**[ORAL ARGUMENT NOT YET SCHEDULED]**
**Nos. 22-5140, 22-5167**

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

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CAMPAIGN LEGAL CENTER,
*Plaintiff-Appellee*,

*v.*

FEDERAL ELECTION COMMISSION
*Defendant-Appellee*,

HERITAGE ACTION FOR AMERICA,
*Movant-Appellant*.

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

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# OPPOSED MOTION TO HOLD APPEALS IN ABEYANCE

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## INTRODUCTION

In February 2021, Campaign Legal Center sued the Federal Election Commission (FEC) for allegedly failing to act on the Center's administrative complaint against Heritage Action for America. After the Commission failed to appear or defend itself, the district court (Kelly, J.) ruled on March 25, 2022 that the Commission had unlawfully failed to act and gave the agency 30 days to do so. The Commission did not respond by that deadline. On May 3, the court therefore issued a final judgment declaring that Campaign Legal Center could bring a direct lawsuit against Heritage Action under the Federal Election Campaign Act of 1971 (the Act). The Center then sued Heritage Action on May 5 in a case now pending before Judge Nichols.

The next day, however, the Commission—prompted by a Freedom of Information Act (FOIA) request—revealed that it had in fact acted on Campaign Legal Center's administrative complaint shortly after the Center had sued the agency. On April 6, 2021, the bipartisan, six-member Commission had voted on the matter, but the Center's administrative complaint failed to garner the four votes necessary to initiate an enforcement action. Instead, three Commissioners voted not to pursue enforcement as an exercise of their prosecutorial discretion.

At that point, the Commission was required to notify the parties that the administrative proceedings were over and to release the voting records along with any statements of reasons by the Commissioners. Had it done so, Judge Kelly would have been compelled to dismiss the Center's lawsuit against the FEC on the ground that the agency's decision not to pursue enforcement was unreviewable in court. *Citizens for Resp. & Ethics in Wash. v. FEC*, 993 F.3d 880, 882 (D.C. Cir. 2021) (*CREW*). And with that suit gone, the Center would have been unable to sue Heritage Action directly under the Act.

But things took a wrong turn. The three Commissioners who voted in favor of initiating an enforcement action—but who failed to secure the necessary fourth vote—blocked the Commission from notifying the parties of the agency's action and from defending against the Center's lawsuit. Through this policy of concealment, these Commissioners subjected Heritage Action to a lawsuit authorized on the false premise that the agency had never acted on the Center's administrative complaint.

Upon learning of this concealment, Heritage Action sought post-judgment intervention in order to move for reconsideration or pursue an appeal. While frustrated by the "procedural mess," Judge Kelly "[r]egrettably" denied the intervention motion on timeliness grounds, while

emphasizing that the court did not "condone the Commission's unseemly failure to appear and defend itself … or what Heritage Action casts as a scheme to hide its activity and leave regulated parties in legal limbo." Dkt. 34 at 2, 7.[1] Judge Kelly recognized, however, that Heritage Action could defend against the Center's direct lawsuit by making "the same" point—namely, that the FEC had acted on the administrative complaint back in April 2021, thereby precluding the Center's direct lawsuit under the Act. *Id.* at 6.

After Judge Kelly denied the intervention motion, the FEC formally closed the file on Campaign Legal Center's administrative complaint and released the statement of reasons of the three Commissioners who voted not to pursue enforcement as an exercise of prosecutorial discretion. Even though it is now clear that the Center's suit against Heritage Action was improperly authorized and can no longer proceed, the Center has refused to dismiss it. While Heritage Action intends to litigate these issues in that case, it has also, in an abundance of caution, appealed the denial of its intervention motion along with Judge Kelly's final judgment declaring that the Center could directly sue Heritage Action.

[1] "Dkt." refers to district-court docket entries in the case below, and "1:22-cv-1248 Dkt." refers to entries in the Center's suit against Heritage Action.

