ORAL ARGUMENT NOT YET SCHEDULED

No. 25-5188

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

GIFFORDS,

Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION

Defendant-Appellee,

NATIONAL RIFLE ASSOCIATION OF AMERICA, et al.

Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-1192-EGS

BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF APPELLEES AND DISMISSAL OR AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters' access to information about campaign financing to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

Date: February 26, 2026

/s/ Stuart McPhail
Stuart McPhail

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INTEREST OF AMICUS CURIAE[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a nonpartisan, Section 501(c)(3) nonprofit corporation that combats corrupting influences in government and protect citizens' right to know the source of campaign contributions. CREW regularly uses the Federal Election Campaign Act's ("FECA") procedures to protect its rights under the statute, including challenging the Federal Election Commission's ("FEC") dismissals of and failures to act on CREW's complaints and, when appropriate, directly challenging the law-breaking entity. CREW is thus familiar with these procedures and the recent developments in them.

ARGUMENT

The judgment below, entered against the FEC, found the agency failed to act on an administrative complaint filed by Giffords, the only other party to this case, because the matter was mired in partisan gridlock. The district court found the FEC's inability to resolve that deadlock to achieve a bipartisan agreement meant Giffords faced no realistic chance of administrative relief and so, consistent with the FECA, it could pursue its claims directly in court. At this late stage, the target of Giffords's complaint, the National Rifle Association ("NRA"), asked the court

[1]All parties have consented to this amicus's filing. No counsel for a party authored this brief in whole or in part and no person other than CREW or its counsel contributed money that was intended to fund preparing or submitting this brief.

below to overturn a judgment that was not against it and then, when that improper attempt failed, filed this appeal of a case to which it isn't a party.

This appeal is improper and should be dismissed, and the district court was right to reject the NRA's belated efforts, for the reasons Giffords lays out. CREW submits this amicus to nevertheless address misrepresentations about the FECA's processes.

Contrary to the NRA's and its supporting amici's representations, the FEC's bipartisan structure exists to protect both respondents and complainants alike. It ensures "every important action"—whether to investigate or dismiss—is the result of bipartisan compromise. *Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). The inability of a partisan bloc of commissioners to commandeer those processes is therefore not "weaponization," *c.f.* NRA Br. 9—it is Congress's plan to ensure a fair process for all parties.

Aspersions about supposed "non-disclosure scheme[s]," NRA Br. 20, are further misplaced. The court below was fully informed of the agency's progress. Nor, for that matter, do amici's examples show any "scheme" by any commissioner in other cases: The law gives *respondents*, not commissioners, control over the confidentiality of ongoing agency matters. *See* 52 U.S.C. § 30109(a)(12) (mandating secrecy absent respondent's "consent").

What commissioners do control is whether the agency pursues or dismisses a matter, or devotes limited agency resources to defending what may be indefensible, and consistent with the FEC's "inherently bipartisan" nature, *FEC v. Democratic Senatorial Campaign Committee ("DSCC")*, 454 U.S. 27, 37 (1981), the FECA requires such questions to be answered in bipartisan agreement. The decision of a commissioner to refuse to dismiss—or for the three who did so here, JA561—is not a "scheme," NRA Br. 45, but the good faith exercise of judgment about the likelihood of progress and the significant legal impacts of dismissal. Those impacts have only grown to subvert the FEC's bipartisan design, license contempt of court, and unlawfully shut the courthouse door on injured Americans seeking to protect their rights.

The "weaponization" opprobrium does not reflect reality. This Court need not weigh in on these issues, however. This appeal is improper. The motion below was improper. Accordingly, this appeal should be dismissed or the decision below affirmed.

I. THE FECA, AND FEC PROCEDURES, RESTRICT WEAPONIZATION AGAINST BOTH RESPONDENTS AND COMPLAINANTS

The FECA sets up a "delicate balance," *CREW v. FEC*, 363 F. Supp. 3d 33, 43 (D.D.C. 2018) (quoting H.R. 12406, H.Rep. No. 94-917, 94th Cong., 2d Session. 4 (1976), *reprinted in* FEC, *Legislative History of FECA Amendments of*

1976, 804 (1997), https://perma.cc/G23G-SQ7T ("Legislative History")), creating a bipartisan agency and sharing enforcement across private and public sectors to ensure fair treatment and protect the constitutional interests of all parties involved.

A. The FECA Protects the Public's Right to Know, Empowering Political Speech and Voting

An "informed public opinion is the most potent of all restraints upon mismanagement." *Buckley v. Valeo*, 424 U.S. 1, 67 n.79 (1976). Accordingly, the FECA imposes disclosure and other requirements that "allow[] voters to place each candidate in the political spectrum more precisely" and "alert[s] the voter to the interests to which a candidate is most likely to be responsive." *Id.* at 67. Facts like those in the disclosures are "the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011), assisting not only the immediate recipient but all "others to whom they would communicate," *FEC v. Akins*, 524 U.S. 11, 21 (1998). Opening this "flow of information" to the public "enhanc[es] the ability of [the] citizenry to make wise decisions." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989). The FECA thus recognizes and protects the "First Amendment interests of individual citizens seeking to make informed choices." *McConnell v. FEC*, 540 U.S. 93, 197 (2003); *accord Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16

(D.C. Cir. 2014) (the FECA protects the "First Amendment Rights of the public to know the identity of those who seek to influence their vote").

