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

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| CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant,<br><br>HILLARY FOR AMERICA and CORRECT THE RECORD,<br><br>Defendant-Intervenors. | Civil Action No: 1:19-cv-02336-JEB |

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO FEDERAL ELECTION COMMISSION'S MOTION FOR STAY PENDING APPEAL**

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## INTRODUCTION

Plaintiffs Campaign Legal Center ("CLC") and Catherine Hinckley Kelley brought this lawsuit on August 2, 2019 to challenge the FEC's dismissal of their administrative complaint against defendants-intervenors Correct the Record ("CTR") and Hillary for America ("HFA") for illegal coordination in the 2016 election.

Plaintiffs' administrative complaint was filed in October 2016, but the Commission waited almost three years to vote on whether to find "reason to believe" FECA was violated, ultimately deadlocking 2-2 on that question and then dismissing the complaint in June 2019. Also in June 2019, the Commission affirmatively voted against authorizing defense of suit in the event this dismissal was challenged under FECA's judicial review provision, 52 U.S.C. § 30109(a)(8), as of course, it was.

The FEC has since remained in persistent default throughout this litigation, and still has yet to file a single pleading defending its decision despite having numerous occasions—and more than three years—to do so. While the FEC sat by, plaintiffs and defendant-intervenors vigorously litigated through three rounds of dispositive motions, as well as an intervening appeal to the D.C. Circuit with full briefing and oral argument, and this Court has now issued five written rulings.

Only weeks *after* the Court issued the fifth of those rulings on December 8, 2022, when it held the dismissal contrary to law and remanded the matter to the FEC, did the Commission deign to make its first appearance. And to what end? To notice an immediate appeal and move for the extraordinary relief of a stay pending appeal, with nary an explanation or even acknowledgement of its long absence in these proceedings.

It has now been well over six years since plaintiffs filed their initial administrative complaint. At this point, further compounding that delay at the behest of a party that could not be

bothered to participate in any proceedings before this Court would cause inordinate prejudice to plaintiffs. But to add insult to injury, the justifications the FEC proffers for this eleventh-hour attempt to stay the Court's December order are founded on legal error.

First, the D.C. Circuit lacks jurisdiction to hear the FEC's noticed appeal on which the request for a stay is predicated. And even as the FEC claims a stay is necessary to preserve its right to appeal, it also concedes it *could* pursue a later appeal after failing to conform with the December order, completely undercutting its claims of irreparable injury. The FEC's decision to sit on its rights for years, only to then seek a premature appeal without ever attempting to present its defense to this Court, is transparent "gamesmanship," *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 98 (D.D.C. 2011), and cannot justify a stay here.

Moreover, the FEC has shown no likelihood of success on the merits of its noticed appeal; on the contrary, its proposed arguments rely on misstatements of the record and errors of law. The chief issue the FEC identifies for appeal is that this Court failed to consider "whether the controlling group's decision reasonably applie[d]" the relevant regulations, FEC Mot. to Stay at 8, ECF No. 73, when it is clear on the face of this Court's written opinions that it indeed undertook such an analysis at length. And even if the controlling Commissioners' rationale actually were consistent with the regulatory text or past precedent, it still fails if it "compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986). As this Court recognized, it did. There is no sound basis for the FEC's preemptive appeal, much less for the extraordinary relief it seeks. Its motion should be denied.

## HISTORY OF THE PROCEEDINGS

On October 6, 2016, plaintiffs filed an administrative complaint alleging that CTR made, and HFA accepted, unreported in-kind contributions in the form of coordinated expenditures, in

violation of FECA's reporting requirements and contribution restrictions. AR038-49 ¶¶ 87-111. Although the FEC's Office of General Counsel ("OGC") recommended that the Commission find reason to believe that respondents violated FECA, *see* AR085, 105, on June 4, 2019, almost three years later, the FEC's then-four Commissioners deadlocked 2-2 on whether to find reason to believe that CTR or HFA had violated FECA. They subsequently voted 4-0 to close the file, dismissing the complaint. AR372-75.

Plaintiffs timely filed this action on August 2, 2019, challenging the dismissal of their FEC complaint under 52 U.S.C. § 30109(a)(8) and the Administrative Procedure Act ("APA") as contrary to law. Compl., ECF No. 1. At the time plaintiffs filed their legal complaint, the two controlling Commissioners who voted against a reason-to-believe finding still had not issued a Statement of Reasons for their vote. Their Statement would not issue for several additional weeks—not until 18 days after the statutory period for seeking judicial review had expired. Plaintiffs subsequently amended and expanded their complaint to address the belated issuance of the controlling Statement, making clear that they were also challenging the controlling Commissioners' construction of the relevant regulations, *see* 11 C.F.R. §§ 100.26, 109.20, 109.21, under the APA as contrary to FECA, *see* Am. Compl. ¶¶ 109-113, ECF No. 15.

On June 4, 2019, the FEC voted on whether to authorize the defense of the controlling Commissioners' dismissal of plaintiffs' administrative complaint, but failed to garner the requisite four votes. The FEC has not since appeared in or presented any defenses to plaintiffs' action. CTR and HFA, however, sought and were granted the right to intervene as defendants. *CLC v. FEC*, 334 F.R.D. 1 (D.D.C. 2019). Intervenors have defended the Commission's dismissal at every stage of this litigation.

