ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5336

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellant,

and

HILLARY FOR AMERICA and CORRECT THE RECORD,
Intervenor-Appellees.

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

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FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION TO DISMISS

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February 16, 2023

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FEC	Federal Election Commission
FECA	Federal Election Campaign Act

INTRODUCTION

Defendant-appellant Federal Election Commission ("FEC" or "Commission") opposes plaintiffs-appellees' motion to dismiss. The Commission has not forfeited an appeal based on issues actually decided by the District Court and pressed by the intervening parties who appeared below, Correct the Record and Hillary for America (collectively, "Intervenors"). Plaintiff-appellees Campaign Legal Center and Catherine Hinkley Kelley ("Complainants") argue the case should be dismissed because the Commission has waived or forfeited its arguments, but they fail to acknowledge these issues were actually litigated by the parties below, ruled upon by the District Court, or are jurisdictional and can be raised at any time. While the Commission's default may mean that it cannot here assert arguments that were not pressed or passed upon at the District Court, there is no unfairness to permitting it to seek appellate review of issues actually litigated by the parties below. Even assuming some forfeiture occurred, the exceptional circumstances presented here — where the Commission seeks to present pure legal issues that involve issues of great importance regarding federal campaign finance law following a change in the composition of its presidential appointees — permit this Court to exercise its discretion to consider this appeal. Finally, even if Complainants' waiver arguments are correct, Complainants would not be entitled

to the dismissal they seek. This Court properly may review the merits decision issued by the District Court.

BACKGROUND

This is an appeal from a district court judgment finding that a Commission dismissal of an administrative complaint was contrary to law. *See* 52 U.S.C. § 30109(a)(8). The consideration of potential enforcement proceedings underlying this action began when Complainants filed an administrative complaint with the FEC alleging that Intervenors violated campaign finance reporting requirements and contribution restrictions in the Federal Election Campaign Act ("FECA"). The Commission split 2-2 at the first step of the enforcement process, the determination whether based on Complainants' allegations there was "reason to believe" a FECA violation occurred and to open an investigation. Add. 7; *see* 52 U.S.C. § 30109(a)(2); Add. 5 (explaining FEC enforcement procedures).

The two Commissioners who voted against further enforcement issued a Statement of Reasons explaining the basis of their vote. (Add. 7.) "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). These controlling Commissioners concluded that certain of the conduct challenged in Complainants' administrative complaint was exempt from FECA's limits on in-

kind contributions and disclosure requirements because they fell within certain FEC regulations, collectively known as the "internet exemption," that exclude unpaid internet activity from the statutory definitions of contributions or expenditures. Add. 7; *see* 11 C.F.R. § 100.26; Internet Communications, 71 Fed. Reg. 18,589, 18,603-07 (Apr. 12, 2006); *see also* 11 C.F.R. §§ 100.94, 100.155. The controlling Commissioners also concluded that the record did not suggest that the Intervenors coordinated on any activity beyond that which was exempt from regulation, and therefore there was no other activity to be reported or subjected to FECA's contribution limits. (Add. 7.)

Complainants sought judicial review of the dismissal under 52 U.S.C. § 30109(a)(8). After failing to garner the necessary four votes, the FEC did not appear in the District Court. (*See* Joint Appendix at 222, (District Court Docket No. 43) (Oct. 16, 2020) (Commission vote to authorize defense of suit failed 3-1).) The District Court granted Intervenors' motion to appear in the lawsuit and defend the dismissal. (Add. 8.) The case thus proceeded without the Commission's involvement through final judgment.

After an initial ruling on Complainants' standing to sue was reversed by this Court, Complainants and Intervenors prepared summary judgment briefs arguing whether the controlling dismissal rationale was contrary to law. (Add. 9.) On December 8, 2022, the District Court granted summary judgment to Complainants.

(Add. 2-21.) The District Court concluded that the controlling Commissioners' rationale was contrary to law in two respects. First, the District Court concluded that it was based on an impermissible interpretation of the internet exemption. (*See* Add. 11-15.) Second, the District Court concluded that the controlling Commissioners' analysis of the record was arbitrary and capricious because it did not properly weigh certain evidence of coordination between the intervenors. (*See* Add. 15-18.) As relief, the District Court ordered the Commission to conform with its ruling within 30 days. (Add. 21.)