These consolidated protective appeals should therefore be placed into abeyance pending the disposition of the motion to dismiss the Center's lawsuit against Heritage Action. This course of action will conserve resources and potentially obviate any need to resolve these appeals, without any material prejudice to the Center.[2]

## BACKGROUND

**1.a.** Congress enacted the Federal Election Campaign Act of 1971 to regulate the financing of federal election campaigns. Pub. L. No. 92-225, 86 Stat. 3 (1972). In doing so, Congress gave the FEC—a newly created independent agency run by six presidentially-appointed Commissioners—"exclusive jurisdiction" over the Act's civil enforcement. 52 U.S.C. § 30106(b)(1).

To prevent any one political party from wielding the Commission's enforcement powers for partisan gain, Congress carefully structured the FEC to consist of no more than three members affiliated with the same political

[2] Heritage Action has conferred with Campaign Legal Center about this motion, and the Center opposes the relief requested. The FEC has not appeared in this matter and there is no counsel of record to notify. Nonetheless, out of an abundance of caution, counsel for Heritage Action contacted the FEC's Office of General Counsel by email, informing the Commission of Heritage Action's intention to file this motion and asking for the Commission's position. The Commission did not respond.

party. *Id.* § 30106(a). In addition, Congress directed that "[a]ll decisions" of the Commission concerning "the exercise of its duties and powers" must be made "by a majority vote" of the Commissioners. *Id.* § 30106(c).

Congress further provided that a private party may lodge an administrative complaint with the Commission alleging a violation of the Act. *Id.* § 30109(a)(1). After reviewing the complaint, along with any response, the FEC must vote on whether there is "reason to believe" that the respondent has committed a statutory violation. *Id.* § 30109(a)(2). Unless there is "an affirmative vote of 4" Commissioners that such a "reason to believe" exists, the FEC cannot proceed further with investigation or enforcement. *Id.*; *see id.* §§ 30106(c), 30107(a)(9).

Instead, when "there are fewer than four votes" to proceed, the FEC "dismisses the administrative complaint." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015). That remains true in the context of so-called "deadlock dismissals"—situations where the Commission splits in its vote (typically on a 3-3 basis) on whether to find reason to believe a violation has occurred and lacks the four votes necessary to proceed any further. *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988); *see, e.g.*, *CREW*, 993 F.3d at 882-83; *Crossroads*, 788 F.3d at 315.

When the Commission dismisses an administrative complaint—or fails to act on it within 120 days after the complaint has been filed—the private party that sought the agency's enforcement may sue the FEC in the D.C. district court. 52 U.S.C. § 30109(a)(8)(A). If the court declares that the Commission's dismissal or failure to act was "contrary to law," then the FEC has 30 days "to conform with such declaration." *Id.* § 30109(a)(8)(C). If—but only if—the Commission fails to conform by that deadline, the private party may bring its own "civil action to remedy" the alleged statutory violation. *Id.*

**b.** When a deadlock dismissal occurs, the Commission must publicly disclose that fact. Congress directed that "[i]f the Commission makes a determination that a person has not violated [the] Act … the Commission shall make public such determination." *Id.* § 30109(a)(4)(B)(ii). And FEC regulations provide that "[i]f the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter," 11 C.F.R. § 111.9(b), and "make public such action and the basis therefor" within 30 days of that letter, *id.* § 111.20(a).

In addition, "[w]hen the Commission lacks four votes to proceed, the commissioners who voted against enforcement must state their reasons why," which are "then treated as if they were expressing the Commission's rationale

for dismissal." *CREW*, 993 F.3d at 883 n.3 (cleaned up). Such statements allow reviewing courts to determine "whether reason or caprice" drove the agency's decision. *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (R.B. Ginsburg, J.). If a deadlock dismissal is "based even in part on prosecutorial discretion," however, it is "not reviewable" under the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985). *CREW*, 993 F.3d at 882.