On February 4, 2020, intervenors moved to dismiss under Rules 12(b)(1) and 12(b)(6) for

lack of standing and failure to state a claim. On June 4, 2020, this Court denied the motion, holding that CLC had "proven its standing" and had stated a claim for relief. ECF No. 33 at 17. In considering the parties' subsequent cross-motions for summary judgment on the merits, this Court "reverse[d] field" on plaintiffs' Article III standing, and dismissed their FECA claim without addressing the merits. ECF No. 46 at 5, 8; ECF No. 45.[1]

Plaintiffs timely appealed. The FEC did not seek to appear in the appeal. On April 19, 2022, the Court of Appeals held that plaintiffs had established standing by "demonstrat[ing] a quintessential informational injury," *CLC v. FEC*, 31 F.4th 781, 784 (D.C. Cir. 2022), and remanded the case for "further proceedings consistent with this opinion," *id*. at 793.

Upon remand, plaintiffs and intervenors again briefed the "merits" of the Commission's rationale for dismissal, as well as additional jurisdictional arguments raised by intervenors. On December 8, 2022, this Court granted summary judgment in favor of plaintiffs, holding that "[b]ecause the Commission's decision was based on an impermissible interpretation of the Act and was otherwise arbitrary and capricious, its dismissal of Plaintiffs' complaint was contrary to law." Mem. Op. at 19, ECF No. 66. It remanded the matter for "the Commission to conform with this decision within 30 days." *Id*. at 20.

Thirteen days later, on December 21, the FEC appeared for the first time in this matter, noticed its appeal of this Court's December 8 order and opinion, and filed this motion. The Commission has not sought to set aside its default in district court, nor to move for reconsideration of this Court's order. Briefing on this motion is due to conclude on January 11, 2022—after the FEC's deadline to conform.

[1] After briefing on whether plaintiffs could maintain their APA claim even if they lacked standing with respect to their FECA claim, this Court answered that question in the negative on February 12, 2021. ECF No. 52.

## LEGAL STANDARD

A stay pending appeal is "an intrusion into the ordinary processes of administration and judicial review and accordingly is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 427 (2009). Instead, "granting a stay pending appeal is always an extraordinary remedy, and the moving party carries a heavy burden to demonstrate that the stay is warranted." *Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc.*, 241 F. Supp. 3d 91, 97 (D.D.C. 2017) (quoting *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 988, 990 (D.D.C. 2006)).

A movant seeking a stay pending appeal must meet "stringent requirements." *CREW v. FEC (Crossroads II)*, 904 F.3d 1014, 1016 (D.C. Cir. 2018) (per curiam). It has the burden of demonstrating: (1) "[the applicant] is likely to succeed on the merits"; (2) "the applicant will be irreparably injured absent a stay"; (3) "issuance of the stay will [not] substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Nken*, 556 U.S. at 434. The FEC's "motion for a stay fails every prong of the showing." *Crossroads II*, 904 F.3d at 1017.

The first two factors "are the most critical." *Nken*, 556 U.S. at 434. "It is not enough that the chance of success on the merits [is] better than negligible," *id.*; it must be "substantial," *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *see also Crossroads II*, 904 F.3d at 1019 (a movant's failure to demonstrate a likelihood of success on the merits is "an arguably fatal flaw for a stay application"). Likewise, a movant seeking a stay must show more than the mere "possibility of irreparable injury," *Nken*, 556 U.S. at 434 (internal quotation marks and citation omitted): "[i]rreparable harm must be 'both certain and great[,]' and 'actual and not theoretical.'" *Crossroads II*, 904 F.3d at 1019 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). "Where there is a low likelihood of success on merits, a movant

must show a proportionally greater irreparable injury, in order to warrant the 'extraordinary remedy' of a stay." *M.M.V. v. Barr*, 459 F. Supp. 3d 1, 4 (D.D.C. 2020) (citation omitted).

Further, where a party seeks an indefinite stay, as here, the stay "must be supported by a balanced finding that such need overrides the injury to the party being stayed." *Belize Soc. Dev. Ltd. v. Belize*, 668 F.3d 724, 732-33 (D.C. Cir. 2012) (internal quotation marks omitted). A court may not "order[ ] a stay 'of indefinite duration in the absence of a pressing need.'" *Id.* (quoting *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)).

**ARGUMENT**

This application does not present those rare circumstances justifying the extraordinary remedy of a stay.

First, the Commission fails to identify an irreparable injury justifying the requested stay—or any injury at all. Its principal argument is that a stay is necessary to permit an appeal of this Court's December 8 order and opinion, but in fact, the opposite is true: an appeal at this juncture cannot be taken because the D.C. Circuit lacks jurisdiction to hear it. Even if the FEC could show appellate jurisdiction to review a non-final remand order, it has forfeited any arguments it might make on appeal by declining to present them here first. The FEC chose to sit on its rights for the duration of this lawsuit—it cannot now leapfrog this Court entirely, where it has filed no pleadings and presented no arguments. The Commission also complains that had it not filed the noticed appeal, its failure to conform with the Court's order would trigger a private right of action under 52 U.S.C. § 30109(a)(8)(C)—but the FEC is not injured by a consequence of its own inaction as specifically prescribed in the agency's governing statute.

Second, even if the Commission were to navigate these jurisdictional and procedural hoops, it has shown no likelihood of success on the merits of its proposed appeal. The first

argument it identifies for appeal is not only unpersuasive but also founded on clear errors of law. The Commission posits that this Court erred because it failed to examine whether an agency action that is contrary to its governing statute can be saved by its hypothetical fidelity to the text of its regulations. *See* FEC Mot. at 7. Even if this argument did not depend on a misstatement of the record in this case, it contradicts the most basic principles of administrative law review. An agency may not interpret its regulations in a manner contrary to its governing statute even if this interpretation is allegedly consistent with past agency precedents: an interpretation that "so materially rewrite[s] and recast[s] plain statutory text do[es] not improve with age." *CREW v. FEC*, 971 F.3d 340, 356 (D.C. Cir. 2020) (quoting *Crossroads II*, 904 F.3d at 1018).

