ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5336

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER AND CATHERINE HINCKLEY KELLY,
Plaintiff-Appellees,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellant,

HILLARY FOR AMERICA AND CORRECT THE RECORD,
Intervenor-Defendant Appellees.

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

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APPELLANT FEDERAL ELECTION COMMISSION'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. Campaign Legal Center and Catherine Hinckley Kelly are the plaintiffs in the district court and appellees in this Court. The FEC is the defendant in the district court and an appellant in this Court. Hillary for America and Correct the Record were intervenor-defendants in the district court and are appellees here. The Institute for Free Speech was an *amicus curiae* in the district court.

(B) Ruling Under Review. The Federal Election Commission appeals the December 8, 2022 final order and judgment of the United States District Court for the District of Columbia (Boasberg, J.), which granted the plaintiff-appellees motion for summary judgment and denied Correct the Record and Hillary for America's motion for summary judgment. The Memorandum Opinion is available at *Campaign Legal Center, v. Federal Election Commission*, Civ. No. 19-2336, 2022 WL 17496220, (D.D.C. Dec. 8, 2022).

(C) Related Cases. This case was previously before this Court on appeal in *Campaign Legal Center v. Federal Election Commission*, No. 21-5081. The Court's opinion reversing the district court's dismissal in that prior appeal is available at 31 F.4th 781 (D.C. Cir. 2022). Following the decision of the district court, Campaign Legal Center filed a lawsuit purporting to invoke a right to file a lawsuit against Correct the Record and Hillary for America

pursuant to 52 U.S.C. § 30109(a)(8)(C) to remedy the alleged campaign finance violations involved in the administrative decision under review in this appeal. *Campaign Legal Ctr v. Correct the Record & Hillary for Am.*, No. 23-cv-00075, (D.D.C. January 10, 2023). The FEC is not aware of any other related cases at this time.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Statutes and Regulations

GLOSSARY

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
J.A.	Joint Appendix

SUMMARY OF ARGUMENT

The Federal Election Commission's opening brief ("Br.") explained why the district court's decision should be reversed and remanded. This Court lacks jurisdiction over the portion of this case that presents challenges to violations of the contribution limits and source restrictions in the Federal Election Campaign Act ("FECA"). Complainant Campaign Legal Center and Catherine Hinckley Kelly ("Complainants"), in their Response Brief ("Resp. Br.") claim that the informational injury found in this Court's earlier decision creates standing to pursue not only alleged disclosure violations but also other alleged FECA violations that do not remedy informational injuries. To the contrary, there is ample authority that an informational injury sufficient to establish standing for a disclosure violation does not automatically establish standing for other alleged violations, such as of the contribution limits or source restrictions in FECA.

The opening brief shows that the district court incorrectly determined that the Commission's dismissal of MUR 7146 was contrary to law by failing to defer to the controlling commissioners' reasoned consideration of this matter. Complainants' response focuses in large part on defending the viability of the parallel case they have filed as a private right of action, but that case was promptly and properly stayed before the district court and proceedings in that case await guidance from this Court. Complainants also contend that the controlling

statement was insufficiently rooted in a statutory analysis, but the regulation at issue was an explicit construction of the FECA terms "public communication" and "general public political advertising." Complainants make no response to this point from the opening brief; indeed they do not discuss or cite those provisions of FECA anywhere in their argument. They further take issue with the applicable Commission regulation and argue instead for their preferred alternative construction of other terms from FECA and their preferred evaluation of the facts that were before the agency, but the controlling group's analysis was rooted in statutory language and readily satisfies deferential review. (JA 267-84.)

While claiming that the FEC's delayed appearance in this case resulted in the forfeiture of its arguments, Complainants generically point to prohibitions on addressing issues for the first time on appeal and argue this case is moot, but Complainants fail to confront the critical fact that the non-jurisdictional issues raised here were pressed and decided by the district court based on a complete administrative record. This Court, therefore, can properly review the issues that were raised or pressed below, and this Court's decision can be implemented in what remains a live controversy with significant potential impacts on the Commission's enforcement authority.