In light of these requirements, the Commission for decades addressed deadlock dismissals through a policy of administratively closing the enforcement-matter file, notifying the parties, and releasing the voting records as well as any statements of reasons. *See, e.g.*, FEC's Partial Mot. to Dismiss at 12, *Citizens for Resp. & Ethics in Wash. v. FEC*, 243 F. Supp. 3d 91 (D.D.C. 2017) (No. 16-cv-259), Dkt. 12 (explaining that "[a]s a result of" a "three-to-three" "split vote, the Commission closed the file"); FEC's Motion to Dismiss at 11, *Citizens for Resp. & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113 (D.D.C. 2015) (No. 14-cv-1419), Dkt. 5 ("If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint."); Matter Under Review 5024 (Nov. 4, 2003)

(deciding by a 6-0 vote to close the file and send the appropriate notices after splitting 3-3 on whether there was reason to believe a violation had occurred). This public release then allows the aggrieved administrative complainant to challenge the FEC's deadlock dismissal in court under 52 U.S.C. § 30109(a)(8).

Recently, however, the FEC—at the behest of Commissioners Walther, Broussard, and Weintraub—has adopted a new policy. As the New York Times reported in 2021 based in part on interviews with Commissioner Weintraub, these three Commissioners "are declining to formally close some cases after the Republicans vote against enforcement" in order to "leave[] investigations officially sealed in secrecy and legal limbo." Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021), https://tinyurl.com/3zdp9sej. The same three Commissioners are then "blocking the F.E.C. from defending itself in court when advocates sue the commission for failing to do its job." *Id.* By making federal courts "believe" that "deadlocked cases are unresolved" through this new policy, these three Commissioners are trying to "open the door for outside advocacy groups to directly sue … in federal court." *Id.*

On May 13, 2022, the remaining three Commissioners issued a statement condemning this new policy. Dkt. 25-2. As they explained, the

FEC—acting through Commissioners Walther, Broussard, and Weintraub—has "weaponiz[ed] a nominal housekeeping act," "affirmatively misled respondents," and "intentionally shielded" its actions "from both judicial and public review." *Id.* at 2, 5. They also revealed that this policy had been applied to "eight enforcement matters" before the FEC at that time, even though "votes have been taken" and "statements of reasons have been included in the file by the commissioners declining to move forward." *Id.* at 2-3.

**2.a.** These appeals concern one of those eight enforcement matters. On October 16, 2018, Campaign Legal Center, along with an individual named Margaret Christ, lodged an administrative complaint with the FEC alleging that Heritage Action had violated the Act by failing to disclose the identities of contributors for certain independent expenditures under 52 U.S.C. § 30104. Dkt. 1-1. A few days later, the Commission acknowledged receipt and designated the matter as Matter Under Review 7516. Dkt. 1-9.

On February 16, 2021, the Center sued the Commission in district court, alleging that the FEC had failed to act on the Center's administrative complaint and that this inaction was contrary to law under 52 U.S.C. § 30109(a)(8)(A). Dkt. 1. When the Commission failed to enter an appearance or otherwise defend against the lawsuit, the clerk of court entered default

against the FEC on May 10, 2021. Dkt. 9. The Center moved for a default judgment two weeks later, on May 24, 2021. Dkt. 10.

On March 25, 2022, the court issued an order granting the Center's motion. Dkt. 16. The court found that "the FEC has taken no action on" the Center's administrative complaint and that this "failure to act … is contrary to law." *Id.* at 1-2. It therefore directed the Commission to "conform to" the order "within 30 days" under § 30109(a)(8)(C) "by acting on" the Center's "administrative complaint." *Id.* at 2. Fearing that the Center's administrative complaint was subject to the Commission's new concealment policy, Heritage Action submitted a FOIA request to the FEC the same day requesting vote certifications and any statements of reasons on the matter. Dkt. 17-5.