Finally, the prejudice to plaintiffs posed by an indefinite delay in these proceedings is severe and unjustified. The Commission affirmatively chose not to appear in this case for over three years, a fact it does not even acknowledge, much less attempt to excuse; the Commission now seeks to make a premature and untimely leap directly to the Court of Appeals; and the delay it seeks—which comes after more than *six* years in which it has declined to act on plaintiffs' administrative complaint—is open-ended and substantial. Lastly, it is well recognized that the public interest is served by full disclosure of campaign contributions and spending, as plaintiffs seek here, *Crossroads II*, 904 F.3d at 1019; the FEC seeks to limit this disclosure.

## I. The FEC Has Not Shown Irreparable Harm Justifying an Indefinite Stay.

The FEC has not articulated any injury, much less an irreparable harm, that it will suffer absent a stay. First, the Commission has forfeited any arguments it intends to make on appeal by virtue of its default in this case; it still has yet to file a single pleading, much less present its substantive arguments for this Court's review in the first instance. At a minimum, its failure to appear and defend this case until weeks after the December order was entered undermines its

assertion of irreparable harm. Second, even if an appeal *could* lie from a party that failed to enter any pleadings, offer any arguments, or defend a case in any way, the D.C. Circuit lacks jurisdiction to hear the FEC's noticed appeal because the FEC seeks to challenge a non-final order. Third, the Commission cannot claim to be "injured" by the prospect of a private right of action accruing under 52 U.S.C. § 30109(a)(8)(C); an event resulting from the normal and intended operation of the FEC's own governing statute is not an encroachment on its jurisdiction.

**A. The FEC has forfeited the arguments it now seeks to make on appeal by failing to appear before or present its defenses to this Court.**

The noticed appeal is unavailing because the FEC effectively seeks to present its defense in the Court of Appeals in the first instance, after failing to appear before this Court for more than three years. As in *Baker*, 810 F. Supp. 2d at 98, a stay pending appeal is not warranted given that defendant chose "to 'sit back and wait,' seeking to vacate the judgment after . . . years of litigation . . . because the judgment 'was not to their liking.'"

The FEC affirmatively chose not to defend itself in this litigation. And the FEC has neither acknowledged nor excused its de facto default. Nor could it: because the FEC's default was "willful," a "set-aside would prejudice plaintiff[s]", and its proposed defense to this action is not "meritorious." *Combs v. Nick Garin Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). The Commission has also made no attempt to introduce its arguments or defenses for this Court's review, not even by moving for reconsideration of the December order. But "[i]t is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *Potter v. District of Columbia*, 558 F.3d 542, 550 (D.C. Cir. 2009) (internal quotation marks and citation omitted); *see also Keepseagle v. Perdue*, 856 F.3d 1039, 1054 (D.C. Cir. 2017). "Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below." *District of Columbia v. Air Fla., Inc.*, 750 F.2d

1077, 1084-85 (D.C. Cir. 1984) (internal quotation marks and citation omitted). Allowing such a "practice," as the FEC urges here, would mean "almost every case would in effect be tried twice." *Id*.

At the very least, the FEC's much-belated appearance in this case seriously undercuts its claims of imminent, irreparable harm. The Commission sat out this case for years, by choice, and its default cannot be excused by circumstances outside of its control, such as any lack of a quorum. *See infra* note 8. The harms the Commission alleges in support of its motion were apparently not so acute as to motivate an appearance in this matter over the past three years. And the Commission's assertion of irreparable harm is further undermined by the fact that it waited two weeks after issuance of the order to file this motion, meaning it is unlikely to be resolved prior to the expiration of the FEC's 30-day deadline to conform.[2]

The FEC claims the deprivation of a party's right to appeal constitutes a per se injury—but this claim presumes the litigant has preserved any arguments for appeal. The FEC here has not.

**B. This motion is premature because the Circuit Court lacks jurisdiction over the Commission's proposed appeal.**

The Commission's motion must further be denied because it is predicated on the premature appeal of a non-final order, over which the D.C. Circuit lacks jurisdiction.

The party invoking appellate jurisdiction bears the burden of establishing it. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). The jurisdiction of a Court of Appeals extends only to "appeals from . . . *final* decisions of the district courts." 28 U.S.C. § 1291 (emphasis added).

[2] Indeed, in conferring on this motion, plaintiffs' counsel offered to stipulate to a limited extension of the deadline to conform to allow for briefing of this motion, particularly in light of the intervening holidays, but the FEC, inexplicably, declined.

"It is well settled that, as a general rule, a district court order remanding a case to an agency for significant further proceedings is not final." *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000) (internal quotation marks and citation omitted); *see also Global Crossing Telecomms., Inc. v. FCC*, 605 Fed. Appx. 4, 5 (D.C. Cir. 2015) ("[T]he paradigmatic non-final order is one remanding a case for significant further proceedings."); *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656 (D.C. Cir. 2013) (this rule "promotes judicial economy and efficiency by avoiding the inconvenience and cost of two appeals: one from the remand order and one from a later district court decision reviewing the proceedings on remand").