ARGUMENT

I. COMPLAINANTS HAVE FAILED TO ESTABLISH STANDING FOR RELIEF REGARDING VIOLATIONS OF THE LIMITS IN FECA

In its opening brief (Br. 16-26), the FEC showed that Complainants lack standing for alleged violations of the contribution limits and source restrictions in the FECA, on which they sought redress in the administrative complaint at issue in the underlying matter. (J.A. 149-61.) While this Court found standing for the Complainants to seek review of alleged violations of disclosure provisions, that decision did not sweep so broadly as to encompass other non-disclosure violations they also alleged. *See Campaign Legal Ctr.* ("*CLC*") *v. FEC*, 31 F.4th 781, 783 (D.C. Cir. 2022) (finding an informational injury from a denial of access to information that is required to be publicly disclosed). Complainants suggest that the Commission is asking this Court to "reconsider" its earlier decision. (Resp. Br. 34-35.) That is not the case. The FEC is seeking to have the earlier decision implemented on its own terms. That decision for purposes of standing "established that, because of this dismissal, they lack access to FECA-required information" and if their "challenge succeeds, they will likely gain access to that information, which will no doubt 'help them . . . evaluate candidates for public office.'" *CLC*, 31 F.4th at 793 (quoting *FEC v. Akins v. FEC*, 524 U.S. 11, 21 (1988)). In doing

so, Complainants established standing for disclosure violations, not other violations they attempt to sweep within the Court's earlier holding.

Here, the Commission relied on well-established authority for the proposition that Complainants need to establish standing for each claim they seek to press and each form of relief sought. (Br. 18 (citing *Davis v. FEC*, 554 U.S. 724, 734 (2008); *Allen v. Wright*, 468 U.S. 737, 752 (1984); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207–08 (2021).) These cases show that standing is not dispensed in gross, and the Complainants here must show standing for each alleged violation on which they seek review. Complainants do not even attempt to make this showing and fail to show standing for each claim in their administrative complaint. (Resp. Br. 35-36.) Instead, Complainants argue that their case in this Court, pursuant to 52 U.S.C. § 30109(a)(8)(C), cannot be viewed as separate claims or parsed because alleged violations involved overlapping conduct. (*Id.*) But there is not standing for all administrative claims just because of factual overlap or because a plaintiff is able to draft a complaint so broadly that it intersperses an alleged informational injury with other alleged non-informational violations. The authorities Complainants cite (Resp. Br. 35-36) provide strong support for the Commission's position. In *Waterkeeper Alliance v. EPA*, the Court found that for it to proceed, the plaintiff needed to establish informational injuries for each of the two statutes under which it brought its claims. 853 F.3d 527, 534

(D.C. Cir. 2017). The court found "by cutting back on CERCLA reporting requirements, [the rules] had the automatic effect of cutting back on EPCRA reporting and disclosure requirements" so that there was an informational injury rooted in both statutes. *Id.* Only after it found standing under both provisions was the court able to move on to the merits. *Id.*

The court in *Waterkeeper* expressly rejected an argument that is similar to what Complainants advance here. (Resp. Br. 35-38.) In evaluating "a single agency action rel[ying] on multiple statutory bases," the Waterkeeper Alliance argued it would be inefficient to hear "piecemeal challenges in various courts." *Waterkeeper*, 853 F.3d at 533. While the court accepted the point that it could hear consolidated cases involving two different statutes, it expressly concluded it needed — and later found — an informational injury for each provision it reviewed. *Id.* at 537. Complainants here have not similarly shown informational injury for each violation on which they seek review.

The court in *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2002), relied on by the Complainants (Resp Br. 35-36), also considered informational injury and found the "detailed description of how the information" would be useful was sufficient to establish informational injury regarding a closed rulemaking process. *Id.* at 1147-48. The court found an informational injury caused by the challenged regulation. *Id.* at 1150. There has been no comparable showing here

for Complainants' counts alleging violations of FECA's source and amount restrictions.

Complainants further rely on *WildEarth Guardians v. Jewell*, 738 F.3d 298, 307 (D.C. Cir. 2013), but that case was rooted in a procedural injury, not an informational injury. And the court in that case expressly noted it was not applying the long rejected commutative theory of standing "whereby standing as to one claim would suffice for all claims arising from same nucleus of operative fact." *Id.* (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006)). That court explained "[i]f the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *WildEarth Guardians*, 738 F.3d at 308 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)).

