(a)(1), is distinct from a vote to find "reason to believe" a violation has occurred, *id.* § 30109(a)(2). Dismissal of an administrative complaint through a "vote[] to close [the] enforcement file," 11 C.F.R. § 5.4(a)(4), requires only a majority Commission vote under FECA, *id.* § 30106(c), although the FEC's general policy is to treat dismissal like "other actions taken by the Commission [that] . . . require[] the vote of at least four Commissioners," 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) ("FEC Enforcement Policy"). Last year, the Commission declined to adopt a proposed Statement of Policy that would change the above procedures and automatically dismiss an administrative matter upon an unsuccessful reason-to-believe vote absent an affirmative vote to keep the file open. *See* Draft Statement of Policy Regarding Closing the File at the Initial Stage in the

Enforcement Process at 1 (Apr. 1, 2021) (proposing that, upon a failed reason-to-believe vote, the "file will be closed unless the Commission votes to keep the file open");[1] Certification, Agenda Doc. No. 21-21-A (Apr. 22, 2021) (noting proposal was not adopted).[2]

When a Commission majority votes to dismiss a matter and to close the file, the FEC must notify the administrative complainant and respondent of the dismissal under 11 C.F.R. § 111.20(a). *See Doe v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019) ("When the Commission ended its investigation and closed the file, it 'terminate[d] its proceedings' within the meaning of 11 C.F.R. § 111.20(a)."). Although FECA prohibits the Commission from revealing the details of any ongoing enforcement matter absent consent from the respondent, *see* 52 U.S.C. § 30109(a)(12)(A); 11 C.F.R. § 111.21(a)-(b), once the Commission has "voted to close [the] enforcement file," the enforcement case is terminated and its investigatory materials must be publicly disclosed, 11 C.F.R. § 5.4(a)(4); *see also* 11 C.F.R. § 111.20(a) (providing that if the FEC "terminates its proceedings, it shall make public such action and the

[1] *See* https://www.fec.gov/resources/cms-content/documents/mtgdoc-21-21-A.pdf.

[2] *See* https://www.fec.gov/resources/cms-content/documents/Vote-Draft-Statement-of-Policy-Initial-Stage-in-the-Enforcement-Process-4-22-21.pdf.

basis therefor no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent").[3]

C. Lawsuits Challenging FEC Failures to Act

Any administrative complainant "aggrieved . . . 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 seek review in the District Court for the District of Columbia, 52 U.S.C. § 30109(a)(8)(A), and the court "may declare that the dismissal of the complaint or the failure to act is contrary to law," *id.* § 30109(a)(8)(C). In a suit challenging the FEC's "failure to act," the FEC's exclusive jurisdiction over the alleged violations ends once 120 days pass without FEC action on the administrative complaint, and the issue before the court is whether the agency has "fail[ed] to take *timely* final action" on the administrative complaint. *Citizens for Percy '84 v. FEC*, No. 1:84-cv-2653, 1984 WL 6601 at *2-4 (D.D.C. Nov. 19, 1984) (emphasis added); *see also Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980) ("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.'").

[3] To date, CLC has not received any notification from the FEC stating that the agency has dismissed its administrative complaint against 45Committee. 45Committee also does not claim to have received any such notification.

To determine whether the agency's failure to take timely final action is contrary to law, "the court should apply the factors set forth in *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980), and *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984)." *FEC v. Rose*, 806 F.2d 1081, 1084 (D.C. Cir. 1986); *see also, e.g.*, ECF 24 at 9-18 (applying *Common Cause* and *TRAC* factors); *Giffords v. FEC*, No. 1:19-cv-1192-EGS, 2021 WL 4805478, at *3-4 (D.D.C. Oct. 14, 2021) (same); Order at 2, *Campaign Legal Ctr. v. FEC*, No. 21-cv-0406-TJK (D.D.C. Mar. 25, 2022), ECF 16 (same). Even if the FEC has taken "some action" on an administrative complaint, that does not mean that it has acted reasonably. ECF 24 at 15; *see also e.g.*, *Citizens for Percy '84*, 1984 WL 6601, at *4. When confronted by alleged agency action during the pendency of delay litigation, courts must determine whether the alleged actions indicate that the Commission is acting expeditiously under the relevant factors. *See, e.g.*, *Democratic Senatorial Campaign Comm.* ("*DSCC*") *v. FEC*, No. Civ.A. 95-0349, 1996 WL 34301203 at *4, *9 (D.D.C. Apr. 17, 1996) (applying *Common Cause* and *TRAC* factors in finding FEC's delay contrary to law even though the FEC voted to find reason to believe and began an investigation six months after suit was filed).