Accordingly, as the D.C. Circuit has repeatedly held, "district court orders remanding the action to the [FEC] are not final, appealable orders." *CREW v. FEC (Am. Action Network II)*, No. 18-5136, 2018 WL 5115542, at *1 (D.C. Cir. Sept. 19, 2018) (per curiam) (citing *Pueblo of Sandia*, 231 F.3d at 880); *see also CREW v. FEC (Am. Action Network I)*, No. 16-5300, 2017 WL 4957233, at *1 (D.C. Cir. Apr. 4, 2017) (per curiam); *Democratic Nat'l Committee v. FEC*, No. 99-5123, 1999 WL 728351, at *1 (D.C. Cir. Aug. 4, 1999) (per curiam) (dismissing appeal of district court order remanding to the Commission because order was not final). The FEC itself has moved (successfully) to dismiss an analogous appeal on the ground of non-finality. *See* FEC Mot. to Dismiss for Lack of Jurisdiction, at 10-13, *Am. Action Network I*, Nos. 16-5300 & 16-5343 (D.C. Cir. Dec. 8, 2016); *Am. Action Network I*, 2017 WL 4957233, at *1.

While there is a limited exception whereby a remand order may be considered final when "the agency to which the case is remanded seeks to appeal and it would have no opportunity to appeal after the proceeding on remand," *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989), that exception does not apply here. The exception arises when "a district court directs an agency to proceed under a certain legal standard" and leaves the agency "no choice but

to conduct its proceedings and to render its decision pursuant to that standard." *Id.* The FEC *attempts* to invoke this exception, *see* FEC Mot. at 3, but it fails to specify what legal standard the Court's order impermissibly imposed.

Nor could it. The Court was clear that it "leaves it to the expert Commission on remand to sketch the bounds of the internet exemption and to more fully analyze the facts before it." Mem. Op. at 19. The only direction the Court gave was that the "exception must have real bounds" and "the clear evidence of coordination . . . shall inform the Commission's analysis." *Id.* at 20. *See also id.* at 14 ("The Court leaves the task of defining the exemption's precise parameters to the expert agency, so long as it is consistent with the principles expressed here."). But this hardly imposes a standard on the Commission. These instructions simply echo the Court's major findings, that: (1) the FEC's "massive expansion" of the internet exemption is contrary to law, *see id.* at 10-14; and (2) the controlling Commissioners "largely (and unreasonably) ignored" "substantial evidence" of "systemic coordination," *see id.* at 14-17.

Directing the Commission to comply with these findings is consistent with the Court's role in reviewing agency action under the APA, *see, e.g.*, *Pueblo of Sandia*, 231 F.3d at 881 ("[I]f the record does not support the agency's decision, then the court must remand to the agency for additional investigation or explanation"); it in no way commandeers the agency's analysis on remand or foreordain the outcome of its proceedings. The Court expressly left it to the "expert Commission" to reconsider the facts and disposition of this case, and the parameters of the internet exemption. *See, e.g.*, *id.* (finding remand order non-final where the district court remanded for further proceedings and did not direct the outcome of those proceedings); *cf. County of Los Angeles v. Shalala*, 192 F.3d 1005, 1012 (D.C. Cir. 1999) (finding remand order final where, "on remand [the agency] would have to interpret paragraph 5(A)(iv) as the district court has construed it").

The FEC itself acknowledges that it has a range of options here. It notes that on remand it is free to conform, or not, to the Court's order, or to dismiss the administrative complaint on other grounds. *See* FEC Mot. at 3-4 ("Should the Commission elect to conform to the Court's order . . ."; "Even if the Commission elected to dismiss the administrative complaint on other grounds . . ."; "Should the Commission elect not to conform, . . ."). It also tacitly concedes that if the Commission fails to conform to this Court's order within 30 days or otherwise defaults, it could then appeal the order. *See* FEC Mot. at 4 ("Should the Commission elect not to conform, . . . that would trigger the plaintiffs' right to bring a private lawsuit. . . . At a minimum, that would result in duplicative proceedings as the private right of action advanced in this Court while the Court of Appeals considered the Commission's case.").[3] That the FEC might not like the possible collateral effects of its own failure to conform, *see infra* at 13-15, does not mean that the Court's order impermissibly binds the Commission on remand.

The Court's order, based on its clear language, *see* Mem. Op. at 14, 19, is "not final[] in character," because it "leaves the core dispute unresolved, and simply turns it back for further proceedings by the agency, after which it 'may well return [to court] again,'" *Am. Hawaii Cruises v. Skinner*, 893 F.2d 1400, 1403 (D.C. Cir. 1990) (citation omitted); *see also, e.g.*, *Schaerr v. U.S. Dep't of Justice*, No. 20-5065, 2020 WL 5642042, at *1 (D.C. Cir. July 8, 2020) (dismissing appeal

[3] The FEC thus effectively admits that there is no "de facto deprivation of the basic right to appeal" threatened here. FEC Mot. at 3. And the cases the Commission cites in support of its argument instead reveal the weakness of its putative "injury." In *Republican Nat'l Committee v. Pelosi*, No. 1:22-cv-00659-TJK, 2022 WL 1604670, at *4 (D.D.C. May 20, 2022), for instance, the court noted that, absent an injunction pending appeal, the case would become moot before the D.C. Circuit could hear the appeal. *See also Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) (granting stay of disclosure order in FOIA case "because disclosure of the documents in question will render any appeal moot"). This case, however, presents the opposite scenario. Because this Court's December 8 order is not appealable until it becomes final, the Commission's noticed appeal is not in danger of becoming moot, but rather is premature.

where district court's remand order did not resolve "core dispute" in the case). Further, and critically, the FEC acknowledges the possibility of a later appeal should it fail to conform. *See* FEC Mot. at 4. This is therefore not a case in which the agency would have "no opportunity to appeal after the proceeding on remand." *Occidental Petroleum*, 873 F.2d at 330. And given the absence of appellate jurisdiction *now*, the FEC cannot meet its burden to show that a stay pending appeal is warranted.