Failing to enforce the FECA thus risks "the integrity of our electoral system," *Campaign Legal Center ("CLC") v. Iowa Values*, 573 F. Supp. 3d 243, 249 (D.D.C. 2021), and raises significant "First Amendment concerns," *Akins v. FEC*, 101 F.3d 731, 744 (1996). Any entity overseeing these laws could underenforce to censor voters' access to information, either from disfavor towards those voters' politics or favor towards the regulated entity's politics,[2] and Congress knew the "history of weak enforcement of campaign finance laws" when it created the FECA's enforcement processes. Legislative History 92 (Statement of Sen. Mondale).[3]

Accordingly, Congress shared enforcement authority with the public, *see* 52 U.S.C. § 30107(e), providing the Commission would act as "first arbiter" on these private claims, *CREW v. FEC*, 923 F.3d 1141, 1149 (D.C. Cir. 2019) (Pillard, J.,

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[2] *See, e.g.*, Rick Hasen, *Quiet Part Out Loud Dep't: Trey Trainor Says He "Fought for" Trump "Every Single Day Throughout the Biden Presidency" When He Was an FEC Commissioner*, Election Law Blog (Feb. 5, 2026) https://tinyurl.com/jey7jwr7.

[3] *Accord id.* at 72 (Statement of Sen. Clark) (stating FECA enforcement "cannot be left to a commission that is under the thumb of those who are to be regulated"); *id.* at 75 (Statement of Sen. Scott) (warning of a "toothless lapdog" when the country needed an "active watchdog" to "restor[e] [] public confidence in the election process").

dissenting). But in part to ensure complaints were dealt with fairly, Congress "made the Commission partisan balanced," *id.* at 1143, "requir[ing] all actions by the Commission occur on a bipartisan basis," *id.* at 1142 (Griffith, J., concurring); *accord Combat Veterans*, 795 F.3d at 153 (the FEC is "designed ... to ensure that every important action it takes is bipartisan"). Four votes—a bipartisan set—are needed to proceed with a complaint. 52 U.S.C. § 30109(a)(2), (4)(A)(i). Similarly, only "a majority vote" of the six-member commission may dismiss a complaint, 52 U.S.C. § 30106(c), *i.e.*, also a bipartisan four-vote threshold, *see also* FEC Commission Directive 10(E)(3), *available at* https://perma.cc/8Q5X-QREN ("Any principal or secondary motion that exercises a duty or power of the Commission under the Act," including dismissal, "shall require four votes for approval"); FEC Statement of Policy Regarding Commission Actions in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (in effect at time relevant here, providing "dismissal of a matter requires the vote of a least four Commissioners"). The FEC can then cull claims insufficient on the law or facts, but only by bipartisan agreement.

If a partisan bloc exploited an understaffed commission to circumvent the FECA's bipartisan requirements, Congress created an explicit backstop: the FEC would default in any subsequent challenge. In the same provision that requires "the affirmative vote of 4 members" to open an investigation, the FECA requires four

votes, not just a majority, to "defend" a legal challenge to a dismissal. 52 U.S.C. §§ 30106(c), 30107(a)(6). Any partisan dismissal would be quickly reversed.[4]

Judicial review would then provide an additional check. The obligation to bring de novo actions would guard against weaponized enforcement. 52 U.S.C. § 30109(a)(6)(A), (a)(4)(C)(iii). To similarly guard against weaponized underenforcement, the FECA provides judicial review of an "order of the Commission dismissing a complaint ... or ... a failure of the Commission to act on such complaint." *Id.* at § 30109(a)(8)(A); *see also id.* at 30109(a)(8)(C) (providing FEC thirty days to correct error).[5] If a complainant's injuries are unremedied because the Commission is "unable or unwilling" to act, rather than because of the infirmity of their claim, *DCCC*, 831 F.2d at 1135 n.5, the FECA "opens the door to private enforcement by [that] aggrieved party," *CREW v. FEC*, 55 F.4th 918, 923

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[4] The Commission eliminated partisan dismissals altogether, providing that "any motion or appeal shall be deemed not approved" if the majority in support "comprises exclusively the affirmative votes of Members affiliated with the same political party (or Members whose positions are aligned for the purpose of nomination by the President)." Commission Directive 10(L)(4).

[5] To facilitate review, courts use either the explanation of the FEC's general counsel if dismissal follows their recommendation, *DSCC*, 454 U.S. at 37–38, or of the commissioners breaking with the recommendation if not, *Democratic Cong. Campaign Comm. ("DCCC") v. FEC*, 831 F.2d 1131, 1132, 1135 (D.C. Cir. 1987). Because that set may be different and less than the majority that votes to dismiss (and in fact could be less than half), their explanation must be part of the record before that majority votes to dismiss. *End Citizens United PAC v. FEC*, 69 F.4th 916, 920 (D.C. Cir. 2023) (the explanation must be part of the record "at the time when a deadlock vote results in ... dismissal").

(D.C. Cir. 2022) (Millett, J., dissenting); *see also United States v. Texas*, 599 U.S. 670, 677, 682 (2023) (favorably citing FECA's private litigation provisions as consistent with separation of powers as it establishes exhaustion and a private right of action rather than "requir[ing] additional arrests or prosecutions").