On remand from this Court, the district court in this case should have taken up only the violations for which the Complainants had shown the informational injury this Court found sufficient to establish standing.

Complainants' argument that they need not tailor their complaint to claims about informational injury to establish standing proves far too much. Mere factual overlap is insufficient to establish the requirements for disparate claims. Proponents of state ballot initiatives, for example, have a special role "when it

comes to the process of enacting the law" but do not have a "'direct stake in the outcome'" of an appeal of a ruling declaring the initiative unconstitutional. *Hollingsworth v. Perry*, 570 U.S. 693, 705-07 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). Complainants don't just seek to make different "arguments" at the agency level (Resp. Br. at 37), they seek to have the Commission enforce six distinct counts alleging FECA violations, only two of which are for reporting violations presenting a potential for informational injury. (Br. at 23.) Complainants resist the contention that an administrative complainant could evade the standing rule for some allegations through artful pleading of disparate violations but fail to provide support for their "same facts" theory. (Resp. Br. 37-39.) That theory is in direct conflict with the Supreme Court's clear requirement of standing for each claim and each form of relief. Complainants' court and administrative complaints include claims and seek relief for violations of the contribution limits and source restrictions. The generalized "interest in enforcement of the law" that Complainants present for those claims is not the sort of injury that provides standing. *Common Cause v. FEC* 108 F.3d 413, 418 (D.C. Cir. 1997) (per curiam).

II. THE DISMISSAL OF MUR 7146 WAS NOT CONTRARY TO LAW

A. The Controlling Group's Application of the Internet Exemption Satisfies Deferential Review

The analysis urged by the Response Brief fails to defer to the controlling commissioners' reasoned application of the internet regulation and would replicate errors in how the matter proceeded in the court below. (Resp. Br. 26-43; JA 267-83.) While the parties appear to agree that review here should be highly deferential and the controlling group's decision cannot be disturbed unless it was based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion," *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986), the Complainants and the district court fail to defer to the statement's interpretation and application here.

Complainants mischaracterize the controlling group's statement suggesting that it exclusively relies on the regulation and "flouts the unambiguous language of its governing statute" (Resp. Br. 41), but that is not a fair description of the statement. Under FECA, "public communications" are limited in relevant part to "general public political advertising," 52 U.S.C. § 30101(22), as defined by statute. And the statutory definition includes "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." *Id.* The Commission's

regulatory construction of that statutory definition concluded that *unpaid* internet communications did not constitute a form of "general public political advertising." *Id.* That is not a failure to consider the governing statute, as Complainants contend, it is a direct exercise of the agency's authority to "make, amend, and repeal such rules . . . as are necessary *to carry out the provisions of th[e] Act*." 52 U.S.C. § 30107(a)(8) (emphasis added). This was all explained in the opening brief (Br. 7, 31-34) and Complainants make no response to it. Indeed, they do not discuss or cite the applicable definition of "public communication" of FECA and its inclusion of the term "general public political advertising," 52 U.S.C. § 30101(22), anywhere in the argument section of the Response Brief.

The controlling statement applied the statutory definition and implementing regulations, which is consistent with the agency's authorities that Congress again specified, including to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA. 52 U.S.C. 30106(b)(1). Commission regulations exclude unpaid internet communications from that definition of "public communication" because information that is uploaded to the internet without charge or placed on a person's own site is not "advertising." 11 C.F.R. § 100.26 (excluding "communications over the Internet, except for communications placed for a fee on another person's Web site" from the definition of "public communication"). The "public communication" definition is incorporated into the

coordination regulation, which the Commission reasonably concluded was necessary to avoid chilling electoral discourse on a range of developing online media, ultimately including not only blogs but later developed social media. As a result, to be coordinated and deemed to be an in-kind contribution, an unpaid internet communication must be both a "public communication" and fall within the definition of coordination. (Br. 7, 31-34.) Neither the Complainants nor the district court establish that the controlling group's application of the statute was unreasonable and should not withstand deferential review.

