Nos. 22-5140, 22-5167

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

CAMPAIGN LEGAL CENTER,
Plaintiff-Appellee,

v.

FEDERAL ELECTION COMMISSION
Defendant-Appellee,

HERITAGE ACTION FOR AMERICA,
Movant-Appellant.

On Appeal from the United States District Court
For the District of Columbia (Kelly, J.)

BRIEF OF THE INSTITUTE FOR FREE SPEECH *AMICUS CURIAE* IN SUPPORT OF THE MOVANT-APPELLANT

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STATEMENT OF INTEREST[1]

The Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. It was founded by the Honorable Bradley A. Smith, who served as a Commissioner on the Federal Election Commission from 2000-2005, including serving as Vice Chairman of the Commission in 2003 and Chairman in 2004. In addition to scholarly and educational work, the Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. The Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. A core aspect of the Institute's mission is to ensure that the Federal Election Commission ("FEC," the "Commission," or the "Agency") lawfully enforces federal campaign finance laws.

[1] *Amicus* files this brief pursuant to the Court's order granting its motion for leave to file an *amicus curiae* brief. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

This case is about what happens when a federal agency goes rogue and decides it no longer must follow its own organizing statute or respond to the authority of the federal courts.

The Federal Election Commission is an independent regulatory agency led by six Commissioners. By law, no more than three Commissioners can be from any one political party. Moreover, by law, the Commission cannot investigate or sanction political actors without the approval of four or more Commissioners. The benefit of this structure is obvious: requiring four votes on a Commission divided three-three between Republicans and Democrats guarantees that there is some minimal level of bipartisan or nonpartisan support before embarking on enforcement proceedings against political speakers.

This structure can and does make it more difficult for the Federal Election Commission to pursue enforcement actions. This is a feature, not a bug, of the system. Unfortunately, not everyone sees it that way. Some, including some Commissioners at the Federal Election

[2] Movant-Appellant consents and Plaintiff-Appellee does not oppose the filing of this brief. Defendant-Appellant has made no appearance in the case.

Commission, would prefer a more partisan agency. These activist Commissioners have resorted to unprecedented procedural shenanigans to try to get their way. That is not the agency that Congress created.

Specifically, they refused to allow the agency's Office of the General Counsel to inform speakers or the public that complaints had been resolved. When challenged in court regarding their apparent inaction in these cases, these same Commissioners flouted the authority of the court, refused to allow the agency to appear, and hid from the court the fact that these matters had not only been acted upon but resolved. One of these matters involved Heritage Action for America and is before this Court.

This Court should not reward the unprecedented and unlawful behavior of a minority of FEC Commissioners and should instead vacate the March 25 and May 3 Orders of the district court.

ARGUMENT

I. The Structure and Purpose of the FEC

A. The FEC Regulates in an "Area of the Most Fundamental First Amendment Activities"

The Federal Election Commission is a six-member body that is vested with "exclusive jurisdiction with respect to the civil enforcement"

of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"). 52 U.S.C. §§ 30106(b)(1) (1997), 30107(e) (1986). By law, "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1) (1997). In addition, "the affirmative vote of 4 members of the Commission shall be required" before the Commission can conduct any investigation. 52 U.S.C. §§ 30106(c) (1997); 30107(a)(9) (1986).

The reasons for this structure are obvious, but worth emphasizing. "Unique among federal administrative agencies, the Federal Election Commission 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.'" *American Fed'n of Labor and Congress of Indus. Org. v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C.Cir.1981)). The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably . . . to petition the Government for a redress of grievances." U.S. Const., amend. 1. "Whatever differences may exist

about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This is because "[i]n a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). Accordingly, "[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Fed. Election Comm'n. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007)(quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

This is particularly true with respect to speech related to elections. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential" and "[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." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Accordingly, "[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 (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Thus, the FEC regulates "in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14; *see also* 52 U.S.C. §§ 30101(8)(A)(i); (9)(A)(i) (2014) (defining contributions and expenditures, respectively, as spending "for the purpose of influencing any election for Federal office.").