On December 21, 2022, while the conformance period remained open, the Commission filed a timely appeal and sought a stay of the District Court's order. (District Court Docket No. 72.) In this Court, the Commission seeks review of the two issues decided by the District Court: whether the controlling Commissioners' analysis "was based on an impermissible interpretation of FECA and implementing regulations" and whether the controlling Commissioners' interpretation of the record was arbitrary and capricious. (*See* Statement as to Issues on Appeal at 3 (Doc. #1982721) (Jan. 23, 2023).) The Commission also seeks to present one additional issue going to the District Court's subject-matter jurisdiction to issue an unqualified remand order on a multi-count administrative complaint where Complainants have Article III standing to pursue only some of those counts. (*Id.* at 2.)

When the District Court did not rule on the Commission's motion before the end of the 30-day conformance period, Complainants filed a private suit pursuant to 52 U.S.C. § 30109(a)(8)(C).[1] The District Court subsequently denied the Commission's motion to stay based on its view that Complainants' filing of its private suit meant that any potential irreparable harm had already been realized and because the Commission's appeal remained available to challenge that Court's order. (Add. 27-28.) Complainants now move to dismiss that appeal.

ARGUMENT

I. THE COMMISSION HAS NOT FORFEITED AN APPEAL BASED ON ISSUES ACTUALLY DECIDED BY THE DISTRICT COURT AND PRESSED BY INTERVENORS

Generally, it "is not [this Court's] practice to entertain issues first raised on appeal." *Roosevelt v. E.I Du Pont de Nemours & Co.*, 958 F.2d 416, 419 (D.C. Cir. 1992). "That rule, however, does not apply where the district court nevertheless addressed the merits of the issue." *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009); *cf. United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that Supreme Court's "traditional rule" precluding review of questions "not pressed or passed upon below . . . operates (as it is

[1] The Commission does not agree that Complainants offered to extend the conformance deadline pending resolution of the stay motion at the district court (Mot. at 15 n.2), rather it was Complainants who declined to stipulate to an extension and schedule for briefing that question.

phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon") (internal quotation marks omitted).

The District Court decision on review here plainly passed upon two of the three issues the Commission seeks to raise on appeal: whether the controlling rationale supporting dismissal of Complainants' administrative complaint was based on an impermissible interpretation of FECA and FEC regulations and whether that rationale's conclusions about alleged coordination between the Intervenors was arbitrary and capricious. (Add. 11-15 (concluding that the controlling rationale's legal conclusions were "contrary to law and thus invalid"); Add. 15-18 (concluding that the controlling Commissioners' "view of the record" was "arbitrary and capricious").) The third issue the Commission seeks to press on appeal involves an attack on the District Court's subject-matter jurisdiction and, because it goes to the court's power to hear the case, "can never be waived or forfeited." *United States v. Miranda*, 780 F.3d 1185, 1188 (D.C. Cir. 2015) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)).[2]

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[2] The Commission acknowledges that a prior panel of this Court concluded that Complainants established an informational injury based on their allegations that reporting provisions of FECA require additional information to be disclosed. *Campaign Legal Ctr. v. FEC*, 31 F.4th 781, 790 (D.C. Cir. 2022). The Commission does not challenge that holding in this appeal. Rather, the Commission intends to argue that the District Court lacked jurisdiction to authorize a private suit based on allegations of violations of FECA's contribution limits, enforcement of which would not have resulted in additional information being disclosed to Complainants. Complainants' overreach beyond the ground for

That is enough to deny Complainants' motion. But there is much more. The Commission's arguments are also not forfeited because the two non-jurisdictional issues it raises were "asserted at the District Court level" — by the Intervenors. *Potter v. District of Columbia*, 558 F.3d 542, 550 (D.C. Cir. 2009) (internal quotation marks omitted). True, the Commission did not muster sufficient votes to defend its dismissal in Court. The Intervenors, however, participated from the earliest stages of this case and pressed each of the non-jurisdictional arguments the Commission here seeks to raise. *Cf. Nat. Res. Def. Council, Inc. v. Env't Prot. Agency*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (explaining that administrative exhaustion requirement does not bar a party that did not participate in a rulemaking before an agency from pressing argument on judicial review "if the agency has had an opportunity to consider the identical issues . . . but which were raised by other parties") (citation and internal quotation marks omitted).

