

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 22-5140, 22-5167

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CAMPAIGN LEGAL CENTER,

Plaintiff-Appellee

v.

FEDERAL ELECTION COMMISSION,

Defendant

HERITAGE ACTION FOR AMERICA

Movant-Appellant

On Appeal from the United States District Court
for the District of Columbia, No. 1-21-cv-00406
Before the Honorable Timothy J. Kelly

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

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INTRODUCTION

The Court should deny nonparty-Appellant Heritage Action for America's ("Heritage Action") motion for an abeyance. Nearly four years ago, in October 2018, Plaintiff-Appellee Campaign Legal Center ("CLC") filed an administrative complaint with Defendant Federal Election Commission ("FEC") alleging that Heritage Action violated the Federal Election Campaign Act ("FECA") during the 2018 federal election cycle. After the FEC failed to act on that complaint for nearly two and a half years, CLC sued the FEC for unreasonable delay in February 2021. Under FECA, if a district court declares the FEC's delay was contrary to law and the FEC fails to act within 30 days, the plaintiff may file a citizen suit against the alleged violator to enforce the campaign finance laws.

Over the next 14 months, the FEC failed to appear in the case; the Clerk entered default against the FEC; CLC moved for default judgment; the district court entered a default judgment order against the FEC declaring that the agency's failure to act on CLC's complaint was contrary to law (and ordering it to act within 30 days); Heritage Action appeared as an *amicus curiae* to argue the FEC had not failed to act; the district court declared, over Heritage Action's objections, that the FEC had failed to act within 30 days and thus confirmed CLC's resulting right under FECA to file a citizen suit against Heritage Action; the district court terminated the case; and CLC filed its citizen suit against Heritage Action.

After these events, Heritage Action filed a post-judgment motion to intervene to seek reconsideration or appeal and, while the motion was pending, noticed an appeal of the district court's rulings on the merits. Exercising its broad discretion, the district court correctly denied that motion for being untimely. Because that decision was not an abuse of discretion, and because appellate jurisdiction is lacking over a nonparty's appeal, CLC intends to file a motion seeking summary disposition of this case by the July 8, 2022 deadline for dispositive motions.

Heritage Action now seeks an abeyance of its own appeals, incorrectly asserting that a motion to dismiss it plans to file in CLC's citizen suit could affect the outcome of this case. Heritage Action does not claim (nor could it) that the *Campaign Legal Ctr. v. Heritage Action* district court could address whether its motion to intervene in this case was correctly denied or whether this Court has appellate jurisdiction over a nonparty appeal. Nor could the *Campaign Legal Ctr. v. Heritage Action* court affect the merits issues that would be before this Court in the unlikely event Heritage Action survives summary disposition. Rather, this Court's determination the merits below would bind both district courts.

In addition, while Heritage Action would suffer no harm absent an abeyance, an abeyance would substantially prejudice CLC and the public interest by further delaying a remedy for Heritage Action's nearly four-year-old violations of the 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 has 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.”).

C. Lawsuits Challenging FEC Dismissals and Failures to Act

Any administrative complainant “aggrieved” by dismissal of its complaint or “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 district court has jurisdiction once 120 days pass without FEC action on the administrative complaint, and the issue on the merits 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).

To determine whether the agency’s failure to take timely final action is contrary to law, the court applies a multi-factored analysis that includes the so-called “TRAC factors.” *See, e.g.*, ECF 16 at 2 (citing *Telecomm. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 70 (D.C. Cir. 1984)); *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-0809-ABJ, 2021 WL 5178968, at *5 (D.D.C. Nov. 8, 2021) (same); *see also Giffords v. FEC*, No. 1:19-cv-1192-EGS, 2021 WL 4805478, at *3-4 (D.D.C. Oct. 14, 2021) (same). Even if the FEC has taken “some action” on an administrative complaint, that does not mean that it has acted reasonably. *Campaign Legal Ctr. v. FEC*, 2021 WL 5178968, at *7; *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 *TRAC* factors in finding FEC’s delay contrary to law even though six months after suit was filed the FEC voted to find reason to believe and began an investigation).