B. The FEC Enforcement Process

Enforcement actions at the FEC begin one of two ways: either someone files a complaint, or the agency obtains information "in the

normal course of carrying out its supervisory responsibilities" that "a person has committed, or is about to commit, a violation of [the] Act." 52 U.S.C. § 30109(a)(2) (2018); *see also* 11 C.F.R. § 111.3(a) (2014).

"Any person who believes a violation" of the Act has occurred or is about to occur may file a complaint, provided that it is "notarized" and "made under penalty of perjury." 52 U.S.C. § 30109(a)(1) (2018); *see also* 11 C.F.R. § 111.4 (2018). No first-hand knowledge is required. Once a complaint is received, the Commission has an obligation to notify the respondent of the allegations against them and provide an opportunity to respond. 52 U.S.C. § 30109(a)(1) (2018); *see also* 11 C.F.R. § 111.6(a) (2014).

By regulation, after either the expiration of the response period or after the receipt of a response, the FEC's General Counsel "may recommend to the Commission whether or not it should find reason to believe that a respondent has committed or is about to commit a violation of statutes or regulations over which the Commission has jurisdiction." 11 C.F.R. § 111.7(a) (2014). While this regulation is couched in permissive language, in practice the Office of the General Counsel almost always develops a recommendation. This

recommendation is nothing more than a staff memo to the Commission; it has no more binding effect than a memorandum from a law clerk to a judge. It does not (and cannot) set agency policy or agency interpretations of the law until and unless approved by the Commission or adopted as a statement of reasons by a controlling bloc of Commissioners. *See, e.g.*, *Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131 (D.C. Cir. 1987) (identifying a controlling group of Commissioners); *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992) (same).

After receiving the General Counsel's recommendation, the FEC considers whether there is "reason to believe" a violation has or is about to occur. *See* 52 U.S.C. § 30109(a)(2) (2018); 11 C.F.R. § 111.9 (2014). A "reason to believe" finding requires "an affirmative vote of 4 of [the FEC's] members" and is a predicate for an investigation. *Id.*; *see also* 11 C.F.R. § 111.10 (2014) (concerning investigations).

Under Commission regulations, "[a]n investigation shall be conducted" after a finding of reason to believe. 11 C.F.R. § 111.10(a) (2014). In practice, many respondents decide that it is not worth going through a full federal investigation and engage in a process known as

"pre-probable cause conciliation," by which they enter an agreement with the FEC to resolve the accusations against them.

For those that do not, the FEC has the option to proceed to a formal probable cause determination, efforts at post-probable cause conciliation, and, if approved by the Commission, civil litigation initiated by the agency. *See* 52 U.S.C. §§ 30109(a)(3)-(6) (2018). At each stage, moving to the next stage requires the affirmative vote of four or more Commissioners.

C. Citizen Suits Under the Act

As noted above, the FEC has "exclusive jurisdiction with respect to the civil enforcement" of the Act. However, "[a]ny party aggrieved," by either an order of the Commission dismissing a complaint or the failure of the Commission to act on a complaint within 120 days, may file suit against the Commission. 52 U.S.C. § 30109(a)(8)(A) (2018). Once a suit is initiated, "the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days." *Id*. at (C). Only if the Commission fails to do so may an aggrieved party bring a civil action against the alleged respondent. *Id*.

II. Three-Three Votes at the FEC are a Feature, Not a Bug

Given the Constitutionally sensitive nature of the activity the Commission regulates, it is imperative that the Commission proceed cautiously and not function as (or be perceived as functioning as) an adjunct of one political party or another. The FEC's structure – the statutory requirement that no more than half of the Commission be affiliated with one political party and that significant decisions, such as investigating political actors, requires the affirmative vote of at least four Commissioners – furthers these imperatives. As the FEC itself claims, "[t]his structure was created to encourage nonpartisan decisions." *Leadership and Structure*, Federal Election Commission (accessed Nov. 3, 2022), https://www.fec.gov/about/leadership-and-structure/. No bloc of Commissioners composed solely of Democrats can initiate investigate Republicans and no bloc of Commissioners composed solely of Republicans can investigate Democrats. *See generally* Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 Geo. Mason L. Rev. 503, 512-13 (2020) (describing the history of the creation of the FEC and noting "[w]hat is clear is that both parties feared the possibility of partisanship in enforcement:

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. Thus the indispensable ingredient in the FEC's creation was its bipartisan makeup."); FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF THE FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, 89 (1977), https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf (last visited Aug. 12, 2021) (bipartisan membership prevents the FEC from "becom[ing] a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate." (Statement of Sen. Alan Cranston)). There must be at least a minimal level of bipartisanship before involving the government in political speech. If there is not, the default is no enforcement action.

