[ORAL ARGUMENT NOT YET SCHEDULED]

No. 25-5188

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

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 AMICI CURIAE INSTITUTE FOR FREE SPEECH AND FORMER FEC COMMISSIONER BRADLEY A. SMITH IN SUPPORT OF NEITHER SIDE

Owen Yeates
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W., Ste. 801
Washington, DC 20036
Telephone: 202-985-1644
oyeates@ifs.org

Counsel for amici curiae

January 20, 2026

DISCLOSURE STATEMENT

Counsel for *amici curiae* Institute for Free Speech and former FEC Commissioner Bradley A. Smith 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
Owen Yeates
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTERESTS OF AMICI 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. 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—founded the Institute and is its Chairman. Along with scholarly and educational work, 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 this amicus brief.

INTRODUCTION

"The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (quotation marks omitted). To prevent the Federal Election Commission from unconstitutionally silencing any official's partisan opponents, Congress required: 1) that no more than three of the six commissioners be from one political party and 2) that at least four commissioners vote to approve enforcement at multiple stages of the process. So structured, the FEC requires bipartisan approval to initiate and maintain enforcement actions. But if the Commission does not act on a complaint for 120 days, the complainant may file a "§ (a)(8)" petition asking a court to rule the inaction is unlawful and—if the Commission fails to correct any issues the court identifies—allow a private enforcement suit.

To protect innocent parties, Congress also required the Commission to keep complaints confidential until the Commission determines that the respondent did not violate the Federal Election Campaign Act ("FECA"), approves a conciliation agreement with the respondent, or initiates a civil action.

Unfortunately, some groups and sympathetic Commissioners have begun to use the confidentiality requirements to enable otherwise unviable lawsuits. The Commission implemented the confidentiality requirements by requiring a vote to close, and thus publicize, its file. Even in situations where the Commission could not pursue a complaint for lack of a fourth vote—a deadlock dismissal—this voting rule worked because the commissioners developed a norm of treating the vote to close the file after dismissal as a ministerial act.

This norm has broken down, enabling improper lawsuits. Certain commissioners found that they could procure the enforcement FECA prohibits after a deadlock dismissal by refusing to close and publicize a file. By thus deceiving a court reviewing a § (a)(8) petition into believing that the Commission has failed to act on the complaint, the court may allow a private enforcement suit.

Courts have approved these suits only because of confusion: Failing to understand that the Commission's enforcement must end—it must dismiss a complaint—absent four affirmative votes. Confusing the file-closing vote as one on the merits rather than a necessary ministerial action within a confidentiality protection framework. And failing to

understand that the Commission's confidentiality policies prevent the Commission from informing a reviewing court about non-final actions.

The standard for reviewing whether the Commission has unlawfully failed to act—whether it has been arbitrary or capricious, or followed a rule of reason—requires a complete understanding of the enforcement process. On its face FECA portrays a quick and simple process. The implemented process, however, is complex and time-consuming. Courts must understand the complexity to properly judge the reasonableness of the Commission's actions.

ARGUMENT

I. CONFUSION ABOUT COMMISSION REQUIREMENTS AND PROCEDURES FUELS IMPROPER § (A)(8) SUITS

A. Courts confuse the number of votes necessary to enforce or dismiss cases.

"[E]very action the FEC takes implicates fundamental rights." *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016). Both parties in Congress "feared the possibility of partisanship in [FECA's] enforcement," and "neither was eager to have campaign finance restrictions ... enforced by an agency under partisan control of the other party." Bradley Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 Geo. Mason L. Rev. 503, 513 (2020). Even

those who believed in strong enforcement 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 89 (1977), https://perma.cc/EQ9C-TP3M.

Congress thus structured the Commission to bar enforcement absent bipartisan agreement. FECA first requires that no more than three of the six commissioners be from "the same political party." 52 U.S.C. § 30106(a)(1).[2] It then requires that at least four of the six commissioners repeatedly vote to approve a complaint's enforcement: to open an investigation by finding reason to believe a violation took place, § 30109(a)(2), to find probable cause of a violation after an investigation and enter conciliation, § 30109(a)(4)(A)(i), to approve any conciliation agreement, *id.*, and to bring a civil case if conciliation fails, § 30109(a)(6).