**C. The Commission is not harmed by operation of its own governing statute**.

Although the Commission attempts to justify a stay as necessary to preserve its ability to appeal this Court's December 8 order, it is clear that its chief concern is "los[ing] exclusive civil enforcement jurisdiction over the case" by triggering plaintiffs' statutory right to bring a private lawsuit if the FEC declines to conform with the Court's order. FEC Mot. at 1-2. But the Commission cannot claim to be harmed by the consequences of its own actions, nor by its governing statute operating precisely as Congress intended. The possibility that a private right of action will accrue just as FECA expressly provides, 52 U.S.C. § 30109(a)(8)(C), cannot work an "injury" on the FEC's enforcement authority. *See* FEC Mot. at 1-2.

It is clear that Congress's intent in enacting § 30109(a)(8)(C) was to couple the FEC's "exclusive" enforcement authority with private citizen lawsuits in cases of agency inaction. *See CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 6 (D.D.C. 2019) (noting that Congress included the "citizen-suit provision" in FECA to "legislate[] a fix" for the fact that "partisan deadlocks were likely to result" given the Commission's divided composition), *reconsidered on other grounds*, No. 18-cv-945-CRC, 2022 WL 612655 (D.D.C. Mar. 2, 2022); *see also CLC v. Iowa Values*, No. 1:21-cv-389-RCL, 2021 WL 5416635, at *7 (D.D.C. Nov. 19, 2021) ("[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.").

But the initiation of a citizen suit does not deprive the FEC of any right or authority, nor compel it to take any particular action, enforcement or otherwise. Instead, the Commission's enforcement authority over an administrative complaint terminates when it dismisses the complaint and subjects itself to possible judicial review. *See* 52 U.S.C. § 30109(a)(8)(A); *cf. In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 543 (D.C. Cir. 1980) (noting, in the context of agency delay, that § 30109(a)(8) limits the FEC's exclusive enforcement authority). If a Court determines the agency acted contrary to law and remands the matter to the Commission, then the Commission again has the opportunity to reconsider its decision or otherwise resolve the proceedings. *Id*. Importantly, the limited remand procedures do not compel the FEC to take any action against respondents or any other person or entity. If the FEC chooses not to conform, only then is 52 U.S.C. § 30109(a)(8)(C) triggered. The accrual of the private right of action itself does not deprive the FEC of any authority to act or decline to act.

The Commission also complains that refusing to grant a stay now may result in "duplicative proceedings," FEC Mot. at 4, but judicial economy is a concern of the courts, not an "interest" of the FEC—even putting aside the credibility of the FEC's late-breaking alarm at possible inefficiency after its years of silence in this litigation.[4] Moreover, the possibility of "duplicative"

[4] The FEC argues that such duplicative proceedings would "undoubtedly cause confusion in the regulated community," and points, for support, to *FEC v. Nat'l Republican Senatorial Committee*, 966 F.2d 1471 (D.C. Cir. 1992). There, the FEC conformed to a district court order rejecting its rationale for dismissal of an administrative complaint, and the subsequent enforcement action was later dismissed, giving deference to the views of the original controlling Commissioners, *see id.* at 1476-78. But this case does little to help the FEC here, as it merely proves that, on appeal, the D.C. Circuit may still defer to the views of the original controlling Commissioners and, thus, there is no basis for the Commission's worry about losing such deference. Further, the "regulated community" is here represented by the intervenors, who have demonstrated that they are more than

or inconsistent rulings is inherent to the statutory scheme that conditions a private right of action on an antecedent judicial judgment that an FEC dismissal was contrary to law. But this was clearly Congress's intent. *Am. Action Network*, 410 F. Supp. 3d at 6. The appeal proposed by the FEC—even if it were timely or meritorious, and it is neither, as explained more fully below—thus does not present any unique danger of duplication, and in any event, would not justify the indefinite stay requested here.

## II. The FEC Cannot Show Any Likelihood of Success on the Merits Because its Proposed Appeal is Based on Errors of Law and Fact.

In addition to demonstrating no pressing need for a stay, the FEC offers only a halfhearted argument that its noticed appeal is likely to succeed on the merits, asserting that this Court "arguably" failed to conduct an element of the "contrary to law" analysis, FEC Mot. at 7, which may "present[] a serious legal question," *id.* at 6. The Commission's reticence is understandable given that its proposed merits arguments are based on gross misstatements of this Court's own decisions and clear errors of administrative law.

### A. This Court did not commit legal error by failing to consider a *post hoc* rationale upon which the controlling Commissioners did not rely.

The FEC's chief argument is that the Court erred by focusing on whether the controlling Commissioners' decision was consistent with the statute, and "*arguably* fail[ed] to consider whether the controlling Commissioners' reasoning was permissible under the text of its regulations." FEC Mot. at 8 (emphasis added). Even putting aside this statement's inversion of the precedence of statute over regulations for the purpose of administrative review, the claim is demonstrably false. In considering whether the controlling Statement of Reasons was contrary to law, this Court *did* review the text of the relevant regulations, *see* Mem. Op. at 3-4, and analyzed

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capable of defending their interests in this matter, including on appeal if they see fit once the matter is final.

the FEC's rulemaking guidance and past precedents applying the regulations, *id*. at 12-14 (citing, *e.g.*, Internet Communications, 71 Fed. Reg. 18589, 18593-95 (Apr. 12, 2006) and MUR 6657 (Akin for Senate)). Further, the Commission fails to account for the fact that the Court's December 8 opinion was its *second* analysis of the relevant regulations and precedents; the Court also reviewed these authorities in its earlier ruling denying intervenors' motion to dismiss. *See* ECF No. 33 at 2-3, 21-23.

