IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER *Plaintiff*,	:	
v.	:	Civil Action No. 20-cv-0588-BAH
FEDERAL ELECTION COMMISSION *Defendant*.	:	

PROPOSED *AMICUS CURIAE* BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF DEFENDANT

ALLEN DICKERSON (No. 1003781)
ZAC MORGAN (No. 1032211)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, N.W.
Suite 801
Washington, D.C. 20036
202.301.3300
adickerson@ifs.org
zmorgan@ifs.org

Date: May 29, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER *Plaintiff*,	:	
v.	:	Civil Action No. 20-cv-0588-BAH
FEDERAL ELECTION COMMISSION *Defendant*.	:	

PROPOSED *AMICUS CURIAE* BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF DEFENDANT

ALLEN DICKERSON (No. 1003781)
ZAC MORGAN (No. 1032211)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Avenue, N.W.
Suite 801
Washington, D.C. 20036
202.301.3300
adickerson@ifs.org
zmorgan@ifs.org

Date: May 29, 2020

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT

The Institute for Free Speech, a nonprofit corporation organized under the laws of the Commonwealth of Virginia, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

TABLE OF AUTHORITIES

Cases

Statutes and Municipal Orders

Other Authorities

INTRODUCTION

Amicus writes to apprise this Court of reasons why Plaintiff Campaign Legal Center's motion for a default judgment should not be granted at this time. While the Federal Election Commission ("FEC" or "Commission") has failed to respond to this Court's show cause order of May 14, 2020, that is only because it is blocked from participating in this litigation by an act of Congress and inaction by the political branches. None of these causes was within the FEC's control.

However, with the confirmation of a new commissioner, the FEC's quorum has been restored and its legal paralysis resolved. The Commission should be given a reasonable amount of time to get its affairs in order and respond to the Plaintiff's suit. That is especially true where the underlying lawsuit poses a distinct threat to the statutory role Congress envisioned for the Commission, the underlying merits of the lawsuit implicate the First Amendment rights of third parties, and there are reasons to doubt Plaintiff's Article III standing.

INTEREST OF *AMICUS CURIAE*[1]

As explained in the accompanying motion for leave to file, *Amicus Curiae* Institute for Free Speech ("Institute") is dedicated to the protection and defense of the political rights enshrined in the First Amendment. The Institute believes those rights are best protected when the legal regime created by the Federal Election Campaign Act ("FECA") is applied reliably, consistently, and with fidelity to the Constitution. Granting a motion for default judgment, against a federal commission that has only recently regained the ability to defend itself in court, would unnecessarily compromise its statutory role.

[1] No other party's counsel authored this brief in whole or in part, nor did any person contribute money that was intended to fund the preparation or submission of this brief.

ARGUMENT

I. The Court Should Continue This Motion Until The Federal Election Commission May Adequately Defend Itself

The Campaign Legal Center ("CLC" or "Center") seeks a default judgment against the FEC, arguing that its delay in acting on the Plaintiff's administrative complaint triggers this Court's jurisdiction under 52 U.S.C. § 30109(a)(8)(A). Mot. for Def. Judgment, ECF No. 12, at 12. CLC's administrative complaint was filed on September 12, 2019, nearly a year after the Facebook group that was the subject of CLC's complaint ceased its activities, but just twelve days after the FEC lost is quorum, and with it, the legal authority to act on Plaintiff's administrative complaint. Complaint for Dec. and Inj. Relief ("Complaint"), ECF No. 1, at 1; 52 U.S.C. §§ 30106(c) and 30107(a)(6) (jointly requiring "the affirmative votes of 4 members of the Commission" to "defend… any civil action" under § 30109(a)(8)).

There are indications that this timing was part of a calculated strategy to take advantage of the Commission's lack of a quorum in order to bring about "faster enforcement and more meaningful penalties, [while also] establishing binding precedent for future cases." Kenneth P. Doyle, "Push to Revive FEC Could Curb Court Action on Campaign Finance," Bloomberg Government, May 6, 2020 (quoting CLC executive and noting that "[c]ampaign finance groups have aggressively pursued legal action since the resignation of GOP-appointed commissioner Matthew Petersen in August paralyzed the election regulator").[2] In other words, CLC filed its complaint with every indication that it would be able to use a default judgment as a judicial fulcrum to bypass the bipartisan structure of the FEC and, acting as a private enforcer, bring third parties

[2] *Available at*: https://about.bgov.com/news/push-to-revive-fec-could-curb-court-action-on-campaign-finance/

to heel. Mot. for Default Judgment at 10 ("Plaintiff will be authorized to file suit to enforce its administrative complaint"); Complaint at 2 ("If the FEC does not or cannot conform within 30 days, the Federal Election Campaign Act ('FECA') authorizes Plaintiff to commence a civil action against APN to enforce the campaign finance laws").