Setting aside the misconception that the controlling statement took the view that the regulation conflicts with statutory language (Resp. Br. 40-41 (citing cases)), Complainants' position essentially amounts to a contention that the agency should disregard governing regulations in the situation presented. However, it is "axiomatic . . . that an agency is bound by its own regulations." *Erie Boulevard Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) (citing *Nat'l Env'tl. Dev. Ass'n's Clear Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014)). "[I]f an agency action fails to comply with its regulations, that action may be set aside as arbitrary and capricious." *Erie Boulevard Hydropower, LP*, 878 F.3d at 269. Within that framework, when the controlling group reconciles the statute and regulatory definitions in its analysis, it is an example of a reasoned decision-making process. And this Court must give "'controlling weight'" to the

interpretation in the statement of reasons "'unless it is plainly erroneous or inconsistent with the regulation.'" (Br. 27 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-16 (2019).)

The controlling group's exclusion of the input costs was part of a reasoned decision-making process. (Br. 33-41; *see also* Brief Amicus Curiae Lee E. Goodman, Former FEC Chair and Commissioner, in Support of Appellant ("Amicus Brief") at 13-16 (June 2, 2023) (Doc. No. 2001980).) The conclusion is consistent with the purposes that were part of the rulemaking principally implicated here. (Br. 35-37.) The conclusion to exclude the input costs was also consistent with prior matters. (Br. 37-39.) Indeed, an agency decision that departs from agency precedent can be deemed to be arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). Adherence to prior precedent, on the other hand, is a hallmark of reasoned decision making.

Complainants' real gripe appears to be with the prior decision, which found that "all Internet communications do not fall within" the meaning of "public communication" and instructed the FEC to delineate which Internet communications should be regulated. *Shays v. FEC*, 337 F. Supp. 2d 28, 67 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). Complainants do not make any direct "attack on the facial validity" of any regulation. (Mem. Op. at 5, No. 19-

2336 (D.D.C. Feb 12, 2021) (ECF No. 53). While the Complainants and the district court present an alternative view, it is not more deeply grounded in the regulation, history, and prior applications, and is certainly not required within the context of the highly deferential review applicable here. (*See* Amicus Br. at 16-22 (arguing district court's reinterpretation of internet exemption is unworkable).)

The district court also relied on material released by WikiLeaks and unreasonably did not defer to the controlling group's reasoned and considered decision regarding that material, a mistake Complainants urge be repeated here (Resp. Br. 16, 15; JA 103). As an initial matter, that material was presented in other administrative complaints, not the one submitted by Complainants, and they have no standing to object to the exclusion of its consideration. *See Citizens for Resp. & Ethics in Wash. v. FEC*, 363 F. Supp. 3d 33, 40 (D.D.C. 2018) ("the language of [Section 30109(a)(8)] does not reflect any intent on the part of Congress to provide for judicial review of the agency's exercise of its discretion to decline to pursue the facts beyond the four corners of the administrative complaint."); *see also Citizens for Resp. & Ethics in Wash. v. Am. Action Network*, 410 F. Supp. 3d 1, 20 (D.D.C. 2019), *on reconsideration*, No. 18-cv-945 (CRC), 2022 WL 612655 (D.D.C. Mar. 2, 2022) (allegations in administrative complaint defines scope of review). Moreover, even if jurisdiction existed for Complainants to object to the exclusion of this material, the controlling group explained its

rationale for not relying on "information obtained and distributed as part of a hostile foreign intelligence operation." (JA 274.) Their statement explained that as "cyberattacks and disinformation campaigns become more sophisticated, material generated by such efforts will require more demanding assessments of credibility." (JA 274 n.36.) While the Commission received advice from the General Counsel's office it was not legally prohibited from using the evidence, provided it wasn't involved in the underlying criminal act, (JA 274), the controlling group also took into consideration ethics rules prohibiting the use of the hacked material. (JA 274 n.34.) And the decision not to rely on the material was shared by a majority of the then-voting Commissioners. (JA 290 (statement of Commissioner in favor of moving forward in the underlying matter expressing agreement that the Commission should exclude from their deliberations materials stolen and disseminated by the Russian government); JA 268 n.4 (noting agreement of Commissioner as reflected in 1-3 vote declining to approve the Factual and Legal Analysis prepared by the Office of the General Counsel; JA 265.) The controlling statement explained the view that selectively releasing authentic materials could also create false impressions and should be seen as unreliable even if the documents purport to be the administrative respondents' own documents. (*Id.*) Ultimately the controlling group decided that use of the material would be incompatible with their responsibilities and did not want to incentivize

foreign nationals to interfere in U.S. elections by using the stolen material in the political sphere. (JA 274.) The district court failed to defer to this interpretation. Complainants, for their part, continue to fail to engage on the reasoning that led to this conclusion and urge this Court to repeat the errors below.