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.¹ “This state of affairs is no secret.” Mem. Op. & Order at 8 n.2, *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-0809-ABJ (D.D.C. May 13, 2022), ECF 37. As one Judge of this Court observed, “[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,” Mem. Op, and Order at 8, n.2, *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-0809-ABJ (D.D.C. May 13, 2022), ECF 37. Congress anticipated this result and included the “citizen-suit provision” in 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 (D.D.C. Nov. 19, 2021) (“[T]he citizen suit provision was created in anticipation of FEC’s regulatory breakdown or

¹ *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”).

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, Plaintiff-Appellee Campaign Legal Center (“CLC”) filed an administrative complaint with the FEC alleging that nonparty movant Heritage Action violated FECA by failing to disclose its donors despite spending hundreds of thousands of dollars on election advertising in support of congressional candidates in 2018. ECF 1-1. Nearly two-and-a-half years later, with no indication the FEC had acted on its complaint, CLC filed suit against the Commission alleging unlawful delay. ECF 1. The FEC failed to appear and defend the suit. ECF 9. Another year passed. Then, on March 25, 2022, the district court, finding that CLC’s allegations against Heritage Action were “supported” and “credible” and outlined “a legitimate threat to the health of our electoral processes,” entered default judgment against the FEC and ordered the Commission to conform to the court’s order within 30 days. ECF 16 at 2 (cleaned up).

On the final day for the FEC to comply with the court’s order, and after taking no action to defend its alleged interests during the fourteen months that CLC’s lawsuit against the FEC was pending, Heritage Action sought leave to appear as *amicus curiae*. ECF 17. As *amicus*, Heritage Action submitted a brief advancing

largely the same arguments it now seeks to raise on appeal. ECF 22.² The next day, CLC filed a motion seeking an order declaring that the FEC had failed to conform with the Court's order within 30 days and confirming CLC's right to file a citizen suit against Heritage Action under FECA, *see* 52 U.S.C. § 30109(a)(8)(C). ECF 21. The Court granted CLC's motion on May 3, 2022 and terminated the lawsuit the next day. ECF 23; May 4 2022 Minute Order. CLC filed suit against Heritage Action on May 5, 2022. *Campaign Legal Ctr. v. Heritage Action*, No. 1:22-cv-1248 (D.D.C. May 5, 2022), ECF 1 (“*Heritage Action*”).

Five days later, Heritage Action moved for post-judgment intervention in the closed case below for purposes of seeking reconsideration or appealing the Court's May 3 Order. ECF 24. Ten days after that, while the motion to intervene was still pending, Heritage Action filed a notice of appeal of the district court's May 3 Order declaring the FEC had failed to conform and acknowledging CLC's right to sue Heritage Action. ECF 26. The appeal was docketed as Case No. 22-5140. The same day, Heritage Action appeared in the citizen suit, *Heritage Action*, and filed a motion to stay the proceedings pending this appeal. *Mot. to Stay, Heritage Action*, No. 1:22-cv-1248 (D.D.C. May 20, 2022), ECF 10.

² In granting leave for Heritage Action to appear as amicus, the district court noted that Heritage Action “is not a party to this case, so to the extent the brief . . . seeks affirmative relief, it is improper.” *See* Apr. 27, 2022 Minute Order. The district court further noted that “it has already decided the issue the brief addresses—whether the FEC acted ‘contrary to law’ under FECA.” *Id.*

After full briefing and hearing argument from the parties, the district court denied Heritage Action's motion to intervene as untimely on June 6, 2022. ECF 34. Two days later, Heritage Action noticed its appeal of the denial of intervention, ECF 35, which was docketed as Case No. 22-5167 and consolidated with the earlier appeal.