The ability to sue over a failure to act, not just dismissal, is a vital protection of the FECA. "[S]o long as a party is unable to obtain ... information" required by the FECA, "it does not matter whether the information is out of reach because the FEC denied the party's administrative complaint or because the FEC has yet to act." *CREW v. FEC*, No. 19-cv-2753-RCL, 2021 WL 12409630, *2 (D.D.C. Feb. 5, 2021) (quoting *Akins*, 524 U.S. at 21). Otherwise, commissioners could pigeonhole disfavored complaints or partisan gridlock would leave a complainant's injuries unremedied.

For the same reason, the FECA requires "sustained agency attention," *Rose v. FEC*, 806 F.2d 1081, 1091 (D.C. Cir. 1986), moving a matter "expeditiously" to completion, 52 U.S.C. § 30107(a)(9); *see also Citizens for Percy '84 v. FEC*, No. 84-2653, 1984 WL 6601, *4 (D.D.C. Nov. 19, 1984) (the Commission's "dilatory conduct ... cannot be condoned if the statute is to have any meaning"); *DSCC v. FEC*, No. 95-0349-JHG, 1996 WL 34301203, *7 (D.D.C. Apr. 17, 1996) ("Congress did not impose specific time constraints upon the Commission to complete final action, but it did expect that the Commission would fulfill its

statutory obligations so that the Act would not become a dead letter."). Previous actions do not obviate a failure-to-act suit if progress ceases. *CLC v. FEC*, No. 20-cv-0809-ABJ, 2021 WL 5178968, *7 (D.D.C. Nov. 8, 2021) (FEC's completion of "some action" insufficient to defeat failure to act claim); *Citizens for Percy '84*, 1984 WL 6601, at *4 (FEC failed to act, notwithstanding successful reason to believe vote, when followed by no further action).

Like dismissals, moreover, Congress expressly required four votes to defend a failure-to-act suit. 52 U.S.C. § 30106(c) (requiring four votes to exercise power in section 30107(a)(6)); *id.* at § 30107(a)(6) (setting out power to defend against suits brought under section 30109(a)(8)); *id.* at § 30109(a)(8) (providing for suits for failure-to-act). Accordingly, absent bipartisan support for the FEC's progress, Congress provided a complainant a speedy means to establish exhaustion of its attempt at timely agency relief and the right to seek their own relief in court. *See id.* at § 30109(a)(8)(A).

Judicial review of the FEC's actions and inactions, and private litigation that may result thereafter, is therefore not a "weaponiz[ation]" of the FECA, *cf.* NRA Br. 8; Br. for the United States as *Amicus Curiae* 6 ("U.S. Amicus"), *Giffords v. FEC*, No. 25-5188 (D.C. Cir. Jan. 20, 2026); Br. of *Amici Curiae* Institute for Free Speech and Former FEC Commissioner Bradley A. Smith in Support of Neither Side 11, *Giffords v. FEC*, No. 25-5188 (D.C. Cir. Jan. 20, 2026) ("IFS Amicus"), it

is the protection against weaponization by Commissioners who may provide their political allies a free pass, hamstring their political opposition, and deprive the public of the means of self-governance.

B. To Guard Against Weaponization, Deadlocks of the FEC are Not Dismissals and, Though They May be "Acts," May Not Establish Progress

Despite these safeguards against partisan weaponization, an amicus asserts the matter ended at the moment of deadlock. IFS Amicus 15.[6] They claim that the deadlock either causes a dismissal, or that a dismissal is a ministerial necessity in the face of a deadlock. Neither is true. Nor, for that matter, would a deadlock necessarily prevent or defeat a failure-to-act suit.

First, "a deadlock will give rise to a dismissal only if a majority of Commissioners separately votes to dismiss the complaint" and "a deadlocked vote

[6] Despite portraying this view as the historical consensus only upset by recent events, IFS took the opposite view not long ago, telling a court that "[n]either FECA nor the Commission's regulations specify that a matter terminates when commissioners tie 3-3 on whether reason exists to believe the respondent violated the Act." Institute for Free Speech Amicus Curiae Brief 4, *CLC v. FEC*, No. 20-cv-0809-ABJ (D.D.C. Aug. 24, 2021), https://perma.cc/U9GA-5A9S. Further, despite relying extensively on the opinion of former FEC Commissioner Allen Dickerson, Commissioner Dickerson expressed a different understanding not long ago. *See* FEC, Agenda Item 21-21-A (Apr. 1, 2021), https://perma.cc/Z7ZA-YMBZ (proposal from Commissioner Dickerson and others to change FEC rules to mandate dismissal in event of deadlock); *see also* FEC, Certification (Agenda Item 21-21-A) (Apr. 22, 2021), https://perma.cc/E8CP-DPRH (showing proposal failed).