B. Insufficient Evidence Regarding Other Expenses

The controlling commissioners' conclusion regarding the insufficiency of the evidence is reasonable. (Br. 41-44.) The Commission presented four reasons the district court decision regarding spending on non-internet spending should be reversed. (Br. 41-44).

First, as a legal conclusion, the controlling commissioners considered evidence of actual coordination, not announced intention, as necessary to show spending was an in-kind contribution. (Br. 41.) In response, Complainants do not dispute the legal need for actual coordination to effectuate an in-kind contribution, but instead assert that the record of intent was sufficient for that showing. (Resp. Br. 52-53; J.A. 102-05.) But it is not contrary to law for the controlling commissioners to require actual evidence of coordination rather than accept more general public statements as governing all the activities of an organization. The Commissioners' insistence on assessing the record on a transaction-by-transaction basis was a reasonable method to evaluate whether coordinated expenditures took place. (J.A. 280-82.)

Second, the value of the controlling commissioners' transaction-by transaction approach was illustrated by the legal consequence of reimbursements. If reimbursements took place, as the respondents before the Commission claimed, the spending was not an in-kind contribution. The Complainants claim this argument is not in the controlling group's statement, but it goes to the heart of the transaction-by-transaction approach emphasized by the controlling group. (JA 280-82.)

Third, the speculative nature of the allegations, which the Complainants attempt to downplay as "passing use of the conditional tense" (Resp. Br. 55), illustrates why the controlling group reasonably viewed the facts supporting the allegations of coordination as equivocal. The series of speculative allegations were permissibly weighed in the controlling statement against denials from the committees themselves. (J.A. 280-81.)

Fourth, the controlling group engaged with the broad record and detailed the ways in which it did not support a violation. (J.A. 281-82.) The controlling statement of reasons showed consideration of press accounts, training, and surrogate programs. (Br. at 43-44.)

III. THIS APPEAL HAS NOT BEEN FORFEITED AND PRESENTS A LIVE CONTROVERSY

A. The Issues Here Have Been Raised and Litigated Below

In its opening brief, the FEC showed that it has not forfeited this appeal because the issues raised here were pressed and passed upon below based on a complete administrative record. (Br. 45-51.) As a general matter, litigants may not advance issues that have not been raised by the parties or passed on by the District Court, but here the questions appealed all *were* raised and argued by the plaintiffs and the intervenor-defendants that appeared before the district court. These are the issues decided by the district court, and there is no bar to appellate consideration of these issues or unfair surprise for the plaintiff in having to respond to them. Indeed, despite the earlier lack of the required four affirmative votes to defend the case, the agency did supply the parties with the administrative record and file the certified list of its contents. (JA 6.) In response, the Complainants argue that the FEC forfeited its appeal (Resp. 25-29), but to support its position, it exclusively relies on authority where the forfeited issues were not actually litigated below or where a different record could have been developed below. That is not the case here.

For example, Complainants cite *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984) for the proposition that a party who fails to raise a claim forfeits it. But that case addresses forfeiture of "issues and legal

theories not asserted at the District Court level" with the result hinging on the fact the district court did not have the opportunity to review the issue. *Id.* (quoting *Johnson v. Riley* 106 F.2d 249-50 (D.C. Cir. 1947).) The rule is rooted in providing a party the "opportunity to offer all the evidence they believe relevant to the issues" and to prevent parties from being "surprised on appeal by the final decision of issues upon which they have had no opportunity to introduce evidence." *Id.* Here, where there is a closed and complete administrative record and the same issues were litigated below, those considerations are not operative. Complainants also rely on *Shatsky v. Palestine Liberation Organization*, 955 F.3d 1016, 1031 (D.C. Cir. 2020), but, likewise, as that case explained, "[g]iven the parties' full presentation of the issue before the district court . . . this case does not implicate concerns about sandbagging," waiting to spring unventilated issues later in a proceeding. The rationales behind the forfeiture rule are not implicated, where the legal issue was fully litigated based on a closed and complete record before the district court.

