[ORAL ARGUMENT NOT YET SCHEDULED]

No. 25-5188

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

GIFFORDS,

Plaintiffs - Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendants - Appellees,

NATIONAL RIFLE ASSOCIATION OF AMERICA, *et al.*,

Appellants.

On Appeal from the United States
District Court for the District of Columbia
The Hon. Emmet G. Sullivan, District Judge
(Dist. Ct. No. 1:19-cv-01192-EGS)

BRIEF OF AMICUS CURIAE INSTITUTE FOR FREE SPEECH
IN SUPPORT OF APPELLANTS' OPPOSITION TO MOTION TO DISMISS

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August 4, 2025

DISCLOSURE STATEMENT

Counsel for *amicus curiae* Institute for Free Speech, Owen Yeates, 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/ Owen Yeates

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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

The district court granted Giffords permission to weaponize the Federal Election Campaign Act ("FECA" or "Act") into lawfare, authorizing it to sue its ideological nemesis. But the district court lacked jurisdiction to grant the order, and Giffords did not meet the predicate conditions under the Act to file the suit.

To protect core First Amendment rights and prevent partisan lawfare, the Federal Election Commission cannot take affirmative enforcement action absent agreement by four of its six Commissioners. Anything less, including a deadlocked vote on a complaint, constitutes a final agency action under 52 U.S.C. § 30109(a)(8).

Giffords filed a complaint with the Commission, which the agency acted on by deadlock. Giffords then filed suit before the district court, alleging lack of FEC action. Not knowing that the Commission had already acted, such that the case was moot, the court ordered the Commission to "mak[e] [a] reason-to-believe determination" within 30 days of the court's order, *Giffords v. Fed. Election Comm'n*, No. 19-1192 (EGS), 2021 U.S. Dist. LEXIS 198301, at *25 (D.D.C. Sep. 30, 2021),

and later authorized Giffords to file suit against the NRA under a FECA provision allowing private suits when the agency fails to act.

Such lawfare followed a scheme by a Commissioner unhappy that FECA prohibits enforcement lacking bipartisan support. By withholding notice of agency action, using an extra-statutory rule requiring a vote by four Commissioners to *publish* the agency's final decision, it would appear as if the agency had not acted. Complainants could then file private suits for agency inaction. Thus, doubly defying FECA—disregarding the four-vote requirement for enforcement and the requirement allowing private suit only for agency inaction—dissatisfied Commissioners could get extra-statutory enforcement.

When advised by the NRA that the Commission had acted, and thus that its earlier orders lacked jurisdiction, the district court ignored the lack of jurisdiction, harming the NRA in Giffords's ongoing private suit. But Congress "uniquely structured the FEC" and FECA to guard against such biased or overzealous enforcement. *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016). The Court should deny the motion to dismiss and review the case on its merits.

ARGUMENT

I. CONGRESS DESIGNED FECA WITH A HIGH BAR TO ENFORCEMENT

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

The FEC must tread with care as it uniquely has "as its sole purpose the regulation of core constitutionally protected activity." *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 499 (D.C. Cir. 2016) (internal quotation marks omitted). Indeed, the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) (cleaned up).

The FEC thus operates in a minefield. "[E]very action [it] takes implicates fundamental rights." *Van Hollen*, 811 F.3d at 499. 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 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—. . . enforced by an agency under partisan control of the other party." *Id.* at 513. Democratic Senator Alan Cranston, a supporter of regulation who believed "[a] strong enforcement agency [was] essential," nonetheless 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 (1976), https://perma.cc/EQ9C-TP3M. Congress thus baked into the agency an "indispensable ingredient"—the necessity of bipartisan agreement for enforcement. Smith, *supra*, at 513. Particularly when enforcement begins by private complaint.

Anyone can file an administrative complaint alleging a FECA violation. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.3(a). A group could thus attempt to win public support for its candidate or issue—not by better ideas and persuasion—by weaponizing the Act to silence an opponent altogether. To protect against this, the Commission must

review a complaint and then vote whether "it has reason to believe" that a violation occurred. 52 U.S.C. § 30109(a)(2).

To further protect against partisan and ideological lawfare, Congress integrated a unique structure into the Commission. The Commission cannot even begin to investigate an alleged violation unless *four* of the six members agree that there is reason to believe a violation occurred. 52 U.S.C. §§ 30106(c), 30107(a)(6) & (9), 30109(a)(2). Because "[n]o more than 3 members" of the commission "may be affiliated with the same political party," 52 U.S.C. § 30106(a)(1), the four-vote threshold frustrates—in every sense of the word—partisan enforcement. No bloc of Commissioners composed solely of Democrats can investigate Republicans, and no bloc composed solely of Republicans can investigate Democrats. "This structure was created to encourage nonpartisan decisions." FEC, *Leadership and Structure*, https://perma.cc/9M32-3C66.