Because the Intervenors actively raised these issues at the District Court, Complainants' arguments as to the policies underlying the forfeiture rule fall flat. (*See* Mot. at 7-10.) There is no risk that Complainants could be "'surprised on

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standing identified by the Court of Appeals is now apparent through their complaint in the private suit, which asserts not only reporting violations but also a separate count for the making and accepting of excessive contributions. Compl. ¶¶ 79-82, *Campaign Legal Ctr. v. Correct the Record*, Civ. No. 23-075 (Docket No. 1) (Jan. 10, 2023).

appeal by final decisions there upon which they have had no opportunity to introduce evidence.'" (*Id.* at 8 (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).) Nor is there any risk of "'sandbagging the district court.'" (*Id.* (quoting *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1031 (D.C. Cir. 2020).) Complainants cannot claim unfair surprise when a party raises an issue on appeal that was actually pressed and decided below. *See Shatsky*, 955 F.3d at 1131 ("[G]iven the parties' full presentation of the issue before the district court . . . this case does not implicate concerns about sandbagging[.]") They had every opportunity to develop arguments during three years of district court proceedings on these same issues when they were raised by the Intervenors.

There is also no concern that Complainants will have been denied an opportunity to introduce evidence relevant to any appeal. (Mot. at 7-8.) Because this is a case on review of an agency nonenforcement action, the "entire case on review is a question of law, and only a question of law." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). The record relevant to that question is "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Despite its default below, the Commission submitted its certified administrative record during district court proceedings, and that record was available to all parties through the entire pendency of the litigation. (District Court

Docket No. 25.) The Commission's default did not deprive Complainants or the District Court of any record-building opportunity.

If anything, the unusual circumstances leading to the Commission's default suggest that permitting its appeal would not incentivize other parties to engage in gamesmanship. Unlike other parties that come before the courts, the Commission is an even-numbered multimember governmental agency regulating a portion of the political system whose membership rules legally mandate that no political party can have a majority for significant actions. 52 U.S.C. § 30106(a)(1); *Combat Veterans for Congress Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015); *cf. Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (noting the FEC's "unique mandate" whose actions "implicate[] fundamental rights"). The balanced structure Congress provided ensures that any Commission decision that requires four votes, which includes votes to defend litigation like the one Complainants brought here, require bipartisan buy-in. *See* 52 U.S.C. §§ 30106(c), 30107(a)(6). But it also increases the chances that an evenly divided Commission will be unable to approve certain actions. That dynamic here resulted in a Commissioner who had supported Complainants' position before the agency exercising discretion not to authorize the Commission to defend its dismissal in court, thereby causing that authorization vote to fail. (*See* Joint Appendix at 222, (District Court Docket No. 43) (Oct. 16, 2020).) Given the Commission's unusual

structure and the uncommon facts here, there is little chance that permitting the Commission to defend itself at this point would have a detrimental effect on the administration of justice.

The Commission's post-suit conduct also rebuts Complainants' assertions of impropriety. Despite lacking authorization to defend itself in court, the Commission prepared and submitted its administrative record, pursuant to court order. (*See* District Court Docket No. 25.) As Complainants recognize (Mot. at 13-14 n.1), the composition of the Commission changed substantially after the administrative proceedings at issue in this case. The most recent change occurred with a new Commissioner taking office on August 2, 2022. *See* FEC, *Dara Lindenbaum Sworn in as Commissioner*, https://www.fec.gov/updates/dara-lindenbaum-sworn-in-as-commissioner/ (Aug. 2, 2022). The agency's approach to this litigation switched from default to defense at the first decisional juncture thereafter. The Commission's default at earlier stages of the litigation was in no sense an attempt at gamesmanship or sandbagging but rather a product of changed membership.

Although not framed in these terms, the natural result of Complainants' argument would prevent any party from appealing an adverse judgment after defaulting without seeking relief in the district court. As courts have reasoned, however, "[n]o statute or rule of civil procedure requires a defaulting party to first

contest the default judgment in district court. In particular, Rule 55(c) itself makes clear that a party *may* move under Rule 60(b) to set aside a default judgment, but it does nothing to suggest that the party *must* do so." *Stelly v. Duriso*, 982 F.3d 403, 407 (5th Cir. 2020); *see Prime Rate Premium Fin. Corp. v. Larson*, 930 F.3d 759, 768 (6th Cir. 2019) ("[W]e do not see anything in the Federal Rules that requires a party always to file a Rule 60(b) motion in order to appeal a default judgment[.]"). This Circuit does not appear to have directly addressed this question and there is "a circuit split on whether a party must file a Rule 60(b) motion challenging a default judgment in the district court prior to appealing," *Stelly*, 982 F.3d at 406. The absence of a requirement in the Federal Rules suggests that the courts of appeal holding that no such motion is required have the better view.

