[ORAL ARGUMENT NOT YET SCHEDULED]

No. 23-7040

In the United States Court of Appeals for the District of Columbia

CAMPAIGN LEGAL CENTER,

Appellant

v.

45COMMITTEE, INC.,

Appellee

On Appeal from the United States
District Court for the District of Columbia
The Hon. Amit P. Mehta, District Judge
(Dist. Ct. No. 1:22-cv-1115)

BRIEF OF AMICUS CURIAE INSTITUTE FOR FREE SPEECH IN SUPPORT OF APPELLEE AND AFFIRMANCE

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Disclosure Statement

Counsel for amicus curiae Institute for Free Speech, Brett R. Nolan, certifies that the Institute is a nonprofit corporation dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. The Institute has no parent company, subsidiary, or affiliate, and no publicly held company owns more than 10 percent of its stock.

/s/ Brett R. Nolan

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INTERESTS OF AMICUS CURIAE[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. It was founded by the Honorable Bradley A. Smith, who served as a Commissioner on the Federal Election Commission (FEC) from 2000 through 2005, including serving as the Vice Chairman of the Commission in 2003 and Chairman in 2005. Along with scholarly and educational work, the Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal level. The Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. A core part of the Institute's mission is to ensure that the FEC lawfully enforces federal campaign finance laws.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus curiae or its counsel, financially contribute to preparing or submitting this brief. All parties have consented to the Institute filing this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In many ways, the question here—whether the district court lacked jurisdiction because the FEC acted on the Campaign Legal Center's administrative complaint—is an easy one. This Court's precedent leaves little doubt that the FEC's deadlocked vote constitutes an action under 52 U.S.C. § 30109(a)(8). That means the Center cannot establish the prerequisites for bringing a citizen suit under the Federal Election Campaign Act (FECA or the Act)—and so the district court correctly dismissed the complaint.

The Center resists this conclusion with a creative interpretation of FECA that turns the Act on its head. As the Center sees it, FECA allows a partisan minority of Commissioners to greenlight citizen suits simply by refusing to administratively close the file on a complaint. This theory is not just wrong—it fundamentally transforms the enforcement framework that Congress enacted, all at the expense of "the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Congress structured the FEC to make partisan enforcement impossible. With only six Commissioners evenly divided between

Republicans and Democrats, tie votes are "baked into the very text of the statute." *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016). That decision reflects a serious concern that Congress had over the potential for partisan abuse inherent in regulating political speech. By setting non-enforcement as the default and requiring bipartisan agreement to depart from that baseline, Congress "uniquely structured the FEC" in way that guards against biased or overzealous enforcement. *See id.* at 1171.

The Center asks this Court to undo that careful structure and authorize a partisan bloc of Commissioners to hand enforcement power to private citizens. The Court should reject such a startling invitation and affirm the judgment below.

ARGUMENT

I. ENFORCING FEDERAL CAMPAIGN FINANCE LAW IS HARD—AND THAT'S A GOOD THING.

The FEC has "exclusive jurisdiction" over "civil enforcement" of federal campaign finance laws. 52 U.S.C. § 30106(b)(1). But Congress structured the agency to make enforcement difficult. Doing so guards against the danger that exists whenever the government regulates political speech.

1. "Unique among federal administrative agencies," the FEC has "as its sole purpose the regulation of core constitutionally protected activity." *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016). No one seriously doubts that "a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). That's because "the whole concept of" a representative democracy "depends on the ability of the people to make their wishes known to their representatives." *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). The First Amendment preserves that ability. It is "the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

Nowhere does that matter more than when speaking about elections. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential," *Buckley*, 424 U.S. at 14–15, so "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," *id*. at 14. For this reason, "[t]he First Amendment has its fullest and most urgent

application to speech uttered during a campaign for political office." *Citizens United*, 558 U.S. at 339 (cleaned up).

The FEC thus operates in a minefield. Everything it does "implicates fundamental rights." *Van Hollen*, 811 F.3d at 499. And every decision it makes, "no matter how mundane or neutral on the surface, [is] likely to have partisan consequences affecting electoral outcomes." Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 Geo. Mason L. Rev. 503, 509 (2020).

