ORAL ARGUMENT NOT SCHEDULED

No. 22-5336

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER
and CATHERINE HINCKLEY KELLEY,
Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellant.

HILLARY FOR AMERICA and CORRECT THE RECORD,
Intervenors.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-02336-JEB
Before the Honorable James E. Boasberg

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF MOTION TO DISMISS

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GLOSSARY OF ABBREVIATIONS

CLC	Campaign Legal Center
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

SUMMARY OF ARGUMENT

On December 8, 2022, the district court granted summary judgment in favor of plaintiffs Campaign Legal Center ("CLC") and Catherine Hinckley Kelley, finding that the Federal Election Commission's "dismissal of Plaintiffs' complaint was contrary to law" and remanding the matter for "the Commission to conform with this decision within 30 days." Add. 20, 21.

At no point in the more than three years of litigation preceding that ruling did the FEC appear to defend its dismissal. Instead, respondents Correct the Record and Hillary for America intervened to do so. Upon remand, the FEC chose to take no action to conform with the district court's order, conveying that decision in a December 21, 2022 motion to stay the remand order indefinitely pending an appeal.

Despite filing its motion to stay almost two weeks into its thirty-day conformance window, the FEC did not seek an expedited ruling, nor any other emergency relief, and predictably, the district court had yet to rule when the thirty-day period drew to a close. Accordingly, after the conformance period expired, CLC exercised its right under the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8)(C), to file an independent private action against respondents, seeking to compel them to report the undisclosed in-kind contributions resulting from their coordinated spending in the 2016 elections. *See* Compl., *CLC v. Correct the Record & Hillary for America*, No. 23-cv-75 (D.D.C. Jan. 10, 2023).

As even a cursory review of this history confirms, the FEC's forfeiture of the arguments it now seeks to raise has been willful and complete, and its appeal should be dismissed. It offers no authority that would suggest otherwise, nor any other sound basis for rescuing the agency from this predicament of its own making.

Indeed, instead of justifying its failure to appear below, the FEC's opposition exposes another infirmity in its appeal, revealing that the FEC's third issue on appeal is a collateral attack on CLC's standing in its suit against Correct the Record and Hillary for America. *See* FEC Opp'n 6-7 & n.2. But this Court has already confirmed plaintiffs' informational standing here, and CLC's private action *is a different case*. The FEC cannot escape the effects of its deliberate failure to preserve its rights in *this* action by challenging the district court's jurisdiction over another one.

The FEC otherwise devotes much of its opposition, *see id.* at 14-18, to combating the charge that its appeal is not just forfeited, but moot. It is both. The December 8 order has no continuing effect on the FEC's rights and responsibilities given the agency's failure to conform on remand and its termination of the administrative proceedings underlying this suit. The only remaining "interest" the FEC asserts here is in guarding the "exclusivity" of its "enforcement authority" by blocking CLC's duly filed private action. *Id*. at 14-15. But this illusory affront to the Commission's "authority" is not a cognizable legal injury. The FEC's appeal should be dismissed as both forfeited and moot.

ARGUMENT

I. The FEC has cited no authority excusing the forfeiture of its arguments.

It is well-settled that when a party "did not argue the point before the District Court," this Court "generally inquire[s] no further into the matter." *United States v. Dillon*, 738 F.3d 284, 293 (D.C. Cir. 2013). The FEC has identified no case that supports a departure from this rule, much less one that would allow a willfully defaulting party to mount a last-ditch appeal only after the result below was not to its liking.

1. The FEC argues that it has not forfeited all of its arguments because the district court "plainly passed upon two of the three issues the Commission seeks to raise on appeal," *i.e.*, whether the controlling Commissioners' rationale rested on impermissible statutory and regulatory interpretations and whether their evaluation of the record was arbitrary and capricious. FEC Opp'n 6. But the two cases the FEC cites did not consider a deliberate and sustained default comparable to the FEC's here, but rather involved disputes among active litigants about the degree to which a single issue had in fact been "pressed" or "passed upon" by the lower court. *See id.* (citing *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009); *United States v. Williams*, 504 U.S. 36, 41 (1992)). The FEC has identified no case that considered, much less permitted, an immediate appeal to this Court by

a party that presented no legal arguments below and effectively remained in default throughout the district court proceedings.