[does not] constitute[] or automatically occasion[] a dismissal." *CLC v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024) (citation modified).[7] "If the Commission does not dismiss the complaint after a failed reason-to-believe vote, the case remains open" and "the Commission may hold further reason-to-believe votes." *Id.* at 382. Commissioners have used these further votes to reconsider their positions, with some matters eventually proceeding to enforcement. *See, e.g.*, Certification, MUR 6920 (Am. Conservative Union), Oct. 24, 2017, https://perma.cc/T9YE-H587 (approving conciliation after reconsidering

[7] One *amici* treats this Court's holding as merely the opinion of "one court," to be viewed in comparison to "another" that held otherwise. IFS Amicus 16. Of course, that other court was a district court, deciding a matter more than a year before this Court rendered its judgment, *see Heritage Action for Am. v. FEC*, 682 F. Supp. 3d 62 (D.D.C. 2023), and was later affirmed on other grounds consistent with *45Committee, see CLC v. Heritage Action for Am.*, No. 23-7107, 2025 WL 222305 (D.C. Cir. Jan. 15, 2025). Even when decided, moreover, the district court's decision was erroneous as its cited authority all involved majority votes to close. *See Heritage*, 682 F. Supp. 3d at 74–75 & n.3 (*citing DCCC*, 831 F.2d 1131 (considering dismissal of MUR 2116, in which matter was closed 6-0 after deadlock, *see* Certification, MUR 2116 (Nat'l Republican Cong. Comm.), June 5, 1986, *available at* p. 14, https://perma.cc/VR8N-USDC); *Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir. 1988) (addressing MUR 1252, closed by 6-0 vote to close the file, *see* Certification, MUR 1252/1299 (Am. for An Effective Presidency), May 25, 1983, *available at* p. 28–29, https://perma.cc/56RH-ULU7); *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) (addressing MURs 6391 & 6471, closed by 5-1 vote, *see* Certification, MUR 6391 & 6471 (Comm'n on Hope, Growth, and Opportunity), Oct. 2, 2015, https://perma.cc/FRR7-9K5V). Indeed, in the CREW case, the dismissal came a year after the deadlock. *See CREW v. FEC*, 236 F. Supp. 3d 378, 387, 388 (D.D.C. 2017) (noting "[i]n September 2014 ... [t]he Commission deadlocked," but "voted 5-1 to close the file" in October 2015).

earlier deadlock); Certification, MUR 6920 (Am. Conservative Union), Dec. 6, 2016, https://perma.cc/T982-YLDF (earlier deadlock on all matters).

Second, a vote to close is hardly ministerial, even in the face of a deadlock. Rather, it "involves judgment, planning, [and] policy decisions." *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). Voting to close permanently ends the agency's consideration and sets the rationale for the Commission's action, *see James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (the agency's explanation is set at "the time the decision was made"). It also starts the clock on a plaintiff's right to sue—the expiration of which permanently deprives the plaintiff of any relief for their injury. *See* 52 U.S.C. § 30109(a)(8)(B); *Jordan v. FEC*, 68 F.3d 518, 518 (D.C. Cir. 1995) (failure to sue within 60-day window from dismissal "deprived [the] court of jurisdiction").

Commissioners voting to find reason-to-believe might vote to close "for any number of reasons, for example, in the interests of transparency of agency operations, closure for respondents, public accountability for the nay-saying commissioners, or in the hopes the complainant will sue the agency and obtain a judicial reversal." *Statement of Commissioner Ellen L. Weintraub On the Opportunities Before the D.C. Circuit in the* New Models *Case To Re-Examine* En Banc *Its Precedents Regarding 'Deadlock Deference'* 9 (Mar. 2, 2022), https://perma.cc/3KED-EMRA ("Weintraub Statement"). But they may also not.

Even in the face of a seemingly intractable deadlock, the commissioners may "consider whether there could be a path forward that would garner four votes," *id.*, or conclude that dismissal would "do larger damage to the law," *id.* at 11. In accord with its "design[] ... ensur[ing] that every important action it take is bipartisan," *Combat Veterans*, 795 F.3d at 153, until a bipartisan group of commissioners agree on the path forward, the case is at a standstill at the agency, establishing the complaint's plausibility and the exhaustion of administrative relief.

On the other hand, the D.C. Circuit has found that holding a vote, even if it deadlocks, is an "act" within the meaning of the FECA, even if it is not and does not necessitate a dismissal. *See 45Committee*, 118 F.4th at 391. Thus, as with other menial acts like distributing complaints, holding votes can defeat a failure-to-act suit if it showed reasonable diligence and progress. But per its duty for "sustained" action, *Rose*, 806 F.2d at 1091, such insubstantial acts are insufficient if progress ceases, *see Citizens for Percy '84*, 1984 WL 6601, at *4 (FEC failed to act, notwithstanding prior vote to find reason to believe, because it was followed by no further action).

For the same reason, then, a failed reason-to-believe vote will not necessarily "conform with [a] declaration" that the agency's failure to act is contrary to law and preclude a citizen suit. 52 U.S.C. § 30109(a)(8)(C). It would only do that if the court's declaration found that the agency had failed to act "at

all." *See 45Committee*, 118 F.4th at 390 ("When a contrary-to-law decision arises from the Commission's failure to act on a complaint *at all*, the Commission conforms by holding a reason-to-believe vote, regardless of the vote's outcome." (emphasis added)); *see also id.* at 381, 383, 390, 392 (FEC "did not appear" and thus its actions were "unknown" to reviewing court, meaning Commission could conform by holding a reason-to-believe vote); *Heritage*, 682 F. Supp. 3d at 68 (deadlocked vote conformed, precluding citizen suit, where failure-to-act declared by court that "heard nothing from the Commission"), *aff'd CLC v. Heritage Action for Am.*, No. 23-7107, 2025 WL 222305 (D.C. Cir. Jan. 15, 2025) (finding in such case, the "FEC complied" by "holding the votes"). Where the reviewing court is aware of the agency's failed votes and faults the lack of further progress, then the holding of additional deadlocked votes would *not* conform with the court's judgment. *See 45Committee*, 118 F.4th at 390 ("[W]hat counts as conforming action depends on what action the contrary-to-law plaintiff was entitled to compel."); *Citizens for Percy '84*, 1984 WL 6601, at *4 (in event of failure to act after reason-to-believe vote, complainant entitled to seek their own relief if Commission could not proceed further).