The Complainants claim that the FEC's arguments have been forfeited, because it is not clear that the "FEC and intervenors interests are aligned such that there is identity between the parties." (Resp. Br. 26-27.) The "identity" between the parties is not, however, part of the applicable standard. (Br. at 45-47.) The "traditional rule" operates "in the disjunctive, permitting review of an issue not

pressed so long as it has been passed upon" by the lower court; the identity of the party making the argument or whether a party made the argument at all is not dispositive. *United States v. Williams*, 504 U.S. 36, 41 (1992); *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009) (forfeiture rule "does not apply where the district court nevertheless addressed the merits of the issue"). In *Williams* because the court had "decided the substantive issue," it did not matter who, or even if it was raised by the parties below, so long as it was passed upon by the court under the disjunctive rule. *Id.* Thus when Complainants cite *National Resource Defense Council v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977), a case applying the standards determining whether to allow a party to intervene as a matter of right in a district court proceeding under Federal Rule 24(a)(2), that precedent has no application here. The forfeiture rule focuses on the result before the district court — what is in the lower court's decision — while the alignment of the parties' interests for purposes of allowing intervention is an analysis of interests that may be "impaired by exclusion" from participating in district court proceedings. *Id.* There is no reason to apply the intervention alignment criteria here.

B. Even if the Issues Had Not Been Pressed and Passed on Below, Exceptional Circumstances Permit Consideration of Them Here

Even if the non-jurisdictional issues had not been preserved below, the FEC showed that the atypical circumstances leading to this appeal and the purely legal

questions involving the scope of federal campaign finance law are of great importance. (Br. 52-54.) Complainants argue this is a routine case, and in any event, the legal issues can be litigated in a private citizen suit they have filed on these same claims. (Resp. Br. 29-30.) However, that argument is misconceived here since the district court has stayed the private-right case and awaits direction from this Court. *See* Memorandum Opinion ("Op."), *CLC v. Correct the Record*, No. 23-0075, at 8 (Apr. 7, 2023 D.D.C.) (ECF No. 17). That court in the private citizen suit has also explicitly rejected "CLC's perplexing[] argue[ment] that the FEC's appeal is 'unlikely to otherwise affect the course of these proceedings.'" *Id.* at 8 (citation omitted). As the district court in that matter has explained:

> Beyond the obvious common legal question driving both this private action and that appeal, however, it is clear that the D.C. Circuit's decision would necessarily influence this litigation no matter how the Circuit decided that question. If, for example, the Circuit reverses this Court's earlier Opinion on either its contrary-to-law or arbitrary-and-capricious grounds, then it is substantially likely that this Court's jurisdiction to hear CLC's citizen suit would be removed. See[*CLC v. Correct the Record*, No. 23-0075, Defs.' Reply in Supp. of It's Mot. to Stay Proceedings] at 16 (citing *Campaign Legal Ctr. v. FEC*, No. 21-406, 2022 WL 1978727, at *3 (D.D.C. June 6, 2022)) (noting that a previous finding "whether the Commission's [action] was contrary to law and whether it conformed with [that] Court's order to act implicate[d] that court's subject-matter jurisdiction").

Memorandum Opinion, *CLC v. Correct the Record*, No. 23-0075, at 8 (Apr. 7, 2023 D.D.C.) (ECF No. 17). When Complainants argue that "insofar as any open legal questions remain" they can be addressed in the private-right case (Resp. Br.

at 30), they fail to appreciate the resolution of this appeal has appropriately become a predicate to resolution of the private suit.

C. This Case Presents a Live Controversy and is Not Moot

There are several potential outcomes from this appeal that would require the district court to revisit its earlier decision to remand to the agency. Those include the requirement that a more deferential review and a different outcome apply to some or all of the alleged activity. Another possibility is direction that a narrower remand order should be issued here, excluding the claims and requests for relief for which Complainants lack standing. In its opening brief (Br. 14-15, 52-54), the Commission showed the district court's order had continuing legal effect and should be reviewed. Those continuing effects include the effect that a lower court opinion, interpreting the application of federal campaign finance laws to internet communications, has on both the Commission and private parties, as well as its effect undermining the FEC's exclusive enforcement authority. (Br. 14-15, 52-54). Complainants respond (Resp. Br. 32-33), that the FEC's showing on continuing legal effect is insufficient, but those effects easily defeat CLC's claim of mootness.