Given Congress's intent to protect First Amendment rights from partisan and ideological lawfare, enforcement must end if, having considered the matter, the Commission lacks four votes to proceed. *See*

[2] All statutory references are to Title 52 of the U.S. Code unless otherwise noted.

End Citizens United PAC v. FEC, 90 F.4th 1172, 1183 (D.C. Cir. 2024), *reh'g en banc granted*, 2024 U.S. App. LEXIS 26602 (D.C. Cir. Oct. 15, 2024) (citing cases holding that dismissal required when Commission deadlocks); *Heritage Action for Am. v. FEC*, 682 F. Supp. 3d 62, 73-4, 76 (D.D.C. 2023), *aff'd alt. gr.*, 2025 LX 186903 (D.C. Cir. Jan. 15, 2025) ("a deadlocked reason-to-believe vote is equivalent to a dismissal").

Given these requirements, this Court explicitly rejected arguments that dismissing an enforcement action requires four votes. *Citizens for Responsibility & Ethics v. FEC*, 993 F.3d 880, 891 (D.C. Cir. 2021). FECA "specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list." *Id.* Indeed, a four-vote requirement for dismissal would turn on its head FECA's requirement prohibiting enforcement without four affirmative votes. And it cannot be "reconciled with [the D.C. Circuit's] previous cases … recogniz[ing] the possibility of 'deadlock dismissals,' namely dismissals resulting" when less than four commissioners support enforcement. *Id.*

Recognizing the binding effect of deadlock votes, courts have made those opposing enforcement the controlling commissioners and required that they prepare the Commission's statement of reasons for possible

judicial review. *See, e.g., Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (remanding for statement of reasons); *see also FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") ("constitute a controlling group" whose "rationale necessarily states the agency's reasons"); *Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 355 (D.C. Cir. 2020) (quoting *NRSC*). And the courts have recognized the binding nature of the vote at the time of deadlock by requiring that the controlling commissioners write their statement near that time. *See End Citizens United PAC v. FEC*, 69 F.4th 916, 920-922 (D.C. Cir. 2023) ("obligated to issue a contemporaneous statement").

Strong reasons support recognizing such dismissals. The dismissals effectuate Congressional intent for the "four-vote requirement," that "enforcement ... not proceed without bipartisan support." Allen Dickerson, Sean Cooksey, James Trainor, *Statement of Reasons*, MUR 6589R-30 at 2, FEC (May 13, 2022), https://perma.cc/D5LA-G52U. Doing so protects fundamental rights from the use of executive power to silence opposing speech. *See* James Trainor, *Statement on the Dangers of Procedural Dysfunction* at 1-2, FEC (Aug. 28, 2020) ("*Procedural*

Dysfunction"), https://perma.cc/JSJ3-ESZ6. It also facilitates resolution within the 120-day period Congress anticipated for Commission action. *See* § 30109(a)(8)(A); Allen Dickerson, Sean Cooksey, James Trainor, *Statement Regarding Concluded Enforcement Matters* at 5, FEC (May 13, 2022) ("*Concluded Enforcement*"), https://perma.cc/ZB45-TBQ3. Dismissal upon deadlocked vote prevents the due process violations that would occur if a commissioner were allowed "to hold a matter open in the hope that a future slate of commissioners will re-vote and reach a different result." Dickerson, *Statement*, MUR 6589R-30 at 5; *see also* Dickerson, *Concluded Enforcement* at 5.

Indeed, the understanding that deadlock votes end enforcement accords with the Commission's explanation of the enforcement process in its *Guidebook for Complainants and Respondents on the FEC Enforcement Process*. FEC (May 2012) ("*Guidebook*"), https://perma.cc/3JUS-2A7F. The *Guidebook* tells complainants and respondents that "[f]our affirmative votes are required to make a finding of probable cause to believe," and that if the Commission does not "find 'probable cause to believe,' the case is closed and the parties are notified." *Guidebook* at 20.