Although this Circuit has not directly addressed the issue, prior cases have declined to dismiss appeals from default judgments entered after a party failed to appear or make arguments to the district court prior to the appeal. *See Gates v. Syrian Arab Republic*, 646 F.3d 1, 3 (D.C. Cir. 2011); *cf. Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 700 (D.C. Cir. 1994) (concluding that government agency not named in original action had not timely challenged default judgment against nonappearing foreign entity because the agency "could have intervened after the [default] judgment and appealed within the time limit"); *Pulliam v. Pulliam*, 478 F.2d 935, 936 (D.C. Cir. 1973) ("[T]he question whether the default judgment was

properly entered in this case is not before us, since the defendant did not file a timely appeal from that judgment."). Complainants dismiss "most of [these] cases" as "off point" (Mot. at 9), but they do not explain how the reasoning of those courts could be correct if it were true that a party necessarily forfeits an appeal by not first appearing in the district court.

This case presents even less reason to require a party to seek relief at the district court before filing an appeal because the decision below was a summary judgment against the Commission after full briefing of purely legal issues by an intervenor.[3] Making a post-judgment motion to ask the District Court to reconsider its legal analysis on the same basis pressed by the Intervenors would have been a fruitless exercise and a waste of resources both on behalf of the parties and the court. The District Court had just rejected those arguments. Making them again would have been a needless formality.

None of which is to say that in the usual case any party may decline to appear in the district court and then try the case anew at the court of appeals. Any issue capable of being forfeited or waived that is not presented to or decided by the district court remains forfeited. A defaulting party is "unable to raise any fact

[3] If the District Court had resolved this case by issuing a default judgment, it would still have had to address the merits of Complainants' claim because the Commission is an agency of the United States. Fed. R. Civ. P. 55(d).

questions that were not brought before the district court" and may forfeit other defenses not affirmatively pled, but "if the existing record and pleadings do not support the judgment, the defaulting party can prevail on appeal without having raised the issues first in the district court." *Stelly*, 982 F.3d at 407. The Commission's appeal does not exceed those limitations, however, and so there is no basis to conclude that it has forfeited its appeal.

II. EVEN IF THE FORFEITURE DOCTRINE APPLIED HERE, EXCEPTIONAL CIRCUMSTANCES WOULD PERMIT THIS COURT TO CONSIDER THE COMMISSION'S ARGUMENTS

Though the Intervenor's assertion and the District Court's resolution of the non-jurisdictional issues the Commission seeks to press here were sufficient to preserve those issues for appellate review, this case also presents "exceptional circumstances" that would permit this Court to exercise discretion to consider otherwise forfeited issues. *Roosevelt*, 958 F.2d at 419 n.5. The atypical circumstances leading to this appeal described above qualify as exceptional. *See supra* pp. 2-5. Again, the Commission seeks to assert purely legal issues that do "not depend on any additional facts not considered by the district court." *Id.* The basic question underlying this appeal — which involves the scope of a Commission regulation addressing the applicability of federal campaign finance contribution limits and disclosure requirements to communications on the internet — is unquestionably one of great importance. Indeed, the District Court indicated

that this case "involves serious legal questions about the metes and bounds of the FEC's internet exemption." (Add. 26.)

Complainants argue that this case cannot present exceptional circumstances because the controlling rationale did not command four votes and is therefore not precedential. (Mot. at 13.) While Complainants' premise regarding administrative authoritativeness may be correct, their conclusion does not follow. In this Court, the Commission challenges a district court order concluding that its controlling legal analysis is contrary to law. Even if the underlying controlling Commissioner rationale is not binding in a later agency proceeding, the District Court's opinion has continuing legal effect.

Beyond the effect the District Court's analysis has on the scope of the Commission's internet exemption, its order also continues to undermine the Commission's exclusive enforcement authority. *See* 52 U.S.C. § 30107(e). Congress granted to the Commission exclusive authority to interpret and enforce FECA, subject only to the possibility that judicial review might declare its failure to act or dismissal "contrary to law." 52 U.S.C. § 30109(a)(8)(C); *see In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 544-46 & n.9 (D.C. Cir. 1980) (discussing importance of FEC's "exclusive jurisdiction" given "the extremely delicate nature of the tremendous power entrusted to it"). Any third-

party suit improperly authorized by a district court undermines the Commission's interest in that exclusivity.