This has not stopped some, specifically those who want a more activist agency, from complaining. Special interest groups lament that "[t]o reduce political corruption, we need a stronger FEC to enforce campaign finance laws and hold political candidates and their donors

accountable."[3] Adav Noti, Erin Chlopak, Catherine Hinkley Kelley, Kevin P. Hancock, and Saurav Ghosh, *Why the FEC is Ineffective*, Campaign Legal Center (Aug. 8, 2022), https://campaignlegal.org/update/why-fec-ineffective.[4] Former FEC Commissioners protest that "[a] bloc of three Commissioners routinely thwarts, obstructs, and delays action on the very campaign finance laws its members were appointed to administer." *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* at 1, Office of Commissioner Ann M. Ravel, Federal Election Commission (Feb. 2017), https://www.fec.gov/resources/about-

[3] Never mind that "hold[ing] political candidates . . . accountable" is what elections are for.

[4] Tellingly, one of the top recommendations of this report is to "make it harder to override the general counsel's recommendation" – which would decrease accountability to the American people for the agency's decisions and give more authority to the unelected and unconfirmed employees of Office of the General Counsel, where all of the authors of this report previously worked. *See supra* at 9 ("[The General Counsel's recommendation] has no more binding effect than a memorandum from a law clerk to a judge. It does not (and cannot) set agency policy or agency interpretations of the law until and unless approved by the Commission or adopted as a statement of reasons by a controlling bloc of Commissioners.")

fec/commissioners/ravel/statements/ravelreport_feb2017.pdf ("Ravel Report").

What these accounts disregard or gloss over is that the agency is functioning exactly as it is designed by Congress. They pay lip service to the idea that "Congress intended the agency to be structured so that a single political party could not unduly influence the agency or its enforcement outcomes," Ravel Report at 6, but caterwaul when they find themselves on the losing side of this equation. It is supposed to be hard to launch a federal investigation into the political activities of Americans. Three-three splits are a feature, not a bug, of the FEC.

A. Three-Three Votes are a Decision, Not a Toss Up

In a very literal sense, at the FEC "the tie goes to the speaker, not the censor." *Wisconsin Right to Life*, 551 U.S. at 474. Notwithstanding the rhetoric from some about "deadlock," a three-three vote in an enforcement action is a decision.

Under the Act, it takes four votes to pursue an enforcement action. If there are not four votes to move forward, the action does not go into a zone of limbo; it fails. It does not matter if it fails six-zero, five-one, or three-three, the result is the same. *See Citizens for*

Responsibility & Ethics in Wash. v. Fed. Election Comm'n (Comm'n on Hope), 923 F.3d 1141, 1142 (D.C. Cir. 2019) (Griffith, J., concurring in denial of rehearing) (noting that the Act does not "differentiate between a deadlock vote that prompts a dismissal and a vote by four or more Commissioners to dismiss the action outright."); *see also In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000) (noting that a three-three vote is a "no-action decision . . . made by the Commission itself, not the staff, and precludes further enforcement."); Bradley A. Smith, Feckless: A Critique of Critiques of the Federal Election Commission, 27 Geo. Mason L. Rev. at 513 (noting "[n]ot only would the Commission have a bipartisan makeup, but a bipartisan vote would be needed for action."). The four-vote requirement is a threshold determination for pursuing enforcement actions.

The Act has no similar requirement for dismissals. 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, which suggests that they are not included under the standard construction that *expressio unius est exclusio alterius*." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*

(New Models), 993 F.3d 880, 891 & n.10 (D.C. Cir. 2021); *compare* 11 C.F.R. § 111.9(a) (2014) (stating that the Commission must make a reason to believe finding by the affirmative vote of four Commissioners) *with id.* at (b) (listing no similar requirement for when "the Commission finds no reason to believe, or otherwise terminates its proceedings."). Instead, Commission regulations draw a distinction between "finding" reason to believe or no reason to believe and "otherwise terminat[ing]." *See* 11 C.F.R. §§ 111.9(b), 111.20 (2014).