Congress rightly worried about this problem when creating the FEC. "[B]oth parties feared the possibility of partisanship in enforcement," and "neither was eager to have campaign finance restrictions - even simple disclosure - that would be enforced by an agency under partisan control of the other party." *Id.* at 513. Senator Alan Cranston, a speech-regulation supporter who believed "[a] strong enforcement agency [was] essential," implored Congress not to "allow the FEC to become a tool for harassment by future imperial Presidents." FEC, *Legislative History of Federal Election Campaign Act Amendments of 1976*, at 88–89 (1977), available at https://perma.cc/EQ9C-TP3M. So when Congress set up the

agency, it baked in an "indispensable ingredient"—bipartisan control over enforcement. Smith, *supra*, at 513.

2. FEC enforcement actions begin one of two ways: either someone files a complaint, or the agency obtains information suggesting that "a person has committed, or is about to commit, a violation of [the] Act." 52 U.S.C. § 30109(a)(1) & (2); *see also* 11 C.F.R. § 111.3(a). Anyone can file an administrative complaint alleging a FECA violation. 52 U.S.C. § 30109(a)(1). And after reviewing the complaint (along with any responses), the Commission must vote as to whether "it has reason to believe" that the respondent has violated or is about to violate the law. 52 U.S.C. § 30109(a)(2).

This is where Congress enacted unique structural features to prevent partisan enforcement. The FEC is run by a six-member commission, of which "[n]o more than 3 members . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). But before the FEC can even investigate an alleged violation, at least four members must vote to do so. 52 U.S.C. §§ 30106(c), 30107(6) & (9), 30109(a)(2). That four-vote threshold makes it impossible for purely partisan enforcement: No bloc of Commissioners composed solely of Democrats can investigate

Republicans, and no bloc of Commissioners composed solely of Republicans can investigate Democrats. "This structure was created to encourage nonpartisan decisions."[2] FEC, *Leadership and Structure*, available at https://perma.cc/9M32-3C66.

But not everything the FEC does requires four votes. As this Court has recognized, "[t]he statute specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list." *Citizens for Responsibility & Ethics v. FEC*, 993 F.3d 880, 891 (D.C. Cir. 2021) (*New Models*). Thus, "[a] decision to *initiate* enforcement, but not to decline enforcement, requires the votes of four commissioners." *Id.* & n.10 (emphasis added). This is the key part of the Act: "the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

Tie votes are thus "baked into the very text of the statute"—a feature of the FEC, not a bug. *Public Citizen*, 839 F.3d at 1170. Doing so errs against enforcement and guards against "partisan domination." *See*

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[2] In fact, and as this case shows, the Act requires four votes even when vacancies or recusals occur. That means the FEC cannot proceed with enforcement even if the reason-to-believe vote is 3-2 or 3-1 in favor of doing so. This further emphasizes Congress's resolve not to allow investigations to proceed on a purely partisan vote.

Smith, *supra*, at 517. Most importantly, however, the structure favors more speech, not less.

II. ADOPTING THE CENTER'S THEORY WOULD EVISCERATE THE PROTECTIONS AGAINST PARTISAN ENFORCEMENT.

The above structural background illuminates the real problem in this case. The Center's expansive view of FECA's citizen-suit provision would remove the guardrails that Congress enacted. And in fact, that seems to be exactly what some commissioners want.

1. FECA's citizen-suit provision is a limited creature designed only to reign in lawless agency action. *See* 52 U.S.C. § 30109(a)(8). Even a quick glance at the statute reveals that this mechanism is not a substitute for the agency's "exclusive jurisdiction" over civil enforcement. *Id.* at §§ 30106(b)(1), 30109(a)(8). The law allows a "party aggrieved by an order of the Commission dismissing a complaint . . . or by a failure of the Commission to act on such complaint" to petition for relief in court. *Id.* § 30109(a)(8)(A). But that relief is limited. If the court "declare[s] that the dismissal of the complaint or the failure [of the Commission] to act is contrary to law," the court "may direct the Commission to conform" within 30 days. *Id.* § 30109(a)(8)(C). That is, the Commission has 30 days to fix its mistake.

The citizen-suit provision only activates if the Commission defies the court's order. When that happens, the complaining party "may bring . . . a civil action to remedy the violation involved in the original complaint." *Id.* As 45Committee notes, this narrow provision "did not produce a citizen suit until 2018"—42 years after Congress enacted it. *See* Appellee Br. at 9.