D. FECA Citizen Suits

If the district court declares that the Commission's "failure to act is contrary to law, [it] may direct the Commission to conform with such declaration within 30

days." 52 U.S.C. § 30109(a)(8)(C). If the FEC fails to conform within 30 days as directed, "the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." *Id.* Such lawsuits are often referred to as FECA "citizen suits." *See, e.g., Campaign Legal Ctr. v. Iowa Values*, No. 1:21-CV-389-RCL, 2021 WL 5416635, at *8 (D.D.C. Nov. 19, 2021).

Due to the Commission's bipartisan structure, it has regularly failed to achieve the votes necessary to pursue or dismiss administrative complaints, to defend itself against lawsuits challenging FEC dismissals or delay, and to appeal adverse court decisions against the agency.[4] As the court below acknowledged, "[t]his state of affairs is no secret." ECF 37 at 8 n.2. Rather, "[t]his situation, as one might expect, occurs with some frequency," *Citizens for Responsibility & Ethics in Washington v. FEC*, 923 F.3d 1141, 1142 (D.C. Cir. 2019) (Griffith, J., concurring), and is the natural outgrowth "of the FEC's unique structure and enacting legislation," ECF 37 at 8 n.2. Congress anticipated this result and included the "citizen-suit provision" in

[4] *See, e.g.*, Statement of Commissioners Bauerly and Weintraub regarding failure of the Commission to seek rehearing en banc in *EMILY's List v. FEC*, https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/EmilysList2009-10-22.pdf; Statement on *CREW v. FEC*, No. 16-CV-259 by Chair Caroline C. Hunter and Commissioner Matthew S. Petersen, at 1 (Sept. 6, 2018), https://www.fec.gov/resources/cms-content/documents/Statement_of_Chair_Hunter_and_Commissioner_Petersen_in_CREW_v._FEC.pdf (explaining that "[f]our Commissioners must agree to an appeal," even when some Commissioners believe "there is compelling evidence of serious errors by the court").

FECA to "legislate[] a fix" for the fact that "partisan deadlocks were likely to result" due to the Commission's divided six-member structure. *Citizens for Responsibility & Ethics in Washington v. Am. Action Network*, 410 F. Supp. 3d 1, 6 (D.D.C. 2019), *reconsidered on other grounds*, No. 1:18-cv-945-CRC, 2022 WL 612655 (D.D.C. Mar. 2, 2022); *see also*, *Campaign Legal Ctr. v. Iowa Values*, 2021 WL 5416635, at *8 ("[T]he citizen suit provision was created in anticipation of FEC's regulatory breakdown or inaction . . . Congress foresaw potential issues with the FEC's process and added a safeguard to protect the First Amendment rights of complainants.").

II. Procedural Background

Nearly four years ago, on August 23, 2018, CLC filed an administrative complaint with the FEC alleging that 45Committee violated FECA by failing to register as a political committee with the FEC after spending tens of millions of dollars to influence the 2016 presidential election. *See* ECF 1-1. The FEC did not act on CLC's complaint within 120 days, and on March 24, 2020, CLC filed suit against the FEC for unlawful delay under 52 U.S.C. § 30109(a)(8)(A). ECF 1.

Two months later, on May 28, 2020, the clerk entered default against the FEC after the Commission failed to answer the complaint or otherwise appear to defend the lawsuit. ECF 10. On June 1, 2020, CLC moved for default judgment against the FEC, a motion it renewed on May 5, 2021. ECF 11; ECF 18.