But even in demonstrating the clear falsity of the FEC's claim, plaintiffs risk giving it too much credit. The more pernicious error underlying this argument is its failure to acknowledge that the relevant regulatory text is silent as to the key legal issue in this case—namely, whether or to what extent general expenses claimed as "input costs" (FEC Mot. at 7) for exempt internet communications are also exempt under 11 C.F.R. § 100.26. *See* 11 C.F.R. § 100.26 (defining public communications to exclude "communications over the Internet, except for communications placed for a fee on another person's Web site"); *see also id*. §§ 109.20, 109.21. The FEC's OGC has acknowledged this regulatory silence,[5] and intervenors did not dispute it here. Unsurprisingly, the FEC does not explain what further analysis of the "text" of these regulations the Court should have—or could have—undertaken. Nor does it even attempt to explain how this "textual" analysis would have provided further support for the controlling Statement of Reasons.

Compounding the risibility of this argument, the FEC also invents the controlling Commissioners' reliance on the text of the regulations in making their dispositive ruling. In fact, the controlling Statement of Reasons only once mentioned the "text" of the regulations, AR391,

[5] *See, e.g.*, First Gen. Counsel's Rpt. at 6, MUR 6729 (Checks and Balances) (Aug. 6, 2014), https://www.fec.gov/files/legal/murs/6729/14044363781.pdf ("Neither the [internet] regulation itself nor the Commission's accompanying explanation and justification expressly address whether the regulation also exempts production costs that are incurred unrelated to the advertisement's dissemination over the internet.").

and that was merely to make the uncontroversial point that the regulatory "text," along with the rulemaking record and subsequent Commission decisions, provided that "an internet communication is not regulated as 'coordinated' unless it is placed for a fee on a third party's website," *id*. To determine whether or to what extent CTR's overhead and general expenses should be exempted as inputs for internet communications, however, the controlling Commissioners instead focused almost exclusively on the FEC's past precedents interpreting its internet and coordination rules, *see* AR391-93. *See also id*. at 391 (claiming that "the Commission has repeatedly interpreted the internet exemption to encompass expenses incurred by a speaker to produce an internet communication").

In short, the FEC is arguing that this Court committed error by not conducting an analysis of the FEC's regulations that the Court in fact conducted, based on an irrational hope that the *text* of the relevant regulations—which is silent as to the dispositive legal issues here and upon which the controlling Commissioners did not substantially rely—will nonetheless supply a *post hoc* justification for the dismissal of plaintiffs' administrative complaint that would justify reversal.

Remarkably, this is not the gravest defect in the FEC's argument. Even if its argument were not constructed on a series of misstatements, it also misapprehends a basic principle of administrative law: if the controlling Commissioners' interpretation of FEC regulations was contrary to the text and purposes of FECA, it was per se "unreasonable," and any purported consistency with the text of the regulations or past agency guidance would not save the interpretation. *See, e.g.*, *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006) ("[A] valid statute always prevails over a conflicting regulation."); *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 267 (D.D.C. 2014) ("If the [agency's] actions violate the plain language of the Act—regardless of whether those actions are good policy

or would otherwise be acceptable under the [agency's] own regulations—then that is the end of the Court's inquiry."). An agency "cannot rely on one of its own regulations to trump the plain meaning of a statute." *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002). The FEC seems to imagine that it can "reasonably" apply its regulations "unbounded" by its own governing statute—asserting that "[t]he question this case presents . . . is not whether the internet exemption is appropriately bounded to the statutory text, but whether the controlling group's decision reasonably applies the regulation," FEC Mot. at 8—but the statute is the source and guide of the Commission's interpretive authority in the first place.

The FEC suggests that, absent a facial challenge under the APA to the relevant regulation, its application of the regulation to dismiss an administrative complaint cannot be challenged under 52 U.S.C. § 30109(a)(8)(A) as contrary to FECA, provided its interpretation is not barred by the text of the regulation itself. FEC Mot. at 8. But the FEC has no authority to interpret its regulations in a manner that is contrary to the clear language of FECA or "the Act's purposes." *Orloski*, 795 F.2d at 165. And plaintiffs' quarrel was not with the regulations in question, but rather with the controlling Commissioners' capacious and unjustified interpretation of FECA and these regulations to exempt virtually every expenditure made by CTR, even those without any nexus to an exempt internet communication.[6]

The D.C. Circuit rejected a similar argument in *Crossroads II*, 904 F.3d at 1019-20. There, intervenor Crossroads GPS sought a stay pending its appeal of a decision finding that an FEC

[6] The FEC's argument also ignores that plaintiffs *did* challenge the "relevant regulations, *see* 11 C.F.R. §§ 100.26, 109.20, 109.21, as construed" under the APA. *See* Am. Compl. ¶ 111; *see also id.* ¶¶ 108-113. Because plaintiffs do not contest the exemption of the immediate production costs of internet communications, there was no need to challenge the facial validity of these three regulations—and of course the rules in no way authorize, or even speak to, the exemption of the sweeping range of expenditures and overhead expenses that CTR and HFA attempted to shield from FECA's reach.