On June 7, 2022, the day after Heritage Action's motion to intervene was denied and over two months after CLC filed its citizen suit against Heritage Action, the FEC voted to close the file and terminated CLC's administrative complaint. *See* Mot. at 12. Although the full administrative record has yet to be released, *see id.*, the FEC has released certain records to Heritage Action in response to its FOIA request. *See* ECF 32-1. The records show that on April 6, 2021, the FEC voted whether to find reason to believe Heritage Action violated FECA (the vote deadlocked 3-3); whether to dismiss the case and close the file under *Heckler v. Chaney* (that vote also deadlocked 3-3); and whether to terminate the enforcement matter by closing the file (another 3-3 deadlock). *Id.* No agency action was taken on the complaint as a result of these votes—the complaint did not advance through the enforcement process, nor was it dismissed. *Id.*; *see also supra* p. 4. The records also reveal that nine months later, on January 11, 2022, the Commission held a second vote on whether to close the file, which again deadlocked 3-3. *See* ECF 32-1. Again, no action was taken as a result of this vote and the complaint remained pending before

the Commission for possible additional votes. *Id.* Finally, the records revealed that on May 13, 2022—seven days after the district court declared the FEC had failed to conform, and six days after CLC filed suit against Heritage Action—three Commissioners issued a Statement of Reasons explaining that they voted in favor of dismissing CLC’s complaint as an exercise of the agency’s prosecutorial discretion.³ Mot. at 11.

Heritage Action subsequently withdrew its motion to stay the proceedings in *Heritage Action*, No. 1:22-cv-1248 (D.D.C. June 10, 2022), ECF 17, and filed the instant motion to hold the consolidated appeals in abeyance pending resolution of its forthcoming motion to dismiss in *Heritage Action*. Mot. at 14.

LEGAL STANDARD

This Court has stated that it will decline to 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)) (denying motion to hold

³ The same three Commissioners released a statement about eight administrative matters that had been held open despite the fact that “votes have been taken . . . and statements of reasons have been included in the file.” Mot. at 9. The statement suggested those matters had “long concluded.” ECF 29-2. The statement is dated May 13, 2022—the same day that these Commissioners submitted their Statement of Reasons regarding Heritage Action. *Id.*

appeal in abeyance and summarily denying petition for review). 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

Heritage Action’s motion for an abeyance should be denied. First, no ruling on Heritage Action’s planned motion to dismiss in CLC’s citizen suit could resolve the issues presented in these appeals, which are ripe for summary dismissal in any event. Second, Heritage Action has identified no harm (irreparable or otherwise) that it would suffer from litigating its own appeals on a normal timeline. Finally, the requested abeyance would result in further needless delay that would significantly prejudice CLC and the public interest.

I. No Ruling in *Heritage Action* Could Resolve the Issues Here

Heritage Action has failed to demonstrate that a district court decision on its forthcoming motion to dismiss in *Heritage Action* would resolve the issues presented in its appeals here.

First, Heritage Action's appeals present two threshold issues that are not before the *Heritage Action* district court: (1) whether the district court in this case, *Campaign Legal Ctr. v. FEC*, abused its discretion in denying Heritage Action's motion to intervene as untimely; and (2) whether this Court has appellate jurisdiction over Heritage Action's attempt to appeal the district court's judgment as a nonparty. These questions turn on facts and legal arguments that are at issue in this case but not in *Heritage Action*. Heritage Action makes no attempt to demonstrate otherwise, and thus fails to show that resolution of its proposed motion to dismiss in *Heritage Action* will inform, much less resolve, the issues presented in these appeals. The Court should deny the requested abeyance. *Riffin*, 2018 WL 1902521 at *1.

Second, a ruling in *Heritage Action* will not affect these appeals because they are ripe for summary dismissal. The court below did not abuse its discretion in denying intervention and this court lacks appellate jurisdiction to hear a nonparty appeal. As such, Heritage Action is unlikely likely to succeed on the merits before this Court.⁴ *Cf. Basardh*, 545 F.3d at 1069 (granting abeyance sought by respondent who was likely to succeed because this Court lacked jurisdiction over the petition on review). Indeed, Heritage Action's motion makes no attempt to even claim its appeals are likely to succeed. As CLC will fully explain in its forthcoming motion

⁴ For this reason, CLC intends to file a motion for summary affirmance and to dismiss the appeal for lack of jurisdiction.

for summary affirmance and to dismiss the appeals, the district court did not abuse its discretion in denying Heritage Action'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, Heritage Action did not file its motion to intervene until 14 months after the case was filed, during which time the FEC failed to appear, default judgment was entered, Heritage Action appeared as an *amicus*, the FEC failed to conform to the default judgment order, the case was terminated, and Plaintiff filed its citizen suit against Heritage Action.⁵