Enforcement requires four votes, but—to protect core First Amendment rights and prevent partisan lawfare—dismissals do not. "The 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. Fed. Election Comm'n, 993 F.3d 880, 891 (D.C. Cir. 2021). "A decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners." *Id.* 891 & n.10. Enforcement must thus end if there are fewer than four votes to proceed. Any other voting arrangement—requiring less than four votes for enforcement or more than two votes to dismiss—would violate Congress's intent to guard against "partisan domination." *see* Smith, *supra*, at 517.

II. THE DISTRICT COURT'S RULING DESTROYS FECA'S PROTECTIONS AGAINST PARTISAN ENFORCEMENT

The district court's decision expands FECA's private suit provision, upending the delicate balance Congress created to prevent partisan lawfare and protect First Amendment rights.

The Congressional committee designing FECA intended that "all civil complaints . . . be channeled to the Commission" "to assure that civil suits are not misused in a partisan manner, and that the complex and sensitive rights and duties stated in the act are administered expertly and uniformly." 120 Cong. Rec. 35,134 (1974) (remarks of Rep. Hays), https://perma.cc/NNM3-GZ7Q. Accordingly, the procedures for handling complaints—including the four-vote requirement for any

"affirmative action"—"represent[ed] a delicate balance designed to effectively prevent and redress violations, and to winnow out, short of litigation, insubstantial complaints" that would otherwise impose "unjustifiable litigation burdens" on the courts and respondents. H. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976), https://perma.cc/X24Y-UERX; *see also Common Cause v. Fed. Election Comm'n*, 630 F. Supp. 508, 511 (1985).

While Congress allowed complainants to seek review of the Commission's decisions regarding their complaints, it crafted a narrow procedure for doing so. For example, "[t]he fact that Congress chose to define the period for seeking review indicates a desire to restrict judicial challenges to agency action." *Id.* at 511.

And Congress expressly protected against a complainant's attempts to bypass the Commission's gatekeeping function. To file a private suit, a complainant must have district court permission, which can only be granted for lawless agency action. After giving the agency 30 days to respond, the court may approve a private suit only if it finds that the Commission's decision to dismiss, or that the Commission's failure to act, "is contrary to law." 52 U.S.C. § 30109(a)(8). Only then may a

complainant "bring . . . a civil action to remedy the violation involved in the original complaint." *Id.*

As an organization dedicated to gun regulation, Giffords filed its private suit against the NRA under this second prong, alleging the Commission's failure to act. But in deadlocking without the four votes required for enforcement, the Commission had acted. A partisan bloc of Commissioners, dedicated to facilitating private suits to evade FECA's prohibition on agency enforcement, worked to conceal the agency action. But the Commission had acted.

Giffords nonetheless hopes to escape the narrow bounds of FECA's private suit provision in its pursuit of the NRA. But the only way to do so is to misinterpret the meaning of a deadlocked vote. It requires treating any tie or failure to reach four votes for affirmative enforcement as a failure to act rather than as "equivalent to a dismissal (or termination)." *Heritage Action for Am. v. Fed. Election Comm'n*, 682 F. Supp. 3d 62, 74, 76 (D.D.C. 2023), *aff'd*, 2025 WL 222305 (D.C. Cir. Jan. 15, 2025). And under this interpretation, deadlocked votes would not function as dismissals, but would eventually (and always) allow private lawfare.

That interpretation runs contrary to precedent, which holds not only that the FEC must "dismiss complaints in deadlock situations," but that it has "engage[d] in final agency action when . . . it deadlocks." *Public Citizen*, 839 F.3d at 1170. Thus, contrary to the position Giffords must implicitly take here and in its private suit against the NRA, 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.

The procedures for deadlocked decisions and closing files worked for decades to expedite resolution of complaints, satisfying complainants' interests and protecting respondents' First Amendment right.[2] Until a single Commissioner concocted a scheme to prevent publication of final decisions—getting enforcement through private suits that she could not get through proper procedure.[3]

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[2] *See Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters*, FEC (May 13, 2022), https://perma.cc/KR38-Y6RQ ("Concluded Enforcement Statement").

[3] Commissioner Weintraub called this "a previously unused, alternative enforcement path." *Statement of Commissioner Ellen L. Weintraub on the Voting Decisions of FEC Commissioners* at 16, FEC (Oct 4, 2022), https://perma.cc/7GTH-NJEX ("Weintraub Statement").