The filing of Campaign Legal Center's private civil action against the Intervenors after the District Court's order does not divest the Commission of any interest in this appeal. The very fact of a four-vote Commission majority to vote to appeal indicates significant and bipartisan interest in this Court addressing the consequential interpretive questions presented regarding the scope of the agency's internet exemption. *See supra* pp. 4-5. Complainants imply, but do not quite argue, that this case may be moot after their filing of a private suit against the Intervenors pursuant to 52 U.S.C. § 30109(a)(8)(C). (Mot. at 14-16.) The failure of the District Court to rule on the Commission's motion to stay the remand order within the conformance period may have emboldened complainants to act hastily, but they did so at their own risk.[4] If the District Court's ruling was incorrect, as

[4] In every other prior private suit arising under the Federal Election Campaign Act it filed, Campaign Legal Center first sought permission to do so from the district court reviewing the Commission's dismissal or failure to act. *See, e.g.*, Order, *Campaign Legal Ctr. v. FEC*, 1:21-cv-406 (TJK) (Docket No. 23) (D.D.C. May 3, 2022) (granting Campaign Legal Center's motion for order declaring FEC had not conformed); Order, *Campaign Legal Ctr. v. FEC*, 1:20-cv-809 (ABJ) (Docket No. 32) (D.D.C. Apr. 21, 2022) (same); Order, *Campaign Legal Ctr. v. FEC*, 1:20-cv-1778-RCL (Docket No. 24) (D.D.C. Feb. 11, 2021) (same); *see also Giffords v. FEC*, 1:19-cv-1192 (EGS) (Docket No. 75) (D.D.C. Nov. 1, 2021) (entering order declaring that FEC had failed to conform and that plaintiff had right to file private action). In one of those cases, Campaign Legal Center waited at least five months for the original reviewing court to confirm that the private right of action existed. *See* Order at 1, *Campaign Legal Ctr. v. FEC*, 1:20-cv-809 (ABJ)

the Commission maintains, this Court could reverse it and remove the condition precedent contrary-to-law finding on which Campaign Legal Center's private suit depends. *See* 52 U.S.C. § 30109(a)(9) (providing that court of appeals may "set[] aside, in whole or in part" any district court order under section 30109(a)); *Citizens for Responsibility & Ethics in Wash. v. Am. Action Network*, 590 F. Supp. 3d 164 (D.D.C. 2022) (dismissing FECA private suit after intervening authority made clear that initial contrary-to-law ruling was in error), *appeal docketed*, No. 22-7038 (D.C. Cir. Mar. 31, 2022); *cf. FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1475-77 (D.C. Cir. 1992) (reversing initial contrary-to-law determination in FEC's post-remand enforcement action). That would terminate the private suit and restore the Commission's enforcement exclusivity.

This Circuit's previous consideration of appeals associated with private suits arising under FECA similarly suggests that the Commission's appeal is not moot. In one of the first suits filed under FECA's private-suit provision, an FEC complainant sued an administrative respondent after a district court concluded that the Commission's apparent inaction on the complaint was contrary to law. *See*

(Docket No. 32) (D.D.C. April 21, 2022) (noting five months had elapsed since court had ruled FEC inaction on administrative complaint contrary to law). The only difference here is that the Commission appealed and took steps to stay the District Court ruling within the conformance period, which suggests that Campaign Legal Center may have hurriedly filed its private suit in an ineffective effort to preempt consideration by this Court.

Democratic Senatorial Campaign Comm. v. Nat'l Republican Senatorial Comm., No. 97-cv-1493 (D.D.C. filed June 30, 1997). As here, the district court denied the FEC's motion for a stay pending appeal. *See* Order, *Democratic Senatorial Campaign Comm. v. FEC*, No. 96-cv-2184 (Docket No. 56) (D.D.C. July 15, 1997). Despite the filing of the private suit, the Court of Appeals reversed the contrary-to-law ruling and remanded for the district court to take evidence on the administrative complainant's standing to sue. *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951, 952-53 (D.C. Cir. 1998) (per curiam). That result could not have occurred had the filing of a private suit mooted the FEC's appeal. As here, the issue of an administrative complainant's standing could have been litigated in the private suit as easily as in the Commission's appeal.[5]