Because the district court did not abuse its discretion in denying Heritage Action's motion to intervene, Heritage Action 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."). Further, Heritage Action attempted to appeal the merits rulings before its motion to intervene was decided. This Court therefore

⁵ Indeed, Heritage Action's motion for an abeyance further undermines its own arguments in favor of intervention here. In its motion to intervene, Heritage Action claimed it had standing and a concrete legal interest in intervening in this action to *avoid* being forced to defend itself in the citizen suit brought by CLC. ECF 24-1 at 9-10, 16-17. Now Heritage Action seeks to postpone this Court's determination of its right to intervene precisely so that it can defend itself in the citizen suit brought by CLC. Mot. at 14.

lacks appellate jurisdiction to reach the merits rulings below. *See Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1328 (D.C. Cir. 2013) (“Because a party *unsuccessfully* appealing a denial of intervention is not a ‘party,’ it may not obtain review of any district court holding other than the denial of intervention.”).

Third, even if this Court were to reach the merits of Heritage Action’s purported appeal—*i.e.*, whether the district court correctly ordered that the FEC’s failure to act was contrary to law and that the FEC failed to conform with that order—the district court in *Heritage Action* will not resolve those issues either.⁶ To state the obvious, the district court in *Heritage Action* is not an appellate court that may review whether the *Campaign Legal Ctr. v. FEC* district court’s orders were correctly decided. For example, if the *Heritage Action* district court were to disagree with the *Campaign Legal Ctr. v. FEC* district court and grant Heritage Action’s planned motion to dismiss, it would not moot this case, either “entirely, or partially.” *Basardh*, 545 F.3d at 1069. The ruling would have no impact at all on the pre-existing district court rulings in *Campaign Legal Center v. FEC*. Rather, there would simply be two conflicting district court rulings. Further, even assuming *arguendo*

⁶ Nor is Heritage Action likely to succeed on the merits of its motion to dismiss in *Heritage Action*, which is based on “a theory that is better characterized as far-fetched than highly tenable.” *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-0809-ABJ, 2022 WL 2111560 at *5 (D.D.C. May 13, 2022) (rejecting similar arguments raised by administrative respondent seeking post-judgment intervention in a separate delay suit against the FEC).

that the *Heritage Action* district court could second guess the *Campaign Legal Ctr. v. FEC* district court, any such ruling still would not control this Court's resolution of these appeals. *Cf.* Mot. at 14 (relying on caselaw where this court held “an appeal in abeyance pending a ruling *from the en banc Circuit or the Supreme Court*”) (emphasis added). This Court would not be bound by the *Heritage Action* district court's ruling (which CLC could appeal) any more than it is bound by the district court rulings *Heritage Action* seeks to challenge in these appeals.

By contrast, this Court's rulings *are* binding—on both the district court below and the *Heritage Action* district court. Indeed, just two months ago *Heritage Action* argued that the district court in *Heritage Action* should stay its proceedings because resolution of these appeals would “assist in the determination of the questions of law involved” in the citizen suit. *Heritage Action*, No. 1:22-cv-1248, ECF 10 at 9-10 (citations omitted). But *Heritage Action* makes no effort to explain how a district court ruling in *Heritage Action* would assist this Court in reviewing the district court's rulings below, much less resolve these appeals. *See Riffin*, 2018 WL 1902521 at *1.

In sum, *Heritage Action* has not demonstrated that a ruling in *Heritage Action* could resolve any of the issues presented in these appeals, which are unlikely to succeed in any event. The Court should deny the requested abeyance. *Id.*