III. THE FEC'S EXTRA-STATUTORY FILE CLOSING PROCEDURE ILLEGALLY HIDES ITS ENFORCEMENT DECISIONS

The scheme to shift enforcement into the hands of private parties arises from an extra-statutory publication requirement. Under threat of fine, no member or employee of the Commission may make anything about a complaint public until it sends the closed file to the complainant and respondent. 52 U.S.C. § 30109(a)(4) and (a)(12); 11 C.F.R. § 111.20 and § 111.21. The Commission, however, implemented an internal rule delaying this release, and thus publication of the file. Rather than sending the file to the parties after the final decision, the Commission long had a practice of releasing a file only when "the Commission has *voted to close* [the] enforcement file." 11 C.F.R. § 5.4(a)(4) (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), https://perma.cc/NM93-RBNL. That is not surprising. An additional step to close the file is unnecessary because "the statute compels FEC to dismiss [deadlocked] complaints." *Public Citizen*, 839 F.3d at 1170.

The file-closing rule was created to comply with the FEC's disclosure obligation by setting the moment when records documenting final

agency action would become public. *See* FEC, *Access to Public Disclosure Division Documents*, 45 Fed. Reg. 31292 (May 13, 1980). For decades, the FEC treated this as an uncontroversial, ministerial step. *See* Weintraub Statement at 5-6 (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 Commissioners on the losing end of an enforcement vote began using this extra-statutory procedure make it appear as though the Commission has not acted, allowing complainants to file private suits. *See id.* at 4 (explaining that "[i]t is indeed departing from past Commission practice"); *see also Heritage Action*, 682 F. Supp. 3d at 71 (describing "evidence" that "certain Commissioners acted purposefully and strategically in attempting to keep the votes non-public")

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), https://perma.cc/TGF9-YP48. Because the case is not officially closed, the complainant, respondent, and the public are never informed of the matter's

resolution. *See* 11 C.F.R. § 111.9(b); 11 C.F.R. § 5.4(a)(4). A partisan Commissioner can thus wield FEC procedures to keep respondents and the district court in the dark, triggering invalid enforcement through a private suit, as happened here and in many other cases. *See* Concluded Enforcement Statement at 1 & 1 n.2 (noting eight separate matters where publication was delayed at least one year after final votes); *see, e.g.*, *Campaign Legal Ctr. v. 45Committee, Inc.*, 118 F.4th 378, 384 (D.C. Cir. 2024); *Heritage Action*, 682 F. Supp. at 68, 71.

All this havoc originates from a disclosure practice that plainly violates the law—as Judge Nichols concluded two years ago. *See Heritage Action*, 682 F. Supp. 3d at 73-76. "Because a deadlocked reason-to-believe vote is equivalent to a dismissal (or termination), such a vote requires prompt disclosure." *Id.* at 76. 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, requires 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(b). The Commission has thus acted contrary to law, not in any purported failure to act on Giffords' or other complaints, but

in Commissioners' misuse of the extra-statutory procedure for closing the file. And this lawless action has resulted in repeated harm to respondents like the NRA, whose First Amendment rights should be protected under FECA's statutory provisions.

IV. THE DISTRICT COURT HAD NO JURISDICTION, BECAUSE THE FEC HAD ACTED AND THE CASE WAS MOOT

This case was already moot when the district court, albeit unaware of the FEC's final action, ordered the FEC to make a reason-to-believe determination within 30 days. *See* NRA's Resp. Br. at 11-12. The Commission had already done exactly what the court ordered, so it was impossible to grant any effectual relief. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013). The case was therefore "outside the jurisdiction of the" court. *United States v. Sanchez-Gomez*, 584 U.S. 381, 386 (2018).

A court must dismiss an action whenever it appears that it lacks jurisdiction, whether that lack of jurisdiction is raised by the parties "or otherwise." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006). And if an "issuing court lack[s] jurisdiction" when it issues orders or judgments, as happened here, those are simply void. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1180 (D.C. Cir. 2013).

The district court had a duty "to ask and answer for itself, even [if] not otherwise suggested," whether it had jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The district court not only failed to ask the question for itself, Op. at 14-15, it refused to address the lack of jurisdiction when "suggested" by the NRA. The NRA is already being harmed by the district court's decision. Rule 60 fortunately permits nonparties to seek relief from such a void judgment. *See* NRA's Resp. Br. at 15-18.

CONCLUSION

The district court unlawfully authorized Giffords' private suit, even though the FEC had already acted and the court lacked subject matter jurisdiction. This Court should hear NRA's appeal.

August 4, 2025

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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. 27(d)(2)(A) and 29(a)(5) because it contains 2,595 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/ Owen Yeates

CERTIFICATE OF SERVICE

I certify that on August 4, 2025, 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/ Owen Yeates