dismissal relying on an application of 11 C.F.R. § 109.10(e)(1)(vi) was contrary to law; intervenor planned to argue that the complainants in their Section 30109(a)(8)(A) action were effectively bringing an untimely facial challenge to the regulation itself. But the Court noted that "the law is well-settled that 'those [adversely] affected' by an agency's application of a rule 'may challenge that application on the ground that it conflicts with the statute from which its authority derives.'" *Crossroads II*, 904 F.3d at 1018 (internal quotation marks and citation omitted). That vacatur of the regulation applied to dismiss CREW's complaint was the only available *remedy* for CREW's injury in *Crossroads II* clearly cannot mean, as the FEC insinuates, that any FEC dismissal based on a supposedly prevailing agency *interpretation* of a regulation cannot be reviewed for conformity with FECA unless accompanied by a facial APA challenge. All the more so when, as here, the regulations neither compel nor authorize the unbounded interpretation at issue—a point plaintiffs briefed on multiple occasions while the FEC sat on the sidelines. *See* Pls.' Mot. for Summ. J. 4-8, 18-28, 41-45, ECF No. 35; Pls.' Opp'n to Def.-Intervenors' Cross-Mot. for Summ. J. 11-30, ECF No. 42.

**B. The FEC's dissatisfaction with the outcome of the Court's "arbitrary and capricious" analysis does not amount to the identification of a legal error.**

The Commission fares little better in the second argument it identifies for appeal, i.e., its claim that this Court did not sufficiently credit the controlling Commissioners' consideration of the record in holding that they acted arbitrarily and capriciously in dismissing plaintiffs' claims regarding coordination of *non-internet* related spending. *See* FEC Mot. at 9. But the Court reviewed the controlling Commissioners' reasoning on this question according to the deferential standard articulated in *Orloski*, 795 F.2d at 161 and *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See* Mem. Op. at 9, 14-16. The FEC does not dispute that these cases supply the correct standard, nor that the Court faithfully applied it. In fact,

the Commission does not identify any defect in the Court's analysis whatsoever—except, of course, for its ultimate adverse conclusion.

Instead of identifying a reversible error, the FEC cherry-picks a handful of examples from the record evidence that the Court highlighted in its opinion (while cautioning that they represented only a "sampling" of the record, Mem. Op. at 14) and insists that the controlling Commissioners did "address" this evidence, FEC Mot. at 9. In so arguing, the FEC elides the broader record of coordination that its OGC compiled in recommending finding reason to believe—and with which the controlling Commissioners failed to engage in rejecting OGC's recommendation. *See* Mem. Op. at 15-16. Insofar as the FEC's argument can be discerned, it seems to contend that the controlling Commissioners need only consider a portion of the record evidence to clear the "arbitrary and capricious" standard, regardless of the other available facts and arguments it disregarded or excluded.[7] This argument lacks any merit.

But even if this second argument did "present[] a serious legal question," appellate reconsideration of this point would not change the outcome because the Court's ruling rested on two independent grounds—that the FEC's dismissal was based on both an impermissible interpretation of FECA's plain language *and* an arbitrary and capricious refusal to consider the available record evidence of coordination. To succeed in its appeal, the FEC would have to persuade the appellate court to reverse both of these contrary-to-law determinations—after, of course, showing that the remand order containing them is presently appealable. As to both

[7] Although the FEC also faults the Court for not accepting the controlling Commissioners' "transaction-by-transaction" approach to reviewing respondents' spending, *see* FEC Mot. 9, this was not the dispositive issue. The chief defect afflicting the controlling Commissioners' analysis was not that they wished to consider the spending as discrete transactions instead of more holistically, but that they arbitrarily failed to consider, or excluded, significant record evidence of coordination, including the extraordinary fact that respondents had not even denied coordinating their offline spending in their formal responses. *See* Mem. Op. at 15-17.

holdings, however, the FEC's merits arguments range from flawed to frivolous. The Commission has thus fallen far short of justifying the extraordinary relief of a stay pending appeal.

### III. The Balance of the Equities Weighs Heavily in Plaintiffs' Favor.

Finally, the FEC's motion should be denied because staying this case indefinitely, as the Commission requests, would indisputably prejudice plaintiffs. In contrast, the purported harms asserted by the Commission are either entirely illusory or the result of its own actions, *see supra* at 7-15, and do not alter the balance of the equities.

First, the FEC does not contest that its motion will injure plaintiffs by causing further delay. Indeed, in perverse fashion, it instead argues that relief in these proceedings has already been so severely deferred that another year or two of delay amounts to only a "minimal" marginal increase in prejudice to plaintiffs. *See* FEC Mot. at 2. The glaring omission from this argument is that the over six-year duration of the administrative and legal proceedings is in large part due to the Commission's own delay, dysfunction, and default. The Commission took three years to adjudicate plaintiffs' administrative complaint, only to end in a gridlocked 2-2 vote and an eventual dismissal. The plaintiffs timely challenged that dismissal under 52 U.S.C. § 30109(a)(8)(A) and the APA, but the controlling Commissioners issued their mandated statement of reasons only after suit was filed, causing further delay and necessitating an amendment to plaintiffs' complaint. The Commission then voted not to appear in this action to defend the dismissal; this default resulted in further delay and motions practice as respondents CTR and HFA, over plaintiffs' objection, sought to intervene to defend the case in the FEC's stead. The Commission then sat out this litigation for

another three years,[8] through *five* written opinions by this Court and a fully briefed appeal to the D.C. Circuit.