This is because the default result is dismissal or, in regulatory parlance, "otherwise terminat[ing]" the matter. *See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process,* 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) ("[T]he Commission will dismiss a matter . . . when the Commission lacks majority support for proceeding with a matter for other reasons."). If the Commission is unable to find reason to believe by an affirmative four votes, it has no authority to continue on and must terminate the matter.

B. The Commission's Practice of Voting to "Close the File" is Extra Statutory

The phrase "close the file" appears nowhere in the Act or Commission Rules of Procedure. *See* FEC Directive 10: Rules of Procedure of the Federal Election Commission Pursuant to 2 U.S.C. 437c(e) (Dec. 20, 2007), https://www.fec.gov/resources/cms-content/documents/directive_10.pdf ("Directive 10"). It also is not a recognized motion under *Robert's Rules of Order*, the default rules of Commission procedure. *See* Directive 10 at § K ("Any parliamentary situation or circumstance not addressed in these Rules shall be governed by Robert's Rules of Order, Newly Revised or if not covered therein by a decision of the Chairman.").

Nevertheless, by practice and tradition the Commission has adopted its own procedure for marking the end of debate: a vote to "close the file." This procedure was first recognized in Commission regulations in 1980, when it was adopted as part of the Commission's efforts to comply with the Freedom of Information Act. *See* Fed. Election Comm'n, *Public Records and the Freedom of Information Act*, 45 Fed. Reg. 31291 (May 13, 1980). As such, it was a way of clearly demarcating when records documenting final agency actions would be

made available to the public. *See* 11 C.F.R. § 5.4(a) (2016). It was not intended as a vote on the merits of a matter.

Consistent with this history, for much of the past four decades, it has been an uncontroversial, ministerial step. *See generally* FEC Vice Chair Allen Dickerson, FEC open meeting, April 22, 2021, agenda item 2, *Draft Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process*, downloaded and saved audio file at 42:25 – 43:00, https://tinyurl.com/w3cj4t3c (last visited Nov. 4, 2022) ("FEC Meeting"). Even when Commissioners disagreed with the substantive results of a vote, they consistently voted to "close the file."

C. Transforming the Vote to "Close the File" from a Ministerial Vote to a Substantive One

Unhappy with their inability to convince their fellow Commissioners to vote their way, several Commissioners developed a novel scheme to abdicate the agency's responsibilities to partisan actors suing in the federal courts: they would simply stop voting to "close the file" in certain matters. *See Statement of Commissioner Ellen L. Weintraub On the Voting Decisions of FEC Commissioners* (Oct. 4, 2022), https://www.fec.gov/resources/cms-content/documents/2022-10-04-ELW-Statement-on-Voting-Decisions.pdf; *Statement of Allen J.*

Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters (May 13, 2022), https://www.fec.gov/resources/cms-content/documents/Redacted_Statement_Regarding_Concluded_Matters_13_May_2022_Redacted.pdf; Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock than Ever*, The New York Times (June 8, 2021), https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html; *see also Statement of Vice Chair Ellen L. Weintraub Regarding CREW v. FEC and American Action Network* (April 19, 2018), https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf (claiming "[i]t's time to break the glass and let this matter move forward unimpeded by commissioners" who voted against enforcement proceedings).

The result is that "these cases [become] zombie matters—dead but unable to be laid to rest. They remain with the [A]gency and on [its] enforcement docket indefinitely, despite having been adjudicated, with the vote outcome and [c]ommissioners' reasoning withheld from the complainant, the respondent, and the public." FEC Commissioner Sean

J. Cooksey, Mem. re: Motion to Amend Directive 68 to Include Additional Information in Quarterly Status Reports to Commission, June 3, 2021, 2, https://tinyurl.com/hwa798e6 (June 10, 2021) ("Cooksey Mem."). Because the case is not officially closed, the complainant and respondent are never informed of the resolution of the matter, *see* 11 C.F.R. § 5.4(a)(4) (2016), which "hide[s] [the commissioners'] deliberation and the [case] outcomes from the respondents," FEC Commissioner Sean J. Cooksey, FEC Meeting at 24:14 – 24:35,—leaving them in "limbo," Trainor Statement, and "effectively left to twist in the wind," FEC Vice Chair Allen Dickerson, FEC Meeting at 7:27 – 7:33, while "keep[ing] federal courts in the dark." FEC Commissioner Sean J. Cooksey, FEC Meeting at 24:14 – 24:35.[5]