Despite Congressional intent requiring four affirmative votes for enforcement, caselaw, and the reasons above, various courts have failed to recognize that enforcement must end if the Commission lacks those four votes. *See, e.g., Campaign Legal Ctr. v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024) ("*CLC-45Committee*") ("'deadlock dismissal'" is merely a "convenient shorthand" and not "automatically ... a dismissal"); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 2023 U.S. Dist. LEXIS 167635, *30 (D.D.C. Sept. 20, 2023) ("*CREW-AAN*") (deadlock vote and dismissal are "separate events"). Indeed, even though enforcement cannot proceed without four votes, some judges argue that dismissing complaints requires a majority vote. *See, e.g., End Citizens United*, 90 F.4th at 1186 (Pillard, J., dissenting); *Campaign Legal Ctr. v. FEC*, 2022 U.S. Dist. LEXIS 220990, *18 (D.D.C. Dec. 8, 2022) (dismissal requires vote of commissioner who favors enforcement and "prefer[s] not to dismiss").

This treatment of the four-vote requirement raises a host of problems. No judge on an appellate panel would deliberately hold a decision until another panel member died or retired to get a different opinion. Doing so would violate the parties' rights to a speedy resolution

and every notion of fundamental fairness and due process. But courts' failures to recognize the finality of deadlock votes at the FEC has allowed certain commissioners to effect such violations. Delaying the vote does not bring new information to bear: The Commission's votes happen only after the General Counsel's office completes its investigations. There is only one reason to repeatedly hold over a matter, time after time with no change in voting, and especially after the controlling commissioners have prepared their written statement: hoping for a different decision by waiting out one of the controlling commissioner's six-year terms. *See* Allen Dickerson, Sean Cooksey, and James Trainor, *Statement Regarding Freedom of Information Act Litigation* at 3, FEC (June 28, 2022) ("*FOIA*"), https://perma.cc/7T2P-TY34 (no reconsideration after statement issued).

In addition, as discussed below, each of these votes happens after an exhaustive investigation and review. When the controlling commissioners vote against enforcement, the Commission has exhausted its "statutory role." Dickerson, *Concluded Enforcement* at 5. Refusing to recognize the deadlock vote as a dismissal allows agency action to be treated as inaction.

And courts do not solve this problem by treating a deadlock vote as non-final agency action that nonetheless satisfies § (a)(8), as the court assumes in *Campaign Legal Center v. Iowa Values*, 691 F. Supp. 3d 94, 106 (D.D.C. 2023). Doing so would beg the question: how can the court know that the Commission has thus acted if deadlock dismissals are not final actions that must be made public? Many of these § (a)(8) suits exist because groups and sympathetic commissioners have supported one another by filing complaints, concealing votes, and then filing (a)(8) suits. Participating commissioners have enabled speech-chilling litigation under the guise of agency inaction by deliberately concealing votes.

Treating deadlock dismissals as anything other than dismissals thus leads only to further problems, and it ignores the due process issues and statutory requirements discussed above.

B. A vote to close the file is part of the confidentiality framework, not a vote to dismiss the complaint on the merits.

Courts have confused the vote to close the file as a vote on final dismissal rather than the final step of FECA's confidentiality framework—allowing opponents to weaponize FECA against

respondents. *But see AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 56 (D.D.C. 2001) ("The undisputed purpose of [§ 30109(a)(12)(A)] is to protect an innocent accused party from disclosure of the fact of investigation.").

FECA prohibits disclosure of "[a]ny notification or investigation" without the respondent's consent. § 30109(a)(12)(A); *see also* 11 C.F.R. § 111.21(a). Anyone violating these confidentiality requirements—a commissioner, FEC employee, "or any other person"—faces mandatory fines: up to $5,000 for knowing and willful violations and up to $2,000 for others. § 30109(a)(12)(B).