The court granted CLC's renewed motion for default judgment on November 8, 2021. *See* ECF 24. Applying the *Common Cause* and *TRAC* factors, the court found that CLC's allegations against 45Committee are credible, that leaving the alleged violations unaddressed would undermine public confidence in the electoral process, and that the FEC's delay was contrary to law. *Id.* at 9, 24. "[P]ursuant to 52 U.S.C. § 30109(a)(8)(C)," the court ordered the FEC to "act on the complaint within thirty days," and then retained jurisdiction over the case "until the agency acts on plaintiff's administrative complaint." ECF 25. The FEC failed to conform to the court's order within 30 days and CLC filed a motion on December 9, 2021, requesting an order declaring that the FEC had failed to conform. ECF 26.

On January 7, 2022—two months after default judgment was entered and a month after the FEC's deadline to conform had elapsed—45Committee moved for leave to file an *amicus curiae* brief "suggesting mootness in light of newly discovered material." ECF 28-1. 45Committee asserted that CLC's motion for an order declaring that the FEC had failed to conform was moot because it had obtained a "heavily redacted" Freedom of Information Act ("FOIA") production from the FEC allegedly "showing that on June 23, 2020, the FEC voted on the underlying administrative complaint at issue in this case." *Id.* at 1. As it does here, 45Committee speculated that the redacted vote certifications likely contain a deadlocked reason-to-believe vote, which, in its view, would be tantamount to the FEC dismissing the

complaint. *Id.* at 2, 4. It claimed that purported dismissal would constitute agency action, satisfying the court's order that the agency act on the complaint and rendering the case moot. *Id.* at 1-2. In the alternative, 45Committee asked that, "[a]t a minimum, the Court [] hold Plaintiff's Motion in abeyance until the Court has an opportunity to review the Commission's unredacted voting records." *Id.* at 7. Although the court allowed 45Committee to file its *amicus* brief, the court clarified that 45Committee "is not a party to this case, so to the extent the brief . . . seeks affirmative relief . . . it is improper." *See* Jan. 24, 2022 Minute Order.

On April 21, 2022, the court granted CLC's motion for an order declaring that the FEC had failed to conform to the default judgment order. ECF 32 at 1 ("Apr. 21 Order"). The court characterized the suggestion in 45Committee's *amicus* brief that the redacted vote certification contained a failed reason to believe vote as "pure speculation" and concluded that 45Committee's arguments were otherwise "not convincing and [did] not justify further delay." *Id.* at 4, 6. In addition, the court explained that if the agency had in fact dismissed the complaint, "the results" would have been "publicly announced" and the parties notified—it would "not take a FOIA request to learn what transpired." *Id.* at 5. The court then affirmed CLC's right to sue 45Committee under section 30109(a)(8)(C). *Id.* at 6. CLC filed suit against 45Committee the next day. Compl., *Campaign Legal Ctr. v. 45Committee Inc.*, No. 1:22-cv-01115-APM (D.D.C. Apr. 22, 2022), ECF 1.

One week later, 45Committee moved to intervene in this case for purposes of appealing the court's April 21 Order. *See* ECF 33. The court denied 45Committee's motion. ECF 37. In doing so, the court concluded that 45Committee's motion was untimely, based on a "far-fetched" theory, and at risk of "seriously prejudic[ing]" CLC "given how long this relatively simple case has been pending." *Id.* at 10-12. Indeed, given the delay in resolving CLC's FEC complaint, the court took the step of "add[ing] its voice to those suggesting that it may well be time for Congress to act" to remedy the FEC's dysfunction. *Id.* at 8-9 n.2. Three weeks later, 45Committee noticed these appeals. ECF 39, 40.

Throughout this time, 45Committee continued to seek the unredacted vote certifications from the FEC under FOIA. After the FEC denied 45Committee's administrative appeal challenging the agency's redactions, 45Committee filed a FOIA lawsuit in this district on February 25, 2022. Compl., *45Committee v. FEC*, Civ. No. 1:22-502-ABJ (D.D.C. Feb. 25, 2022), ECF 1. The FEC moved for summary judgment on June 24, 2022. Def. FEC's Mot. for Summ. J., *45Committee v. FEC*, Civ. No. 1:22-502-ABJ (D.D.C. June 24, 2022), ECF 18. In its motion, the Commission explained that it had properly redacted the records under the deliberative process privilege because "[c]losure of the file has for decades constituted a predicate for a matter to be considered finally resolved," and "there has been no successful vote to close the file in MUR 7486 . . . ." *Id.* at 1, 18.