[5] Under the Act, "any notification . . . made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." Moreover, *ex parte* communications concerning enforcement matters are generally prohibited. *See* 11 C.F.R. § 111.22. Thus, Commissioners seeking to inform the public that a matter was actually decided and respondents were in a catch-22 – Commissioners could not tell respondents that the Commission had actually voted on their matter due to confidentiality restrictions that were designed to protect respondents from undue public prejudice. *See Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Freedom of Information Act Litigation* (June 28, 2022),

The explicit goal of this strategy is to push FEC enforcement actions out of the Commission and into the federal courts. As described above, if the Commission does not "act" on a matter within 120 days, aggrieved persons may bring suit in federal court. Since matters are bottled up inside the agency, there is no public indication that the Commission has "acted" on the matter. The "aggrieved person" can then sue in federal court. Worse, the same Commissioners who blocked the Commission from "closing the file" also blocked the Commission from appearing in court to explain itself, leaving the court with the impression that the FEC has failed to act when it has acted, and has no valid defense when in fact the controlling block of Commissioners has entered a statement of reasons explaining the decision. It is nothing less than a fraud on the courts.

The consequence is exactly what happened in this case: the FEC defaults and the complainant brings suit directly against the respondent, effectively abdicating the FEC's "exclusive jurisdiction" over civil enforcement to the federal courts.

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https://www.fec.gov/resources/cms-content/documents/Statement-re-FOIA-Litigation-6.28.2022-Dickerson-Cooksey-Trainor.pdf.

Make no mistake: this strategy flouts the requirement in the Administrative Procedure Act that federal agencies act without "unreasonabl[e] delay[]." 5 U.S.C. § 706(1) (1966). It is also flouts the authority of the federal courts. But, in this case, it has proven effective – commissioners on the losing end of the Commission votes were able to hide that the Commission had actually resolved the enforcement action in favor of Heritage Action for America until after the district court entered a default judgment.

III. The Scheme to Hide Commission Actions from the Court is Inequitable and Prejudicial to Heritage Action for America

But for the deliberately deceptive actions of the non-controlling group of Commissioners, this case would not be here. On April 6, 2021, the Commission failed to find reason to believe a violation occurred by a vote of three-three. *See* MUR 7516 (Heritage Action for America), Certification (Apr. 6, 2021). By doing so, the Commission "acted" on Campaign Legal Center's complaint. Had these facts been disclosed to the district court – as they should have – Plaintiff-Appellee's complaint would have failed.

The only reason these facts were not disclosed is a policy, adopted by a non-controlling group of Commissioners on the FEC, to deliberately conceal material facts from the court to further their policy agenda.

The consequences of this decision are deeply inequitable and prejudicial to the Heritage Action for America. Had these facts been known, Heritage Action for America would not have needed to seek to intervene in this case – it would have been resolved based on the administrative record. At minimum, Heritage Action for America would have had sufficient information to file a timely motion for intervention to vindicate its interests before the court authorized a citizen suit against it.

Instead, Heritage Action for America has incurred significant expense seeking to vindicate its rights in this litigation and stands to incur significant additional expenses defending itself against a citizen suit that would never have been authorized had the true facts been known – all for exercising its fundamental First Amendment rights. This is deeply inequitable and prejudicial to Heritage Action for America and any other similarly situated respondents.

It does not have to be this way. This Court should make clear that this sort of deliberate chicanery is patently unacceptable, grant Heritage Action for America intervention of right, and set aside the orders authorizing the citizen suit against Heritage Action for America.

CONCLUSION

For the foregoing reasons, the orders of the district court should be reversed.

Dated: November 7, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7) because, excluding the portions of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), this document contains 4,247 words.
2. This document complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook typeface.

Dated: November 7, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2022, I electronically filed this document using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record for all Parties.

/s/David A. Warrington