The bottom line is that this Court can still remedy the intrusion on the Commission's exclusive civil enforcement authority and vacate the order against the agency if it agrees that the decision below was in error. A reversal of that

[5] The parties eventually agreed that the case was moot, but only after both the Commission concluded its agency proceedings on the administrative complaint and the private suit was voluntarily dismissed. *See* Per Curiam Order, *Democratic Senatorial Campaign Comm. v. FEC*, No. 99-5429 (D.C. Cir. Apr. 4, 2000). The Commission maintained that the case was not moot until after the private suit was dismissed because it invaded on its exclusive civil enforcement jurisdiction. *See* FEC's Response to Mot. to Dismiss, *Democratic Senatorial Campaign Comm. v. FEC*, No. 99-5429 (Docket No. 501864-1) (D.C. Cir. Feb. 24, 2000).

decision would void the private suit and lift the order against the Commission's analysis. Complainant's suggestion of mootness is incorrect.

III. DISMISSAL IS NOT AN APPROPRIATE REMEDY FOR FORFEITED ARGUMENTS

Even assuming Complainants were correct that the Commission forfeited or waived arguments actually litigated and decided below by defaulting at the District Court, they would not be entitled to a *dismissal* of the Commission's appeal. None of the cases Complainant's cite — not one — granted that relief. All but one of those decisions rather *affirmed* the district court rulings after full briefing on the merits. The sole exception is a case in which this Court *reversed* a "default judgment as void." *Combs v. Nick Garin Trucking*, 825 F.2d 437, 448 (D.C. Cir. 1987). The only case Complainants cite that even alludes to potential dismissal of an appeal, *District of Columbia v. Air Florida, Inc.*, likewise merely affirmed the lower court's ruling. 750 F.2d 1077, 1086 (D.C. Cir. 1984).[6] The *Air Florida* Court referred to "a practice of dismissing appeals brought on grounds not asserted

[6] The *Air Florida* Court also explained that certain "exceptional circumstances" exist where a court of appeals has "the discretion to consider questions of law that were neither raised below nor passed upon by the District Court." 750 F.2d at 1085. Complainants truncate this quotation to exclude the Court's explanation that it may take up even issues not "passed upon by the District Court." *Id.*; *see* Mot. at 11 ("While this Court has recognized certain 'exceptional circumstances' under which it has the discretion to consider questions of law that were neither [*sic*] raised below,' none of those circumstances exist here.") (quoting *Air Florida*, 750 F.2d at 1085).

in the trial court," but most of the cases cited by the Court had likewise affirmed after declining to consider unpreserved arguments and so fail to establish any such practice. *Id.* at 1084 & n.38.[7] That passing reference therefore appears to be an indication that the Court rejects on the merits appeals on grounds that are forfeited or waived absent extraordinary circumstances, not that any such appeal should be dismissed at the outset.

That approach is consistent with the idea that waiver and forfeiture are non-jurisdictional rules governing "the administration of the business of the courts." *Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1947). Their non-jurisdictional nature is confirmed by the fact that an appellate court is "not rigidly limited to issues raised in the tribunal of first instance." *Roosevelt*, 958 F.2d at 419 n.5. Courts of appeals "have a fair measure of discretion to determine what questions to consider and resolve for the first time on appeal." *Id.*

How this Court should exercise that discretion is an issue that should be decided by a merits panel. Complainants do not request summary affirmance, but the above demonstrates that the merits of this case are not "so clear that expedited action is justified" and that there is "benefit" to be "gained from further briefing

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[7] One case cited by the *Air Florida* court "dismiss[ed a] portion of [an] appeal on the ground that it was not properly asserted below," but that case likewise did not cite any decisions dismissing appeals. *Doe v. McMillan*, 459 F.2d 1304, 1311 n.10 (D.C. Cir. 1972), *aff'd in part, rev'd in part*, 412 U.S. 306 (1973).

and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987). At a minimum, because Complainants' forfeiture arguments go to the merits of the appeal, and not appellate jurisdiction, there is no basis to grant their motion.

CONCLUSION

For the foregoing reasons, Complainants motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(B) because it contains 4737 words, excluding the parts of the motion exempted by Fed. R. App. P. 27 (d)(2)(B) and 32(f).

The motion also complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it was prepared using Microsoft Word 14-point Times New Roman.

/s/ Greg J. Mueller
Greg J. Mueller
Attorney
Federal Election Commission

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2023, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF System.

/s/ Greg J Mueller
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