2. With the help of a partisan bloc of Commissioners, the Center hopes to avoid the narrow confines of FECA's citizen-suit provision by affording the law a novel reading. As the Center sees it, the FEC fails "to act" on a complaint when it ties on a reason-to-believe vote (or otherwise fails to reach four votes in favor of enforcement). If accepted, this would mean that a series of tie votes over a complaint will eventually (and always) trigger a citizen suit because the agency never "act[s]" in conformance with the law. But that interpretation runs contrary to precedent, *see* Appellee Br. at 20–23, and the statute's text, *see id.* at 24–26, 38–50, which provide that such a vote against enforcement amounts to "final agency action," *Public Citizen,* 839 F.3d at 1170. No reasonable reading of § 30109(a)(8) supports the notion that

the FEC fails "to act" merely because the decision not to investigate was decided on a 3-3 or 3-2 vote. *See* Appellee Br. at 20–26, 38–50.

The Center's contrary view rests on a misunderstanding about the role that bipartisan agreement plays under FECA. The Center contends that a tie vote cannot be agency action because otherwise "a partisan bloc of three Commissioners could unilaterally dismiss all cases brought against any members of their own party—or dismiss all cases, period." Appellant Br. at 42. This, the Center says, would undermine the FEC's bipartisan structure, putting questions of enforcement into the hands of only three Commissioners.

But that gets the problem exactly backward. Never mind that nothing like this has ever happened in the FEC's 47-year history.[3] Congress "structured the FEC toward maintaining the status quo"—that is, non-enforcement. *Public Citizen*, 839 F.3d at 1171. It did not require bipartisanship (or four votes) for everything the FEC does.

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[3] Even the most charitable look at the data shows the Commission ties on well under half of its votes to dismiss. *See* Smith, *supra*, at 528–31. Still, any fear that a partisan bloc of Commissioners will, for the first time in the FEC's history, summarily dismiss complaints against their own party overlooks that such dismissals could be challenged as contrary to law under § 30109(a)(8).

Quite the contrary: "The statute specifically enumerates matters for which the affirmative vote of four members is needed *and dismissals are not on this list*[.]" *New Models*, 993 F.3d at 891 (emphasis added). The FEC requires bipartisan agreement before exercising its enforcement authority—but it requires no such thing when deciding to stand down.

In reality, the Center's claim to preserve the FEC's "carefully balanced bipartisan structure" would do the opposite. According to the Center, it takes only three (partisan) votes to prevent the FEC from acting on a complaint under § 30109(a)(8). And when the complaining party sues over the FEC's inaction, it takes only three (partisan) votes to prevent the FEC from showing up in court to defend itself. *See* 52 U.S.C. §§ 30106(c), 30107(a)(6). That triggers a default judgment, greenlighting a citizen suit for enforcement on the underlying complaint. The result? "[A] partisan bloc of three Commissioners," Appellant Br. at 42, can unilaterally authorize a citizen suit whenever the FEC votes against enforcement. Rather than reinforce the bipartisan structure of the FEC, the Center's legal theory would eviscerate it.

III. THE FEC'S EXTRA-STATUTORY REQUIREMENT TO CLOSE ITS FILES ILLEGALLY HIDES ITS ENFORCEMENT DECISIONS FROM THE RESPONDENTS AND THE PUBLIC.

The scheme to shift enforcement proceedings into the hands of private parties starts and ends with a misguided interpretation of a regulation requiring the FEC to disclose its enforcement files within "30 days from the date on which all respondents are notified that the Commission has *voted to close* such an enforcement file." 11 C.F.R. § 5.4(a) (emphasis added). This requirement of "closing the file" appears nowhere in the FEC's enabling statute. And it appears nowhere in the agency's rules of procedure. *See* FEC Commission Directive No. 10 (Dec. 20, 2007), available at https://perma.cc/NM93-RBNL. Nor is that surprising. An additional step to close the file appears unnecessary given that "the statute *compels* FEC to dismiss complaints in deadlock situations." *Public Citizen*, 839 F.3d at 1170 (emphasis added).

The file-closing rule originated as an effort to comply with the FEC's disclosure obligation by delineating the point at which records documenting final agency action would be made public. *See* FEC, *Access to Public Disclosure Division Documents*, 45 Fed. Reg. 31292 (May 13, 1980). Consistent with that history, the FEC traditionally treated this

as an uncontroversial, ministerial step. *See Statement of Commissioner Ellen L. Weintraub*, at 5–6 (Oct. 4, 2022), available at https://perma.cc/CK75-EHM5 (acknowledging that in past practice, "even those who wanted to pursue the complaint usually voted to dismiss those matters to get the details in front of the public"). But recently, Commissioners on the losing end of an enforcement vote have decided to use this extra-statutory procedure to trigger citizen suits by withholding consent to close the file, making it appear as though the FEC has not yet acted on the complaint. *See id.* at 4 (explaining that "[i]t is indeed departing from past Commission practice").