In short, while this Court has found that deadlocks are an "act" by the agency within the meaning of the FECA, they are not final acts and do not terminate the Commission's obligation to proceed with a matter expeditiously. If

the Commission cannot reach a bipartisan agreement—either to terminate the case or to proceed with investigation—that merely demonstrates a complainant has exhausted their attempts to obtain any relief from the agency and may seek their own relief in court.

II. THE PROCESS HERE WAS NOT "WEAPONIZED"

Cries of "weaponiz[ation]," NRA Br. 9; U.S. Amicus 10, IFS Amicus 11, are both inapposite here and misguided. The court below was fully apprised of the Commission's actions. Further, the supposed "weaponization" was in fact a response required by attempts to overturn the FEC's bipartisan structure and weaponize the dismissal procedures to deprive complainants of their day in court to pursue their plausible claims.

A. The Court Found a Failure to Act and a Failure to Conform Fully Informed about the Commission's Deadlocked Votes

Contrary to the NRA's and amici's concerns, the record here shows the court below knew of the Commission's workings prior to concluding it had failed to act and, accordingly, a repeat of those same stalled actions—of which the court also knew—could not conform with the court's judgment.

The FEC appeared and litigated this matter, informing the court of events at the agency to that point. *See* JA053–186, JA230–336. Although the Commission lost quorum, after it was restored in 2020, JA349–350, the FEC alerted the court to

its acts since the loss of quorum, including a deadlocked February 2021 vote to find no reason-to-believe, and then a deadlocked vote to find reason-to-believe and a deadlocked vote to close the file later than same month. JA337–341. Only after receiving these notices did the court declare a failure to act. JA372; *see also* JA350–351 (court's memorandum noting failed votes); JA367–371 (concluding FEC's acts "substantially justified" until February 2021, but finding failure to act because Commission "allow[ed] a matter to languish for months following an inconclusive vote"). Additionally, before finding a failure to conform, the court was told of the additional deadlock vote since its judgment. JA378–379. The court found that vote, which did not establish any progress past its prior gridlock, failed to conform. JA387; *see also 45Committee*, 118 F.4th at 390 (deadlocked vote only shows progress if the prior failure was to act "at all"). Accordingly, having shown no realistic chance of relief at the FEC, the court recognized Giffords's right to seek its own relief in court.

Giffords did not thereby secure some unfair benefit. If the Commission had voted to close the file, Giffords could challenge that dismissal and win the right to seek its own relief in court. *See* 52 U.S.C. § 30109(a)(8)(A). Although Giffords here established an unreasonable delay rather than an erroneous dismissal, Giffords has not avoided its need to establish its claim on the merits. *See, e.g.*, Pl.'s

Combined Mem. Of P & A in Opp. To All Defs.' Mot. To Dismiss, *Giffords v. NRA*, No. 21-cv-2887-LLA (D.D.C. Apr. 11, 2025).

Giffords satisfied its obligations to obtain a judgment that the FEC failed to act expeditiously on its complaint. It established that it would not receive timely relief from the agency for its plausible complaint—one of which a bipartisan set could not find fault. The Commission's spinning its wheels by holding additional failed votes hardly dislodged that finding.

B. The Amici's Claimed "Weaponization" Was In Fact a Legitimate Response to Weaponization of the FEC Processes by Commissioners Working Against Enforcement

Rather than focus on this case, amici largely focus on other matters in which the FEC deadlocked, could not muster a majority to close the file, and then defaulted in a subsequent failure-to-act suit and so did not appear to produce an administrative record to the reviewing court. *See* IFS Amicus 14; U.S. Amicus 5. It was in these cases that courts entered decisions without a full appreciation of the events, if any, that had transpired at the agency and it was that lack of information these courts found concerning.

Of course, as already stated, that is not what happened here. The court below was fully informed about the FEC's actions. Yet even in the other cases, the accusation of "weaponization" is unwarranted. Rather, the accusation is based on

misrepresentations by the respondents in those cases, including by counsel who now acts as counsel to one of the amici. *See* U.S. Amicus 12.

1. The Nondisclosure of Open FEC Matters Is at the Discretion of Respondent

Courts have admittedly expressed concern over ruling without transparency into the workings of the Commission. That opacity is commanded by the FECA in the first instance, which makes it a crime for any person, including a FEC commissioner, to disclose to anyone outside the agency the events that are transpiring until the matter is closed. *See* 52 U.S.C. § 30109(a)(12). But the FECA gives the respondents control over that confidentiality, permitting them, and them alone, to waive it. 52 U.S.C. § 30109(a)(12)(A) (confidentiality terminated by "written consent" of the respondent to disclose).[8]

Accordingly, a respondent who was concerned that a court hearing a failure-to-act suit was uninformed would not be left to the mercy of the agency. Rather, they could choose—without exercising any irrevocable powers impacting the legal rights of others like closing an ongoing proceeding or devoting limited agency resources to defending an indefensible case—to release the entirety of the agency's

[8] At the time relevant here, the Commission could produce a truncated summary of actions under seal, *see, e.g.*, JA126–131, but only by authorizing a defense on the merits. The Commission changed that in August 2023. *See* FEC Br. 5 n.1.

file to the court. A court left uninformed is thus so only at the choice of the respondent.