45Committee then filed an Administrative Procedure Act ("APA") lawsuit against the FEC on June 17, 2022, seeking to obtain the same unredacted vote certifications and alleging that the FEC's longstanding practice of requiring four votes to close the administrative file violates the APA. Compl., *45Committee v. FEC*, No. 1:22-cv-01749 (D.D.C. June 17, 2022), ECF 1.

The same day it filed its APA case, 45Committee appeared in and moved to stay CLC's citizen suit pending this appeal and its FOIA and APA lawsuits against the FEC. Mot. of Def. 45Committee to Stay Proceedings at 1-2, *Campaign Legal Ctr. v. 45Committee*, No. 1:22-cv-01115-APM (D.D.C. June 17, 2022), ECF 17. The district court denied the stay motion on July 18, 2022, finding that 45Committee had failed to establish the requisite pressing need for an indefinite stay of the citizen suit, and that "[a]dding an indefinite amount of time on top of the four years that has already passed" since CLC first filed its administrative complaint against 45Committee "would be highly prejudicial to [CLC]." Order at 1-2, *Campaign Legal Ctr. v. 45Commitee*, No. 1:22-cv-01115-APM (D.D.C. Jul. 18, 2022), ECF 23.

LEGAL STANDARD

This Court will not hold a case in abeyance where the "[t]he petitioner has not demonstrated that a ruling [in another pending matter] could resolve any of the issues presented in the current petition for review." *Riffin v. Surface Transp. Bd.*, No. 17-1161, 2018 WL 1902521, at *1 (D.C. Cir. 2018) (citing *Basardh v. Gates*, 545 F.3d

1068, 1069 (D.C. Cir. 2008)). In evaluating a motion for an abeyance, the Court "may also take account of the traditional factors in granting a stay, including the likelihood that the movant will prevail when the case is finally adjudicated." *Basardh*, 545 F.3d at 1069. The other "traditional" stay factors include whether the movant will suffer irreparable injury absent a stay, whether a stay would "substantially injure the other parties interested in the proceeding," and "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 425-26 (2009).

ARGUMENT

The Court should deny 45Committee's motion to hold these appeals in abeyance. First, 45Committee has failed to demonstrate that a ruling on any of the claims it has pending in other courts will resolve the issues presented in these appeals. As such, the Court should deny the motion on this ground alone. *Riffin*, 2018 WL 1902521, at *1. Second, 45Committee is unlikely to succeed on the merits of its appeals. Third, 45Committee has not identified any harm, irreparable or otherwise, that it would suffer from litigating its own appeals in the usual course, while the requested abeyance would result in further needless delay that would significantly prejudice CLC and the public interest.

I. 45Committee Cannot Show that a Ruling on its Collateral Claims Could Resolve these Appeals.

45Committee has failed to demonstrate that a ruling in any of the cases for which it seeks to hold these appeals in abeyance "could resolve any of the issues

presented" in these appeals. *Riffin*, 2018 WL 1902521, at *1. The threshold question in these appeals of whether district court correctly determined that the post-judgment motion to intervene below—based on information 45Committee had in its possession for months before filing its motion—was untimely. That question turns on facts and legal arguments that are at issue in this case, not in 45Committee's FOIA or APA proceedings, nor in CLC's citizen suit against 45Committee. 45Committee makes no attempt to explain how any of these proceedings will inform, much less resolve, this threshold question. As such, the Court should deny the requested abeyance. *Id.*

II. An Abeyance is Unwarranted Because 45Committee Is Unlikely to Succeed on its Appeals.

45Committee is unlikely to succeed on the merits before this court, and thus an abeyance is not warranted. *See Basardh*, 545 F.3d at 1069; *Nken*, 556 U.S. at 425. These appeals are ripe for summary affirmance and dismissal because the district court did not abuse its discretion in finding 45Committee's motion untimely and this court lacks jurisdiction over a nonparty's appeal. As such, CLC intends to file a motion for summary affirmance and to dismiss the appeal by the July 25, 2022 deadline for dispositive motions.