**b.** On April 26, Campaign Legal Center sought a declaration that the Commission had failed to conform to the default-judgment order. Dkt. 21. The court granted the request on May 3, ruling that the Commission had "failed to conform" to the default-judgment order by not "acting on Campaign Legal Center's administrative complaint" by April 25 and that the Center may therefore "bring 'a civil action'" against Heritage Action under 52 U.S.C. § 30109(a)(8)(C). Dkt. 23 at 1-2. Two days later, the Center filed a direct lawsuit against Heritage Action. No. 1:22-cv-1248 (D.D.C.) (Nichols, J.).

The very next day, May 6, the Commission responded to Heritage Action's FOIA request by stating that it would produce responsive records, thereby confirming that the FEC had in fact acted on the Center's administrative complaint. Dkt. 24-2. The Commission subsequently released vote certifications recording that it had taken "action[]" on the Center's administrative complaint on April 6, 2021—over a year before Judge Kelly's April 25, 2022 deadline. Dkt. 32-1 at 4. On that day, the Commission voted on whether there was reason to believe that Heritage Action had violated the Act in a manner warranting enforcement. *Id.*

The enforcement vote failed by a 3-3 breakdown. *Id.* The three Commissioners who voted against enforcement—Commissioners Cooksey, Dickerson, and Trainer—supported dismissal as a matter of agency enforcement discretion "under *Heckler v. Chaney*." *Id.* Their "'controlling'" statement of reasons from that day confirms that they "voted to dismiss, as an exercise of prosecutorial discretion, the allegation in this matter that Heritage Action … improperly reported certain independent expenditures by not including donor information." 1:22-cv-1248 Dkt. 18-1 at 3 & n.1. As that statement explained, "[a]t the heart of this matter is First Amendment protected activity that took place at a time when the meaning of the provision

of the law at issue was in flux, in a matter which came before the Commission as part of a tremendous enforcement backlog." *Id.* at 5.

The same three Commissioners likewise voted on April 6, 2021 to close the administrative file—so that the Center and Heritage Action could be notified of the FEC's action on the administrative complaint. Dkt. 32-1 at 5. Commissioners Broussard, Walther, and Weintraub, however, refused to do so, thereby concealing the Commission's action from the parties and the courts. *Id.* Instead, the FEC waited to formally close the administrative file until June 7, 2022, after Judge Kelly had authorized the Center's direct lawsuit. 1:22-cv-1248 Dkt. 17-2.

**c.** In response to the Commission's revelations, Heritage Action moved to intervene before Judge Kelly on an expedited basis on May 10 in order to seek reconsideration of the court's May 3 final judgment or appeal it. Dkt. 24. After Judge Kelly did not order expedited briefing, Heritage Action filed a protective notice of appeal on May 20 of the final judgment authorizing the Center's suit. Dkt. 26.

On June 6, Judge Kelly "[r]egrettably" denied the motion to intervene on the premise that it was "not timely." Dkt. 34 at 2. In doing so, however, the court observed that "Heritage Action can advance the same" arguments in

the Center's direct suit before Judge Nichols, who "will have to consider them, because whether the Commission's failure to act was contrary to law and whether it conformed with this Court's order to act implicate" Judge Nichols' ability to entertain that suit. *Id.* at 6. Judge Kelly also emphasized that the denial of the intervention motion does not "condone the Commission's unseemly failure to appear and defend itself in this Court, or what Heritage Action casts as a scheme to hide its activity and leave regulated parties in legal limbo." *Id.* at 7. Heritage Action filed a second protective notice of appeal of the denial of its intervention motion on June 8, Dkt. 35, and this Court consolidated the appeals.

When Heritage Action asked Campaign Legal Center whether it would voluntarily dismiss its complaint against Heritage Action in No. 1:22-cv-1422 before Judge Nichols, the Center refused. Heritage Action will therefore move to dismiss the Center's direct lawsuit on July 8, 2022 in light of the revelations that the Commission had previously acted on the administrative complaint and that the controlling Commissioners had voted to dismiss the complaint in the exercise of prosecutorial discretion. Dismissal of the Center's direct suit against Heritage Action in No. 1:22-cv-1248 would make it unnecessary for this Court to adjudicate these consolidated appeals.