The respondents' ability to waive confidentiality further means that a commissioner's attempt to deprive a reviewing court would be pointless. Such a scheme would be defeated by a simple election on the part of a respondent to waive confidentiality.

Indeed, the NRA waived confidentiality in this case—though it was dilatory and only exercised its right after the court entered judgment against the FEC and found that it had failed to conform. JA417–418 (stating NRA waived confidentiality on November 3, 2021, after the court found a failure to conform on November 1). Similarly, in both cases supposedly "weaponized" by the lack of disclosure, the respondents chose to maintain confidentiality despite knowing the FEC was in default and would not appear, waiving their confidentiality only after the respective courts found a failure to act. *Compare 45Committee*, 118 F.4th at 383–384 (FEC sued in March 2020 and defaulted, with default judgment issued November 8, 2021), *with* FEC, Letter from E. Stewart Crosland, Attorney, Jones Day, to FEC Commissioners (Nov. 19, 2021) (on file with agency), https://perma.cc/YU7H-YK99 (waiving confidentiality on 45Committee matter); *and compare Heritage*, 682 F. Supp. 3d at 68 (FEC sued in February 2021 and defaulted, with default judgment entered March 25, 2022), *with* FEC, Letter from

E. Stewart Crosland, Attorney, Jones Day, to FEC Commissioners (Mar. 31, 2022) (on file with agency), https://perma.cc/4BQ9-KWT4.[9]

Notwithstanding the respondents' responsibility for the opacity, at least one respondent's counsel never disclosed this fact to a reviewing court while he blamed the FEC for the lack of disclosure his client caused. *See, e.g.*, Ex. A (Tr. Of Motions Hr'g, *Heritage Action for Am. v. FEC*, No. 22-cv-1422 (Apr. 26, 2023) at 37:22–25, Dkt. No. 34) (accusing FEC of "bad faith and improper behavior by concealing its action for over a year to convey the false impression to Judge Kelly that the FEC had not acted when, in fact, they had acted")); *id.* at 39:23–24 (claiming "[t]he commissioners are committed to the scheme of concealing records"). That lack of candor misled the court into blaming the FEC, rather than the respondent, for its lack of insight. *See Heritage*, 682 F. Supp. 3d at 66 (declaring FEC's nondisclosure of deadlocked votes in still open matter "unlawful" despite FECA's command otherwise at pain of criminal prosecution; never

[9] The respondents have not disclosed why they waited to waive, but it at least gave respondents two bites at the apple, to litigate the FEC's actions before the failure-to-act court and again before a later court. It also let them sandbag complainants who do not know the state of FEC's proceedings—and who, unlike respondents, cannot waive confidentiality—into litigating a failure-to-act suit based on the presumption of no action rather than insufficient action.

discussing the fact nondisclosure was compelled by the respondent). As noted, that counsel is also counsel to one of the amici here. *See* U.S. Amicus 12. [10]

Respondents have the power to ensure the confidentiality provisions of the FECA pose no barrier to fully informing a court about open FEC proceedings. Absent a waiver, however, the FECA makes it a crime for anyone, including a commissioner, to disclose those proceedings. The nondisclosure of ongoing FEC proceedings is the choice of the respondent.

2. Withholding a Vote to Close is Not "Weaponization"; Withholding the Justification for that Vote and Depriving Complainants of Judicial Review Is

Putting aside disclosure, the NRA and its amici further claim the Commission was "weaponiz[ed]" because commissioners elected not to close the file despite a deadlock on opening an investigation. NRA Br. 8; IFS Amicus 11; U.S. Amicus 6. As noted, the choice to close is a complex one that weighs various important factors; a presumption of bad faith is unwarranted. The actual history of the events, moreover, demonstrates it was eminently reasonable.

[10] By misleading the court into thinking disclosure could only happen on a vote to close, Heritage tried to undermine the FEC's bipartisan structure and weaponize the FEC's processes to convert deadlocks into automatic dismissals. *See Heritage*, 682 F. Supp. 3d at 76. As discussed above, the D.C. Circuit corrected that error. *See 45Committee*, 118 F.4th at 382.

The NRA and its amici start with a 2021 newspaper interview by a single commissioner to allege a nefarious "scheme." NRA Br. 50; U.S. Amicus 9; *see also* IFS Amicus 14 (quoting article in *Heritage*, 682 F. Supp. 3d at 69). Putting aside that it was three commissioners, not one, who kept this matter open, that individual commissioner's choices reflect a reasonable and good faith reaction to events that started well before that article.

For some time now, the FEC has been mired in gridlock. Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 9 (Feb. 2017), https://perma.cc/24JG-GYN6 (showing dramatic increase in deadlock votes). Commissioners wanting enforcement in the face of gridlock would dismiss in the hopes a court would at least resolve their dispute, but then found courts deferring to only one side of the disagreement: those against enforcement. *See* Weintraub Statement 3–8. The dissenting views of their colleagues—even if they were of equal or greater number on the Commission—would be afforded no such deference. If a court adopted the rationale because of that deference, that idiosyncratic commissioners' views would then become precedent, despite never having commanded a majority of the Commission. Voting to close in the face of this imbalance was troubling, *see* Weintraub Statement 11, but still commissioners did it, *see, e.g.*, *In re* American Action Network *et al.*, 1, MUR 6589 (June 24,

2014) (Certification), https://perma.cc/V3XL-K4ZC (majority voting to close file after 3-3 deadlock).