These efforts should not be encouraged, as they bypass the protections Congress established in providing for civil enforcement of the federal campaign finance laws and creating an expert agency to do so. The FEC was carefully designed to ensure that its unusually delicate work would be carried out without regard to partisan advantage. Legislative History of the Federal Election Campaign Act Amendments of 1976 at 89 (design intended to ensure the FEC could not "become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate") (written statement of Sen. Alan Cranston).

Like other agencies charged with regulating sensitive activity, such as the Federal Communications Commission or the Securities and Exchange Commission, the FEC has a mandatory bipartisan structure. 52 U.S.C. § 30106(a)(1) ("No more than 3 members of the Commission appointed…may be affiliated with the same political party"). But *unlike* those agencies, the Commission requires a bipartisan *majority* before it can undertake any substantive official acts. *See e.g.* 52 U.S.C. § 30109(a)(2) ("…by an affirmative vote of 4 of its members…"). This longstanding requirement expresses the grave importance Congress, an inherently partisan legislative body, and the President, historically the head of his own party, have assigned to the independence of the FEC.[3] As relevant here, this means that the Commission requires four votes

[3] Or at least its ability to act independently of any *partisan* majority. There is no requirement that commissioners be affiliated with a political party, let alone one of the major parties. But, in practice, the Commission has usually consisted of three commissioners affiliated with the Democratic Party, and three affiliated with the Republicans.

to even order its general counsel to defend this action. *See* 52 U.S.C. § 30106(c) ("[T]he affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 307(a) [52 U.S.C. § 30107] of this Act"); 52 U.S.C. § 30107(a)(6) ("…to defend (in the case of any civil action brought under section 309(a)(8) [52 U.S.C. § 30109(a)(8)] of this Act").

That fourth vote is in sight, although it has long been delayed by the political branches' inaction. The President nominated James E. "Trey" Trainor III to the Federal Election Commission in both 2017 and 2018, yet the Senate did not act on either nomination. "Six Nominations and One Withdrawal Sent to the Senate Today," The White House, Sept. 14, 2017;[4] "Nominations Sent to the Senate Today," The White House, Jan. 8, 2018.[5] The President renewed that nomination after the 116th Congress was seated in 2019 and was initially met with more silence. "Nominations Sent to the Senate," The White House, Jan. 16, 2019.[6]

On September 1, 2019, the Commission lost its statutory quorum upon the resignation of Commissioner Matthew Petersen, reducing the number of commissioners sitting on the FEC from four to three.[7] The problem here, in other words, is not a "regulatory breakdown" at the

[4] *Available at*: https://www.whitehouse.gov/presidential-actions/six-nominations-one-withdrawal-sent-senate-today/

[5] *Available at*: https://www.whitehouse.gov/presidential-actions/nominations-sent-senate-today-2/

[6] *Available at*: https://www.whitehouse.gov/briefings-statements/nominations-sent-senate/

[7] This was not the first time that the Commission has lost its quorum. A similar state of affairs took place in 2008, "early in the second of session of the 110th Congress." R. Sam Garrett, Congressional Research Service, "The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications" at 1, May 5, 2009 ("…just two commissioners—[David] Mason (R) and Ellen L. Weintraub (D)—remained in office"); *available at*: https://www.everycrsreport.com/files/20090505_RS22780_574d34cad30fdadcc967cc92a96f5ec

Commission, but that the President and Senate were in a three-year stalemate over a nomination.[8] Mot. for Default Judgment at 11.

It seems, then, that CLC took advantage of a dispute between the political branches that rendered the FEC defenseless. But its approach raises more questions than simply those of administrative law. After all, "[u]nique among federal administrative agencies," the FEC "has as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *Am. Fed'n of Labor-Congress of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003) ("*AFL-CIO*") (citation and quotation marks omitted). And the enforcement process CLC envisions—one in which it selects the targets of enforcement, bypasses the many statutory protections given respondents before the FEC, including the right to mediation and the bipartisan structure already discussed, and then imposes litigation costs on those entities—is a recipe for chilled political speech. It would also allow CLC, and doubtless other groups, many motivated by partisan advantage, to take on the mantle of prosecutorial discretion and target this new enforcement machinery at their political or ideological opponents.[9]

212df5433.pdf. Despite this state of affairs continuing into June of a Presidential election year, *id*. at 2, Congress chose not to amend FECA or alter the structure of the Commission.