45Committee makes no attempt to demonstrate that these appeals are likely to succeed. As CLC will explain fully in its forthcoming motion, the district court did not abuse its discretion in denying 45Committee's motion to intervene as

untimely. "A motion for intervention after judgment will usually be denied where a clear opportunity for pre-judgment intervention was not taken." *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (citation omitted). Here, 45Committee did not file its motion to intervene until two years after the case was filed, during which time the FEC failed to appear, the court entered default judgement against the Commission, 45Committee obtained the evidence it relies on to justify its intervention here, 45Committee appeared as an *amicus* below, the FEC failed to conform to the default judgment order, the case was terminated, and CLC filed its citizen suit against 45Commitee. Setting aside every other opportunity 45Committee had to intervene, it *still* waited four months after obtaining the vote certification that allegedly shows the FEC acted on CLC's administrative complaint before seeking to intervene, and only did so after the case had terminated.

Because the district court did not abuse its discretion in denying 45Committee's motion to intervene, 45Committee remains a nonparty and cannot appeal the merits of the case. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."). 45Committee is therefore unlikely to succeed on appeal and the Court should deny the motion for an abeyance. *See, e.g.*, *Riffin*, 2018 WL 1902521, at *1 (denying motion to hold appeal in abeyance and summarily denying petition for review).

Nor is 45Committee any more likely to succeed on its appeal of the merits, even assuming *arguendo* that the Court has jurisdiction to hear it. Because the FEC has not notified either 45Committee or CLC that it has initiated an investigation or closed the file in the underlying matter, the redacted vote certifications almost certainly reflect an unremarkable situation: that the FEC failed to act on Plaintiffs' administrative complaint because it could neither muster the votes to enforce FECA nor dismiss the complaint. *See supra* pp. 4-7. As the district court correctly noted below, 45Committee's contrary theory that the Commission is voting to dismiss administrative complaints but concealing that fact in violation of federal law and agency regulations is at best "far-fetched." ECF 37 at 10; *see also* ECF 32 at 5 (noting that when the agency acts on an administrative complaint "it does not take a FOIA request to learn what transpired" because the respondent is notified when an investigation is commenced, and votes to dismiss and the bases therefor are made public once they occur).

III. The Balance of the Equities Weighs Against Abeyance.

The balance of the equities weighs against abeyance. 45Committee identifies no harm, irreparable or otherwise, it would suffer if it had to litigate the appeals it chose to file absent an abeyance. Instead, 45Committee merely contends that it would be "efficient" for this Court to hold these matters in abeyance until some unspecified future date at which point 45Committee may determine—based on an

entirely conjectural and highly speculative series of events—that it no longer wishes to pursue these appeals, and therefore this Court will not need to consider the issues raised herein. 45Committee's Motion to Hold Appeals in Abeyance at 13 ("Mot."). 45Committee does not contend that the *resolution* of any of the other pending proceedings "may entirely, or partially, moot" these appeals—rather 45Committee contends that depending on the success or failure of its legal theory in other proceedings, it may later decide to voluntarily moot this proceeding by dismissing its appeals. *Id*. This is not "a paradigmatic basis for abeyance," Mot. at 14, it is simply litigation strategy couched as equitable doctrine. The Supreme Court has regularly declined to endorse such arguments in other equitable contexts. *Cf. U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) (declining to provide equitable relief to party that voluntarily mooted its claim); *Sanders v. United States*, 373 U.S. 1, 17 (1963) (finding that equitable doctrines do not "require[] the court[] to tolerate needless piecemeal litigation, to entertain collateral proceedings whose only purpose is to vex, harass, or delay").

While 45Committee would suffer no harm in proceeding with these appeals in the normal course, yet more delay here would substantially prejudice CLC and the public interest by exacerbating the harms already ongoing because of 45Committee's continuing failure to fully disclose its 2016 federal campaign finance activity. As recognized by the court below, those harms include (1) the harm to

"public confidence in our electoral system" which can be "undermined when alleged violations of law remain unaddressed," ECF 24 at 17, and (2) the harm to CLC's informational interests as an election watchdog that relies on full and accurate FEC reporting, *see id.* at 9 (finding that CLC has informational standing). Continued delay will also harm CLC's ability to successfully prosecute its suit against 45Committee given the risk that evidence will spoil and witness recollections will fade, *see Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982).