Unfortunately, once this deference proved insufficient to protect erroneous dismissals, the blocking commissioners then began to ignore the court orders that went against them. For example, in 2016 a court declared certain commissioners' legal analysis to be contrary to law, *see CREW v. FEC*, 209 F. Supp. 3d 77, 94 (D.D.C. 2016) (declaring "lifetime" test erroneous), but, rather than accept this rebuke and correct their analysis, those commissioners simply ignored it and continued to employ the illegal analysis to reject meritorious complaints, *see* Statement of Reasons of Comm'r Weintraub 1–3, MUR 6872 (New Models) (Dec. 21, 2017), https://perma.cc/7C7E-D9Q8 (castigating colleagues for invoking an already struck down analysis). A later set of commissioners continued this behavior, declaring they would ignore the decision of this Court after it found the law required greater disclosure. Statement of Policy Concerning the Application of 52 U.S.C. § 30104(c) p. 6, (June 8, 2022), https://perma.cc/74ZB-HMTN (declaring that commissioners would refuse to enforce 52 U.S.C. § 30104(c)(1) as a distinct disclosure, notwithstanding this Court's decision in *CREW v. FEC*, 971 F.3d 340 (D.C. Cir. 2020)).

At the same time, the commissioners who voted against opening investigations were withholding their justification from their fellow

commissioners, despite the fact that by voting to close, the majority of commissioners would be adopting that justification as their own rationale for voting to dismiss for purposes of judicial review, if not precedent. *See DCCC*, 831 F.2d at 1132, 1135. Indeed, the practice got so bad, with commissioners refusing to disclose any rationale for blocking enforcement until not only after the Commission voted to close, but after the dismissal was challenged in court, that the Commission earned a rebuke from the D.C. Circuit. *See ECU,* 69 F.4th at 923.

So, for example, in the Heritage matter, the FEC held and deadlocked on reason-to-believe and closure votes starting in April 2021, *see In re* Heritage Action 1–2, MUR 7516 (Apr. 6, 2021) (Certification), https://perma.cc/7PGV-EXTA, but the commissioners did not proffer a justification for those votes until over a year later, *see* Statement of Reasons, Comm'rs. Dickerson, Cooksey & Trainor, III, 1–5, MUR 7516 (*In re* Heritage Action) (May 13, 2022), https://perma.cc/EJ85-FV6N, after the FEC already defaulted, *Heritage*, 682 F. Supp. 3d at 68. Similarly, in 45Committee, the Commission first deadlocked on reason-to-believe and dismissal in June 2020, *see In re* 45Committee, Inc. 1–2, MUR 7486 (June 23, 2020) (Certification), https://perma.cc/2DGM-3CVT, but a justification was only proffered in August 2022, *see* Statement of Reasons, Comm'rs. Cooksey & Trainor, III, 1–8, MUR 7486 (45Committee, Inc.) (Aug. 30, 2022), https://perma.cc/5BQ8-CY2H, after the agency had already defaulted, *see*

45Committee, 118 F.4th at 383–84. And here, the blocking commissioners withheld their justification until December 2021, JA572, after the court found a failure-to-act, JA373, and despite the Commission first voting on closing the file in February 2021, JA340–341; *see also* NRA Br. 52 (stating commissioners only began to formulate a justification for blocking enforcement *after* voting against it and voting to close); *see also* JA638–639 (showing justification not shared with democratic commissioners before publication). It can hardly be said to be bad-faith to withhold a vote for a proposition when the eventual justification for that vote is itself being withheld.[11]

The problems in this approach were then multiplied when a divided panel of this Court rendered an erroneous judgment, now the subject of *en banc* reconsideration, that empowered a non-majority to terminate judicial review of a dismissal merely by mentioning prudential considerations in their eventual justification. *See CREW*, 892 F.3d at 439. In the face of that decision, a commissioner believing that a violation of the FECA had been established and that

[11] The only evidence of a justification in these cases is in the form of an after-the-fact statement of reasons and there is no evidence that an explanation was provided earlier in any other form. The agency is obliged to provide sufficient in-record evidence of an explanation contemporaneous with the dismissal vote to ensure votes are not undertaken, or compelled, arbitrarily, *see James Madison Ltd.*, 82 F.3d at 1095, but commissioners have refused to do so, *see* FEC, FEC implements new enforcement case closure procedures (Apr. 3, 2024), https://perma.cc/9ELK-PKP3.

a plaintiff was wrongfully deprived of their rights faced a terrible dilemma. Her colleagues now could not only block agency enforcement, but also unilaterally block judicial review to the permanent injury of the wronged plaintiff and unilaterally block judicial resolution that might adopt her views of the law. *See id.* Indeed, her colleagues might invoke legal interpretations already declared erroneous, contravening court orders. She would also likely have no idea what the eventual rationale would be—whether her colleagues would permit review, and if they did, what supposed disagreement would be given. In short, she was being asked to take an act that is the definition of arbitrary and capricious—to vote to close a file and injure a wronged party against her better judgment and without any rationale, and with no realistic hope of remedy. It is no wonder then that commissioners facing that dilemma chose not to close rather than acquiesce in this weaponization.