Now, with what can only be described as stunning disregard for the equities—and without a word acknowledging its default—the FEC asserts that, in light of the over six-year delay it has caused, an open-ended stay of an additional year or two will not unduly injure plaintiffs. According to the Commission's self-serving mathematical calculations, compounding delay with further delay equals no prejudice at all.

But both the Supreme Court and the D.C. Circuit have held that the "undue delay" caused by an indefinite stay harms plaintiffs by denying them the right to pursue their claims in court. *Belize*, 668 F.3d at 732 (citing *Landis*, 299 U.S. at 255). That harm is particularly acute here, where plaintiffs have diligently pursued enforcement against the FEC for over six years, only to be stymied by the FEC's inaction and default. In a similar case, Judge Jackson recognized that such inaction leaves CLC "and countless others in a dire situation," that further delay would "seriously prejudice[]" plaintiff, and that "[n]one of these delays have been due to plaintiff's lack of diligence or effort." Mem. Op. & Order at 8 n.2, 11, *CLC v. FEC*, No. 1:20-cv-0809-ABJ, ECF No. 37

[8] Unlike in some other recent cases, the Commission's loss of a quorum in parts of 2019 and 2020 had no effect on its ability to appear or defend itself in this case. It had an effective quorum when plaintiffs' administrative complaint was dismissed and their cause of action accrued, on June 4, 2019, *see* AR 372-75 (vote certification); when plaintiffs filed this lawsuit, on August 2, 2019 (ECF No. 1); when the Court issued its ruling on intervenors' motion to dismiss, on June 4, 2020 (ECF Nos. 32 & 33); and when intervenor-defendants filed their Answer to the Amended Complaint, on June 18, 2020 (ECF No. 34). The Commission was without a quorum from July 3 to December 9, 2020, but then regained a full complement of six Commissioners and has maintained one ever since. *See* Cong. Research Serv. Rep. No. 45160, *Fed. Election Commission Membership and Policymaking Quorum, In Brief*, at 3 https://crsreports.congress.gov/product/pdf/r/r45160 (updated Dec. 11, 2020). Whether the FEC's failure to appear or file a single paper in this litigation until now—by way of a motion seeking to bypass this Court entirely—resulted from gamesmanship or indolence, it was decidedly not the product of helplessness or any inability to act. The agency should not be rewarded for these tactics with further delays at plaintiffs' expense.

(D.D.C May 13, 2022). So too here. Further delay at this juncture unquestionably causes plaintiffs substantial injury, a point the FEC does not seriously dispute.

At the same time, as described *supra* in Part I, the FEC's claim of irreparable injury is entirely illusory. Indeed, the Commission would probably *strengthen* the jurisdictional foundation for its appeal by forgoing a stay and waiting until this Court's order becomes final; and, by allowing the private right of action to accrue as prescribed by statute, the Commission would also take the issue of prejudice to plaintiffs off the table. It is unclear why the FEC has tied itself into procedural knots to bring a premature appeal to a non-final order when the ball is now in its court: the matter has been remanded to the agency and a new slate of Commissioners has the chance to consider anew both the legal issues raised in MUR 7146 and the record evidence. It appears, however, that the Commissioners have not availed themselves of this opportunity by even considering conformance with the December 8 order, or the feasibility of undertaking other actions to resolve this case—or at least the FEC has made no such suggestion in its motion.

Finally, the FEC states in conclusory fashion that its interests are "one and the same" with the public interest. FEC Mot. at 2. But the Commission here is not defending a provision of FECA or a regulation of general applicability supported by well-recognized governmental interests, such as combating corruption or promoting transparency. *Cf. Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (defending 52 U.S.C. § 30101(6) and 11 C.F.R. § 102.14(a) on grounds that the provisions "limit[] fraud, abuse, and confusion"). Instead, the Commission seeks to defend its refusal to require two specific political committees—which indisputably engaged in millions of dollars of coordinated activity—to comply with FECA's contribution limits and disclosure requirements. But it is "well settled" that the public has "countervailing interests in receiving important voting information and in transparency," *Crossroads II*, 904 F.3d at 1019.

Such disclosure is the principal relief plaintiffs seek here, and indeed, the basis for their informational standing. *CLC*, 31 F.4th at 784. In contrast, the FEC's asserted concerns about sowing "confusion in the regulated community," FEC Mot. at 4, ring hollow given its failure to appear or defend its positions until this late date—after allowing members of the regulated community to do so in its stead through years of litigation.

Moreover, the controlling Commissioners' decision challenged here does not even represent the majority position of the Commission, but instead the non-binding conclusions of a mere two (now former) Commissioners; it has no legal force or precedential value. *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 & 453 (D.C. Cir. 1988) (recognizing that minority Statement of Reasons is "not law" and does not create "binding legal precedent or authority for future cases"). One may fairly question if there is *any* public interest in the Commission's belated defense of a non-authoritative minority interpretation of law that a federal court has already found contrary to FECA and which countermands the statute's anti-corruption and informational objectives. Indeed, one may question what even the *Commission's* interest is in defending the erroneous interpretations of law rendered by two of its six Commissioners: these interpretations would *constrain*, not enhance, its power to enforce FECA in the future, and render it *less* capable of responding flexibly to the rapidly evolving medium of the internet or ensuring transparency in campaign spending online.

## CONCLUSION

For these reasons, this Court should deny the FEC's untimely motion for a stay.

**Dated: January 4, 2023**

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2023, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

Respectfully submitted,

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