## ARGUMENT

This Court should place these protective appeals into abeyance pending the disposition of the motion to dismiss Campaign Legal Center's direct lawsuit against Heritage Action in No. 1:22-cv-1248 before Judge Nichols. This Court "[o]ften" issues abeyance "orders in light of other pending proceedings that may affect the outcome of the case before" it. *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (collecting cases addressing petitions for review). When two cases raise "common issues," the "prospect" that "[r]esolution of the" other proceeding "may entirely, or partially, moot" the case before this Court "militates in favor of holding" it in "abeyance," given the "'longstanding policy of the law to avoid duplicative litigative activity.'" *Id.*; *see Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 557-58 (D.C. Cir. 2015) (Srinivasan, J., concurring in part) (collecting cases holding an appeal in abeyance pending a ruling from the en banc Circuit or the Supreme Court).

This Court should follow that practice here. As Judge Kelly recognized, the questions "whether the Commission's failure to act was contrary to law and whether it conformed with this Court's order to act" at issue in these appeals can and must be decided in the Center's direct suit against Heritage Action currently pending before Judge Nichols. Dkt. 34 at 6. If Judge Nichols

dismisses that lawsuit on the ground that it should never have been authorized under 52 U.S.C § 30109(a)(8)(C), and that ruling is not appealed, this Court will have never have to resolve these appeals. Accordingly, if this Court does "not decide the merits of appellants' challenge … now," it "may never need to." *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (cleaned up).

While dismissing these appeals to litigate these issues before Judge Nichols would now arguably be even more efficient, the Center's conduct has made it necessary to keep these appeals alive. The Center has signaled it will contend that Heritage Action cannot "relitigate" the merits questions raised before Judge Kelly in defending itself against the direct lawsuit. 1:22-cv-1248 Dkt. 14 at 5; *see id.* at 23. Heritage Action therefore had no choice but to preserve these appeals in order to protect its right to press the argument that the Center's lawsuit was improperly authorized. But while these protective appeals remain a necessary backstop, there is no need to litigate them now.

Moreover, holding these appeals in abeyance will not materially prejudice the Center. To the contrary, granting abeyance here would save both parties from the burden of having to litigate the same issues in two different jurisdictions simultaneously.

## CONCLUSION

This Court should place these appeals into abeyance pending the disposition of the motion to dismiss in *Campaign Legal Center v. Heritage Action for America*, No. 1:22-cv-1248 (D.D.C.) (Nichols, J.).

Dated: June 23, 2022

Respectfully submitted,

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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. Circuit Rule 32(e)(1), this document contains 3264 words.

2. This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Expd BT typeface.

*/s/ Brett A. Shumate*

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on this 23rd day of June 2022, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

*/s/ Brett A. Shumate*

# ADDENDUM

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

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|---|---|
| CAMPAIGN LEGAL CENTER,<br>*Plaintiff-Appellee*,<br>v.<br>FEDERAL ELECTION COMMISSION,<br>*Defendant-Appellee*,<br>HERITAGE ACTION FOR AMERICA,<br>*Movant-Appellant*. | Nos. 22-5140, 22-5167 |

## CERTIFICATE OF PARTIES AND DISCLOSURE STATEMENT

### A. Parties and Amici

The appellant in this Court and the movant in the district court is Heritage Action for America (Heritage Action).

The appellee in this Court and plaintiff in the district court is the Campaign Legal Center. The appellee in this Court and defendant in the district court is the Federal Election Commission.

The Institute for Free Speech appeared as *amicus curiae* in the district court.

### B. Disclosure Statement

Heritage Action for America is a 501(c)(4) nonprofit organization, has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Dated: June 23, 2022

Respectfully submitted

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