The result is that "these cases [become] zombie matters—dead but unable to be laid to rest." Sean J. Cooksey, *Re: Motion to Amend Directive 68 to Include Additional Information in Quarterly Status Reports to Commission*, at 2 (June 3, 2021), available at https://perma.cc/TGF9-YP48. Because the case is not officially closed (according to the FEC), the complainant, respondent, and the public are never informed of the resolution of the matter. *See* 11 C.F.R. § 111.9(b); 11 C.F.R. § 5.4(a)(4). So not only can a partisan bloc of Commissioners wield this regulation to default the FEC in court in the hopes of

triggering enforcement through a citizen suit, they can do so while keeping those alleged of wrongdoing—and the court itself—in the dark, as initially happened here. In this view of things, the tie, apparently, goes to the censor. *But see Wisconsin Right to Life*, 551 U.S. at 474.

All this havoc originates from a disclosure practice that plainly violates the law—as Judge Nichols concluded in a similar proceeding earlier this year. *See Heritage Action for Am. v. FEC*, Civ. A. No. 1:22-cv-1422, 2023 U.S. Dist. LEXIS 122680, at *22 (D.D.C. July 17, 2023). This Court "has consistently referred to failed reason-to-believe votes as 'deadlock dismissals' and held that such dismissals constitute final agency action." *Id.* at *23 (collecting cases). In doing so, the Court has explained that a "deadlock mean[s] the Commission could not proceed." *CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018). So the proceeding terminates. *Id.*

"Because a deadlocked reason-to-believe vote is equivalent to a dismissal (or termination), such a vote requires prompt disclosure." *Heritage Action*, 2023 U.S. Dist. LEXIS 122680, at *26–27. The Administrative Procedure Act requires "[p]rompt notice" when an agency denies a complaint. *See* 5 U.S.C. § 555(e). And FECA, along with

its corresponding regulations, require disclosing a non-enforcement decision to the parties and the public. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.9. The FEC thus acts contrary to law when it relies on its extra-statutory requirement to close the file instead of treating the vote against enforcement as a dismissal—exactly what happened here.

This practice imposes real harm. The Center filed its allegations against 45Committee in 2018. JA062. But 45Committee did not learn that the FEC voted against enforcement until years later, after the Center filed this suit for private enforcement. JA254. That kind of looming threat—the threat that a federal agency might launch an investigation or enforcement proceeding at any time—would give anyone pause before venturing into public debate again. Yet all it took to impose that cloud over political speech is three partisan Commissioners voting against closing the FEC's administrative file indefinitely.

On this last point, the Center's criticism of the FEC's delay and procedural irregularity merits a brief response. The Center casts itself as the victim of a rogue agency—criticizing the agency for keeping it in the dark about "the status of its own complaint." Appellant Br. at 56.

But the Commissioners who caused the delay and secrecy did so *to benefit* the Center, trying to engineer a workaround to FECA's four-vote requirement for enforcement proceedings. *See Statement of Commissioner Ellen L. Weintraub*, *supra*, at 4–5. Any victim of such irregularities is plainly 45Committee, the respondent accused of violating federal law. For every day that the Center spent wondering about "the status of its own complaint," Appellant Br. at 56, 45Committee spent wondering whether the FEC would launch an investigation. Four years in limbo under threat of federal enforcement, all because a three-member bloc of Commissioners deliberately prolonged this process, shrouding it in secrecy, as a scheme to indirectly authorize federal enforcement that the FEC would not vote to approve. *See Statement of Commissioner Ellen L. Weintraub*, *supra*, at 4–5.

It should not be this way. Not when exercising "the most fundamental First Amendment activities" is on the line. *Buckley*, 424 U.S. at 14.

CONCLUSION

The district court correctly held that it lacks jurisdiction because the FEC acted on the Center's complaint when it voted against enforcement

by failing to find that it had reason to believe 45Committee violated the law. This Court should affirm.

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) because it contains 3,152 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 Serif typeface, Century Schoolbook, in 14-point font using Microsoft Word.

/s/ Brett R. Nolan

Certificate of Service

I certify that on September 27, 2023, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brett R. Nolan