The "weaponization" of which amici complain is the result of a dilemma imposed on a commissioner of good faith who merely wished for a fair hearing on her understanding of the law and for aggrieved complainants. It is impossible to know what may have transpired in these cases had the controlling commissioners agreed to share their rationale prior to demanding their colleague's vote, focused on the actual reviewable disagreement on the law and facts, and omitted any claim

to their "superpower" that precluded accountability. *CREW*, 923 F.3d at 1150 (Pillard, J., dissenting).

Regardless, leaving aside the impropriety of these accusations in other matters, they are entirely ill-fitted here. Here a majority of three commissioners, not one, voted against closure. *See* JA341, JA561. That refusal neither deprived the reviewing court of any information, nor conferred any unfair advantage on the complainant who had to demonstrate their administrative exhaustion to a reviewing court and who must now demonstrate the merit of their underlying claim in front of another. That process is not "weaponization"; it is the pursuit of justice.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the district court should be affirmed.

Date: February 26, 2026

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because it contains 6,485 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). In addition, this brief 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

/s/ Stuart McPhail
Stuart McPhail

CERTIFICATE OF SERVICE

I certify that on February 26, 2026, the foregoing brief was electronically filed with the Clerk of this Court using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished using the CM/ECF system.

/s/ Stuart McPhail
Stuart McPhail

Exhibit A

Portions of the Transcript Of Motions Hearing,
Heritage Action for Am. v. FEC,
No. 22-cv-1422 (Apr. 26, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER,

Plaintiff,

vs.

HERITAGE ACTION FOR AMERICA,

Defendant.
_____/

Civil Action
No. 22-CV-1248

Washington, DC
April 26, 2023

2:04 p.m.

//////////////////////

HERITAGE ACTION FOR AMERICA,

Plaintiff,

vs.

FEDERAL ELECTION COMMISSION

Defendant.
_____/

Civil Action
No. 22-CV-1422

Washington, DC
April 26, 2023

2:04 p.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE CARL J. NICHOLS
UNITED STATES DISTRICT JUDGE

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*** Proceedings recorded by stenotype shorthand.
*** Transcript produced by computer-aided transcription.

P R O C E E D I N G S

DEPUTY CLERK: Your Honor, this is Civil Action 22-1248, *Campaign Legal Center versus Heritage Action for America* and Civil Action 22-1422, *Heritage Action for America versus Federal Election Commission*.

Will parties please come forward to the lectern and identify yourselves for the record. We will start with Campaign Legal Center this afternoon.

MS. DANAHY: Good afternoon, Your Honor. Molly Danahy for Campaign Legal Center.

THE COURT: Ms. Danahy.

Heritage?

MR. SHUMATE: Good afternoon, Your Honor. Brett Shumate from Jones Day. Would you like me to introduce the rest of the folks?

THE COURT: Sure. That would be great.

MR. SHUMATE: Okay. Also from Jones Day is Stewart Crosland, Stephen Kenny, Brinton Lucas, Chuck Roberts and from my client, Heritage Action, Daniel Mauler.

THE COURT: Good afternoon, everyone.

All right. And the Commission?

MR. BELL: Good afternoon, Your Honor. Christopher Bell for the Federal Election Commission, and my colleagues are Kevin Deeley and Harry Summers also from the Federal Election Commission.

make those clear and be glad to answer any questions. Otherwise, reserve our time.

THE COURT: Thank you.

MR. BELL: Thank you.

THE COURT: Mr. Shumate.

MR. SHUMATE: Thank you, Your Honor.

May it please the Court, Brett Shumate on behalf of Heritage Action for America.

These two cases boil down to one simple question. Did the Commission act on CLC's Complaint against Heritage Action for America when the commissioners voted on whether the Complaint provided a reason to believe that Heritage Action had violated the federal election laws?

If you agree with the D.C. Circuit and Judge Mehta that an FEC vote on a complaint is FEC action, then you should issue three rulings on the pending motions.

First, the Court should grant our Motion to Dismiss CLC's citizen suit, because if the FEC acted on the Complaint, then there is no basis for a citizen suit against us.

Second, you should grant our Motion for Discovery in the APA case, because the FEC engaged in bad faith and improper behavior by concealing its action for over a year to convey the false impression to Judge Kelly that the FEC had not acted when, in fact, they had acted.

So first reason why this case is not moot is voluntary cessation does not moot the case. Under the case law, the FEC has a very heavy burden to show that it's absolutely clear that this conduct can never happen again or that Heritage Action would never fall victim to the concealment policy ever again.

THE COURT: So, I think you just answered my question the way you just framed it. I just want to be sure.

So if we're thinking about this as a mootness case, and the FEC has done what it's done, then the question is, could it do it again or will it do it again, and the burden shifting of it. The question isn't about whether it might apply the so-called policy to someone else. The question is whether it might apply it to Heritage.

Do you agree with that?

MR. SHUMATE: I agree.

THE COURT: Okay. Thanks.

MR. SHUMATE: And that's our concern because Heritage Action is continually engaging in political advocacy. CLC, as you no doubt have seen, they are interested in seeking an enforcement action against Heritage Action. The commissioners are committed to the scheme of concealing records.

We've put in the record Commissioner Weintraub's

C E R T I F I C A T E

I, **Lorraine T. Herman, Official Court Reporter,** certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.

May 25, 2023 /s/ Lorraine T. Herman
DATE **Lorraine T. Herman**