Indeed, if this Court were to reverse and remand, further proceedings in the district court could vitiate the jurisdictional prerequisite for the private right of action and result in the dismissal of that action. Complainants acknowledge that the defendants in the private suit could potentially obtain a dismissal of that action.

Within the briefing on the Motion for Stay of the private right of action case, which was granted, Complainant Campaign Legal Center pointed out that "should this Court's jurisdiction over the citizen suit come into question following the D.C. Circuit's decision, Defendants could simply move to dismiss." Memorandum Opinion, *CLC v. Correct the Record*, No. 23-0075, at 8 (Apr. 7, 2023 D.D.C.) (ECF No. 17) (citing CLC Opp. to Motion for Stay, *CLC v. Correct the Record*, No. 23-0075, at 24 (Mar. 6, 2023) (ECF No. 14).)

Complainants argue that the FEC's failure to act on the remand from the district court renders this appeal moot. (Resp. Br. at 33.) They argue that "upon expiration of the conformance period and the filing of CLC's citizen suit, the district court's directive to conform ceased to have any practical significance." (*Id.* at 32 (citing cases). But rather than take up the administrative matter again, the agency has now appealed that decision, as is its right. The agency cannot do both simultaneously, as acting on remand potentially moots an appeal. Agencies are permitted to appeal under an exception to the finality requirement for precisely this reason. An "agency cannot later challenge its own actions complying with a remand order, whereas a private party dissatisfied with the action on remand may still challenge the remanded proceedings" after they are complete. *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656-57 (D.C. Cir. 2013). The D.C. Circuit has been able to decide cases the FEC appealed from remand orders to the agency and

has determined that is the proper course. *See, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (appeal from remand order from district court); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (explaining that remand should be remedy rather than district court "dictating the ultimate outcome"). Indeed, if the FEC complied with the Court order in a way that Complainants urge here, the agency could hardly sue itself for further review of the initial decision. The decision in *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471 (D.C. Cir. 1992) proves this point. Complainants observed before the district court that the case establishes that "the D.C. Circuit may still defer to the views of the original controlling Commissioners" (Opp'n at 14 n.4 (ECF No. 75), but point to no procedural mechanism by which *the FEC itself* could appeal the case to that court.

To illustrate the point, FECA requires the Commission to attempt conciliation prior to the filing of any enforcement action against an administrative respondent, and any conciliation agreement is a "complete bar to any further action by the Commission." 52 U.S.C. § 30109(4)(A)(i). If the Commission chose to conform with the district court's previous remand order by reaching a conciliation agreement, it could not then later appeal the Court's ruling.

True, the Commission could conform with the Court's ruling by asserting another basis for nonenforcement, which presumably Complainants would

challenge again. But it could not reassert the basis for dismissal previously relied on by the controlling Commissioners and rejected by the Court.

Complainants ineffectively try to have it both ways when they argue that the existence of the private suit moots the appeal but is impermissible to take into account to determine whether the district court's order has any continuing effect. (Resp. Br. 27-28, 30-32, 33-34). As explained above, they have it backwards on both counts. The appeal will evaluate the propriety of the jurisdictional prerequisites for the private-right action. Complainants' mootness argument is at odds with both the general authority of this Court to review the actions of the courts below and the specific agency exception to finality for appeals of remand orders.

If this Court were to reverse the district court order, the Commission's exclusive enforcement authority under 52 U.S.C. § 30107(e) would be vindicated given the likely downstream impact on the citizen suit that was enabled in error. Similarly, if this Court were to revise or narrow the scope of the remand order, the Commission could address any further order from the district court after appeal in the manner that FECA contemplated. And as explained, supra p. 19, the district court has explained the continuing effect of this case, both the influence of the decision and this case's effect on its jurisdiction.

CONCLUSION

For all the foregoing reasons, the Court should reverse the decision below in its entirety and remand to the FEC for consideration of allegations regarding disclosure violations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because the brief contains 5,421 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 this 14th day of July 2023, I electronically filed the Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

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I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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