The FEC also does not cite any authority to support its attempt to avoid a finding of forfeiture by stepping into the shoes of intervenors. *See* FEC Opp'n 7. And its attempt to piggyback on another party's arguments is particularly misplaced here, given that intervenors have chosen *not* to appeal the December 8 order, but instead to litigate these issues in CLC's ongoing private action.[1]

2. As to the third question the FEC seeks to raise on appeal, the Commission concedes it was neither raised by intervenors nor considered by the district court; instead, it claims that it is a question of "subject-matter jurisdiction" and consequently cannot be forfeited. FEC Opp'n 4, 6. But the problem is that the FEC is not contesting the district court's jurisdiction to hear *this* case—which this Court has already confirmed, *CLC v. FEC*, 31 F.4th 781 (D.C. Cir. 2022), and the FEC claims not to dispute. *See* FEC Opp'n 6 n.2. Instead, the FEC is purporting to challenge a different court's jurisdiction to hear a different case, namely, CLC's private action,. *See id.* (citing Compl. ¶¶ 79-82, *Correct the Record*, No. 23-cv-75,

[1] Nor is it apparent that the FEC's and intervenors' interests are aligned such that any identity between these parties can be assumed. *See, e.g.*, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("[B]y treating general alignment as dispositive, the district court went against the weight of authority in this Circuit."); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977).

and arguing that CLC "overreach[ed]" in terms of standing by "assert[ing] not only reporting violations but also a separate count for the making and accepting of excessive contributions"). Insofar as the FEC wishes to contest another court's jurisdiction to hear certain counts of CLC's complaint in the private action, it must do so in *that* case.

The FEC attempts to sidestep this obvious infirmity by framing the issue as whether the district court here "lacked jurisdiction to authorize a private suit based on allegations of violations of FECA's contribution limits." *Id.* But the district court's remand order did not "authorize" CLC's private right of action. Instead, CLC's right to bring a private action accrued by operation of statute upon the Commission's failure to conform with the December 8 order within thirty days. FECA does not require that the complainant seek an additional court "authorization" at this point. *See* 52 U.S.C. § 30109(a)(8)(C) (providing that a court "may declare that the [FEC's] dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days, *failing which the complainant may bring, in the name of such complainant, a civil action* to remedy the violation involved in the original complaint") (emphasis added). Unsurprisingly, the FEC does not identify any part of the remand order that "authorizes" a private action, nor any other order doing so. It is clear that the "third question" the FEC

identifies for appeal does not arise from the December 8 order or concern *this* case at all.

3. Finally, the FEC suggests that disposing of the Commission's appeal on a motion to dismiss is procedurally inappropriate because forfeiture is non-jurisdictional, so a merits panel must consider whether to hear the arguments the FEC failed to make below. But it cites no case supporting this point, and acknowledges that *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1086 (D.C. Cir. 1984), indicated the opposite. FEC Opp'n 18-19 & n.7. And unlike the cases it references—which typically involved forfeiture of only a subset of the issues raised by the parties—the FEC presented no arguments whatsoever below, and thus has preserved nothing for a merits panel to consider. Furthermore, as plaintiffs have argued, *see infra* Part III, this appeal is also moot, providing a separate jurisdictional ground for its dismissal.

II. No "exceptional circumstances" justify allowing this appeal to proceed.

The FEC has failed to show any of the "exceptional circumstances" that this Court has found may warrant consideration of arguments that were not raised below. *See, e.g.*, *Air Florida*, 750 F.2d at 1085.

Although the Commission claims this case "involves serious legal questions about the metes and bounds of the FEC's internet exemption," FEC Opp'n 14 (citing Add. 26), it does not suggest that these questions arise from "an intervening change"

or "uncertainty in the state of the law." *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992). And even insofar as any open "legal issues" remain, they can be litigated in CLC's ongoing private action.

The FEC also cannot demonstrate that dismissing its appeal would work "a miscarriage of justice." *Id.* The Commission sat out this litigation for years, and concedes that its initial failure to appear was due to a 2019 vote declining to authorize defense of suit, not to incapacity or a lack of quorum. *See* FEC Opp'n 9. The FEC attempts to excuse its absence by arguing that entry into the case was not possible until an August 2022 "change in the composition of its presidential appointees," *id.* at 1, 10, but it elides the several other "decisional junctures" between June 2019 and August 2022 when new appointees joined the Commission and it nevertheless failed to appear, *see* Pls.' Mot. to Dismiss 13-14 n.1.

Even accepting that August 2022 marked a determinative "change" to the Commission's membership causing it to "switch[] from default to defense," FEC Opp'n 10, this still does not explain why the FEC failed to participate in summary judgment briefing following this Court's ruling in *CLC*, 31 F.4th 781—which entirely postdated the new Commissioner's arrival. And even after the Commission finally decided to appear on December 21, it still made no attempt to present arguments to the district court or move for reconsideration.