[8] This fact distinguishes the instant matter from the default judgment recently granted by this court against the FEC on April 9th, *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm'n*, Case No. 19-2753 (D.D.C. 2020), where there was a colorable claim that "resources [were] available to the agency," *Common Cause v. Fed. Election Comm'n*, 489 F. Supp. 738, 744 (D.D.C. 1980), because of a 14-month period between the filing of the administrative complaint and the Commission's loss of a quorum.

[9] Happily, the restoration of a quorum should eliminate the Center's concern that "there is a substantial likelihood that [the alleged] type of illegal activity will continue, or even grow" absent a default judgment. Mot. for Default Judgment at 7. Now that four commissioners will shortly be back to work, the risk of "large-scale noncompliance with federal disclaimer and disclosure laws" will hopefully diminish, *id*. at 8, as the FEC will now be able to make enforcement decisions, as

CLC is correct that a normal defendant in a typical case that "has not appeared, filed an answer, or otherwise defended its action" would be subject to a default judgment. Mot. for Default Judgment at 4, ¶ 14. But for the reasons already given, the FEC in this matter is not a normal defendant, even by the standards of a government defendant, and this is not a typical case. Default judgment would be a strong remedy where the Court is on notice of the reason for the Commission's delay, that the delay was caused by the FEC's statutory mandate and Congressional inaction, and that the situation has changed so that the Commission may now defend itself.

II. The Court Should Satisfy Itself As To The Plaintiff's Standing

This Court should also hesitate to enter a default judgment because the Plaintiff does not appear to possess Article III standing, and "[w]hen there is doubt about a party's constitutional standing, the court must resolve the doubt, *sua sponte* if need be." *Lee's Summit, Mo. v. Surface Transp. Bd.*, 231 F.3d 39, 41 (D.C. Cir. 2000). Just a few days ago, in another case brought by this same Plaintiff arguing that the Commission's inaction was contrary to law, a judge of this Court dismissed the complaint under Fed. R. Civ. P. 12(b)(6). *Campaign Legal Ctr. v. Fed. Election Comm'n*, Case No. 18-53, 2020 U.S. Dist. LEXIS 92402 (D.D.C. May 26, 2020) (finding CLC had no Article III standing to bring a 52 U.S.C. § 30109(a)(8)(A) suit); *see* Complaint at 2; ¶ 1 ("This is an action under FECA, 52 U.S.C. § 30109(a)(8)(A)"). The Court applied *Common Cause v. Federal Election Commission*, 108 F.3d 413, 419 (D.C. Cir. 1997), which held that § 30109(a)(8)(A) "does not confer standing" on parties. Specifically, the Court determined that circuit precedent "stated unambiguously" that the statute "does not confer standing" where the

per its statutory mandate, on a bipartisan basis.

case "involves a challenge to agency inaction." *Campaign Legal Ctr.*, 2020 U.S. Dist. LEXIS 92402 at 3. That decision is on all fours with the facts here.

CONCLUSION

Plaintiff's suit should be dismissed for lack of standing or, in the alternative, its motion for a default judgment should be continued until the FEC is able to mount the defense anticipated by Congress.

Furthermore, in the event this Court determines that a hearing would be useful, and the FEC is unable to appear, *Amicus* respectfully requests the opportunity to present oral argument to the Court.

Respectfully submitted,

/s/ Allen Dickerson
Allen Dickerson (No. 1003781)
Zac Morgan (No. 1032211)
Institute for Free Speech
1150 Connecticut Avenue, N.W.
Suite 801
Washington, D.C. 20036
202.301.3300
adickerson@ifs.org
zmorgan@ifs.org

Date: May 29, 2020

CERTIFICATE OF SERVICE

I hereby certify that on the 29th of May, 2020, I caused a copy of the foregoing to be filed via CM/ECF on all Parties that have entered an appearance in this Court. A paper copy was sent via the U.S. mail to the General Counsel's Office at the Federal Election Commission at:

1050 First Street, N.E.
Washington, D.C. 20463

/s/ Zac Morgan
Zac Morgan