II. Heritage Action Would Not Suffer Irreparable Harm if the Abeyance Were Denied

Heritage Action identifies no harm, irreparable or otherwise, it would suffer if had to litigate the appeals it chose to file absent an abeyance. Indeed, Heritage Action frankly admits that it is pursuing these “protective” appeals only as a “backstop” in the event that it loses in *Heritage Action*. Mot. at 15. And Heritage Action’s claim that if it wins its planned motion to dismiss in *Heritage Action* “and that ruling is not appealed, this Court will never have to resolve these appeals” is a red herring. *Id.* First, Heritage Action cannot control whether CLC would appeal a dismissal order in *Heritage Action*. Similarly, Heritage Action will ultimately have an opportunity to appeal any adverse ruling against it in *Heritage Action* to this Court. *Cf.* Mot. at 15 (citing *Heritage Action*, 1:22-cv-1248 (D.D.C. June 3, 2022), ECF. 14 at 5). Second, Heritage Action is not prejudiced by its inability to relitigate the merits of the district court’s ruling in *Campaign Legal Ctr. v. FEC* on appeal here—those arguments are precluded solely because it failed to timely intervene below. *See* ECF 34; *see also Heritage Action*, 1:22-cv-1248 ECF 14 at 5 (opposing Heritage Action’s motion for stay pending these appeals in *Heritage Action* on grounds that the appeals are meritless).

Further, Heritage Action’s claim that its abeyance would “conserve resources,” Mot. at 4, is undermined by its abrupt reversal on its motion to stay in *Heritage Action*. *Compare* Mot. at 4 *with, Heritage Action*, No. 1:22-cv-1248 ECF

10 at 9-10 (arguing that staying the citizen suit and allowing these appeals to proceed would “promote judicial efficiency and preserve party resources”). These contradictory assertions notwithstanding, Heritage Action fails to advance any justification for its proposed abeyance, much less identify any harm—irreparable or otherwise—it will suffer should the appeals proceed in the normal course.

III. The Abeyance Would Substantially Prejudice CLC and the Public Interest

While Heritage Action would suffer no irreparable harm absent an abeyance, endorsing its attempt to re-sequence these cases to its advantage would substantially prejudice CLC and the public interest by continuing to unnecessarily delay resolution of CLC’s “supported” and “credible” campaign finance allegations against Heritage Action. Order, ECF 16 at 2. As the court below acknowledged in denying the motion to intervene, Heritage Action’s “‘delay in moving for intervention will prejudice’ CLC” by causing “further delay on the adjudication of claims that have been pending since CLC first filed its administrative complaint in 2018 and are now the subject of the new lawsuit.” ECF 34 at 6. Similarly, an abeyance here would further delay the adjudication of CLC’s claims in the citizen suit and undermine CLC’s interest in finality in this matter by allowing Heritage Action to use the pending appeals as a “backstop” to any adverse decision in the citizen suit. *See* Mot. at 15; *see also Heritage Action*, No. 1:22-cv-1248, ECF 10 (Mot. to Stay); *id.* ECF 17 (Notice Withdrawing Stay Mot.).

Indeed, yet more delay would substantially prejudice CLC and the public interest by exacerbating the harms already ongoing because of Heritage Action's continuing failure to fully disclose its 2018 federal campaign finance activity. Those harms include: (1) the "legitimate threat to the health of our electoral process" posed by Heritage Action's alleged FECA violations, *see* Order, ECF 16 at 2 (cleaned up); (2) harm to CLC's informational interests as an election watchdog that relies on full and accurate FEC reporting, *see id.* at 1 (finding that CLC has standing "because it seeks the information it claims Heritage Action has unlawfully withheld"); and (3) harm to CLC's ability to successfully prosecute its suit against Heritage Action given the risk that, with the passage of yet more time, evidence will spoil and witness recollections will fade, *see Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982).

CONCLUSION

Heritage Action has failed to demonstrate that a ruling on its forthcoming motion to dismiss in *Heritage Action* would affect the outcome of these appeals, in which it is unlikely to succeed on the merits. Because Heritage Action has demonstrated no potential harm from proceeding with its own appeals, while the abeyance would substantially prejudice CLC and the public interest, the Court should deny the motion for an abeyance.

Date: July 5, 2022

Respectfully submitted,

/s/ Molly E. Danahy

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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 4720 words.

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/s/ 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 5, 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

Heritage Action for America,

Movant-Appellant.

Nos. 22-5140, 22-5167

**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 5, 2022

Respectfully submitted,

/s/ Molly E. Danahy

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