The FEC nonetheless claims that given the "unusual circumstances" of this case, hearing its forfeited appeal will not "incentivize gamesmanship" nor cause "a detrimental effect on the administration of justice." FEC Opp'n 9. But it provides no grounds to hope that the "gamesmanship" and political infighting on the Commission that precipitated its three-year default is likely to abate in the future. There is every reason to believe that the agency's dysfunction will recur—particularly if the FEC is permitted to jump in and out of litigation as its internal politics shift, without penalty and regardless of the delay or prejudice it causes. *See* Pls.' Mot. to Dismiss at 12 (noting FEC's acknowledgment that its appeal would cause delay).

The FEC also attempts to wave away its obligation to first move the district court to reconsider the December 8 order by claiming that "a post-judgment motion" would have been "a fruitless exercise and a waste of resources." FEC Opp'n 12. But the same would presumably be true with respect to any default judgment; the lower court's possible reluctance to reconsider a recent decision cannot, in itself, excuse a party from first presenting its arguments to the district court in the ordinary course.

Finally, the Commission complains that "the natural result" of plaintiffs' argument is that no party could "appeal[] an adverse judgment after defaulting without seeking relief in the district court," only to concede in the next sentence that, while this Court has not addressed the issue, some Circuits demand exactly that. *Id.*

at 11. In cases where a default occurred through mistake or inadvertence, or where it was infeasible for the defaulting party to timely move the district court, greater solicitude might be warranted. No such exceptional circumstances exist here.

III. This appeal is moot.

It is undisputed that the FEC elected not to conform with the district court's December 8 remand order, and that the order imposes no further obligations on the Commission with respect to the administrative matter underlying this case. Accordingly, although the FEC's precise arguments are still unclear at this stage, its appeal appears to be moot. At minimum, the FEC's failure to identify any continuing injury to its interests underscores that dismissing its appeal as forfeited would work no "miscarriage of justice."

Not only does the December 8 order impose no further obligations on the FEC with respect to plaintiffs' administrative complaint, it also does not affect any authoritative Commission position or policy. The district court considered a Statement of Reasons issued by only two Commissioners. Add. 7. This minority opinion has no precedential effect or even relevance beyond the administrative matter underlying this case.

The FEC concedes that "the underlying controlling Commissioner rationale is not binding in a later agency proceeding," but nonetheless maintains that the "District Court's opinion has continuing legal effect." FEC Opp'n 14. The

Commission fails, however, to answer the critical question: a "continuing legal effect" on *what*? During the remand period, the December 8 order had the "legal effect" of directing the Commission to conform, but the Commission declined to do so. Upon expiration of the conformance period and the filing of a citizen suit, that directive to conform ceased to have any practical significance.

Indeed, the only continuing "effect" of the remand order that the FEC posits is its supposed impingement on the Commission's "exclusive enforcement authority" under FECA. *Id.* at 14-15. But the remand order did not limit or "undermine" the Commission's authority. *Id*. at 14. On the contrary, it returned to the Commission an administrative proceeding that it had closed, thus *renewing* the Commission's authority to take further enforcement action. What ended the Commission's "enforcement authority" was its own decision not to use it on remand. And it was FECA that then authorized CLC to "bring . . . a civil action to remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C).

At base, the Commission's apparent goal is simply to claw back CLC's duly filed private action. But an agency has no valid "legal interest" in blocking lawsuits to which it is not a party, particularly when such suits pose no conceivable future obligation on the agency and arise by direct operation of the agency's organizing

statute.[2] And insofar as the FEC wishes to challenge subject-matter jurisdiction in CLC's private action, it has appeared in the wrong case and must vindicate this "interest" elsewhere.

CONCLUSION

For the foregoing reasons, the Commission's appeal should be dismissed.

Dated: February 23, 2023

Respectfully submitted,

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[2] The FEC cites *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951, 952-53 (D.C. Cir. 1998), for the proposition that this appeal is not moot. FEC Opp'n 17 & n.5. But that stemmed from a delay case, where the private action was filed while the Commission was still considering the plaintiff's administrative complaint. Although the initiation of a private action following a delay case might divest the FEC of its "authority" over an open enforcement matter, no such "injury" occurs when a private action is predicated on a dismissal case. CLC's private action has no effect on the FEC's "enforcement authority" over an administrative matter the FEC has already chosen, twice, not to pursue.

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 27(d)(1)(E)(2) because the brief contains 2,578 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2023, I electronically filed this reply with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

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