Indeed, the prejudice to CLC of further delay is so apparent that two separate courts in three different opinions have denied prior attempts by 45Committee to delay the ultimate resolution of the violations alleged by CLC in its administrative complaint and its citizen suit against 45Committee. *See* ECF 32 at 6 (rejecting 45Committee's arguments as amicus that the FEC had acted on CLC's complaint and was concealing that fact, because they were "not convincing and do not justify further delay"); ECF 37 at 11 (finding that CLC "would be seriously prejudiced by the belated intervention given how long this relatively simple case has been pending; the amount of time that has gone by while plaintiff's motions for default judgment were pending; and the length of time that has elapsed since the actions that led to the underlying administrative complaint."); *see id.* (finding that "[n]one of these delays have been due to plaintiff's lack of diligence or effort"); Order, *Campaign Legal*

Ctr. v. 45Committee, No. 1:22-cv-01115-APM (D.D.C. Jul. 18, 2022), ECF 23 (denying 45Committee's motion to stay CLC's citizen suit pending resolution of 45Committee's FOIA and APA lawsuits against the FEC because "the prospect of a dismissal at some future date cannot override the injury Plaintiff would suffer from an indefinite stay. . . . Plaintiff has been pressing its matter, first administratively before the FEC and then in litigation before this District Court, since August 2018. Adding an indefinite amount of time on top of the four years that already has passed would be highly prejudicial to Plaintiff.") (internal citations omitted). The substantial prejudice to CLC of an abeyance outweighs any interest 45Committee has in waiting to decide whether it wants to proceed with its appeals. The Court should deny the motion.

CONCLUSION

45Committee has failed to demonstrate that a ruling in its pending collateral proceedings would affect the outcome of these appeals, in which it is unlikely to succeed on the merits. Because 45Committee has not demonstrated any potential harm from proceeding with its own appeals, and an abeyance would substantially prejudice CLC and the public interest, the Court should deny the motion for an abeyance.

Date: July 21, 2022

Respectfully submitted,

/s/ *Molly E. Danahy*

CAMPAIGN LEGAL CENTER
Adav Noti
Kevin P. Hancock
Molly E. Danahy
Orion de Nevers
1101 14th Street, NW, St. 400
Washington, D.C. 20005
(212) 736-2000
anoti@campaignlegalcenter.org
khancock@campaignlegalcenter.org
mdanahy@campaignlegalcenter.org
odenevers@campaignlegalcenter.org

Counsel for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1), this document contains 5061 words.

2. This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style.

/s/ Molly E. Danahy
Molly E. Danahy

CERTIFICATE OF SERVICE

The undersigned certifies that I filed the foregoing document using this Court's CM/ECF system, which effected service on all parties, on July 21, 2022.

/s/ *Molly E. Danahy*
Molly E. Danahy

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Campaign Legal Center, *Plaintiff-Appellee,* v. Federal Election Commission, *Defendant* 45Committee, Inc., *Movant-Appellant*.	Nos. 22-5164, 22-5165

CAMPAIGN LEGAL CENTER'S RULE 26.1
DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, Appellee Campaign Legal Center makes the following disclosure:

Campaign Legal Center is a 501(c)(3) nonpartisan, nonprofit organization, that has no parent corporation, does not issue stock, and in which no publicly held corporation has any form of ownership interest.

Date: July 21, 2022

Respectfully submitted,

/s/ *Molly E. Danahy*

CAMPAIGN LEGAL CENTER
Adav Noti
Kevin P. Hancock
Molly E. Danahy
Orion de Nevers
1101 14th Street, NW, St. 400
Washington, D.C. 20005
(212) 736-2000
anoti@campaignlegalcenter.org
khancock@campaignlegalcenter.org
mdanahy@campaignlegalcenter.org
odenevers@campaignlegalcenter.org

Counsel for Plaintiff-Appellee