FECA establishes limited exceptions to this confidentiality. If conciliation fails and the Commission begins a civil action, investigative materials necessarily enter the public court record. *See* 11 C.F.R. § 111.20(c); *id.* § 111.21(c). The Commission must also "make public any [signed] conciliation agreement," and—critically—"a determination that a person has not violated this Act." § 30109(a)(4)(B)(ii); *see also* 11 C.F.R. § 111.20(a)-(b).

The Commission added a step—not found in FECA—to the enforcement process to protect the file's confidentiality, a vote to confirm that it should be made public. *See* 11 C.F.R. § 5.4(a)(4). After

any vote requiring dismissal, and after completed conciliation, the Commission thus votes whether to close the file and make it public. The vote to close also requires four commissioners. § 30106(c) ("majority vote"); Trainor, *Procedural Dysfunction* at 7 (four votes).

But someone reading the statute or the *Guidebook*, or even the confidentiality provisions at 11 C.F.R. §§ 111.20 and 111.21, would not know that the Commission votes to close the file. In fact, the *Guidebook* implies that the file is immediately closed and made public: "If the Commission does not find 'probable cause to believe,' the case is closed and the parties are notified." *Guidebook* at 20.

The Commission had no need to make the public, complainants, or respondents aware of the vote because the commissioners previously maintained norms that facilitated lawful, efficient governance. When the Commission deadlocked, even commissioners favoring enforcement voted to close the file and to defend the agency in later § (a)(8) suits as a pro forma or ministerial matter. *See* Dickerson, *Concluded Enforcement* at 1 ("Formal, invariably unanimous votes … to close the file …"); Lee Goodman, Caroline Hunter, and Matthew Petersen, *Statement Regarding the Commission's Vote to Authorize Defense of Suit in* Public

Citizen, et al. v. FEC*, Case No. 14-CV-00148 (RJL)* at 1, FEC (Apr. 10, 2014), https://perma.cc/4X42-KR3G.

Voting to close the file became an issue only as the historical norms broke down. *See* Dickerson, *Concluded Enforcement* at 1 ("convention has eroded in the last four years"). Unhappy that they could not get the four votes required for Commission enforcement, certain commissioners broke the norms. They set out to bypass FECA's bipartisan approval requirement by enabling private lawsuits by the complainants. But that would only work if they concealed the agency's action by voting against closing the file, misleading courts into ruling that the Commission had unlawfully failed to act on those complaints. Commissioner Weintraub described this deviation as "using the small amount of leverage that [she] ha[s]," hoping that a court would "come to the same decision [she] would." *Heritage Action*, 682 F. Supp. 3d at 69.

But as then-Chairman Dickerson wrote, "There is no legal support for the argument that a majority of the Commission must vote to close a file in order to conclude a matter." Dickerson, *Concluded Enforcement* at 2. FECA prohibits enforcement without four votes, and "Congress did not require a further vote to dismiss or disclose the deadlock." *Heritage*

Action, 682 F. Supp. 3d at 75. That is the reason "the D.C. Circuit has long recognized the existence of 'deadlock dismissals.'" Dickerson, *Concluded Enforcement* at 2. And because the controlling commissioners' statement at the time of the deadlock vote is the agency decision, courts have required that they put the "statement of reasons into the file," *id.* at 3, near in time to the vote, *see, e.g., End Citizens United*, 69 F.4th at 921 (holding statement untimely if even two months later). This belies any claim that the deadlock vote is not a dismissal, and that the later vote is anything but "the nominal act of file closure." Dickerson, *Concluded Enforcement* at 3.

Examples where the Commission voted multiple times in a matter are not to the contrary. There are limited situations where the Commission may delay closing the file, such as when the commissioners are still genuinely deliberating and one asks the chair to hold the matter over, the Commission splits a matter into multiple parts for consideration over different days, or there are related, ongoing investigations. Such situations differ from a § (a)(8) suit where a commissioner refuses to close the file even though the controlling

commissioners decided the matter and filed their statement. *See id*. at 3-4.

Courts have nonetheless been confused as § (a)(8) suits have brought the existence of this vote and the breakdown of norms to their attention. One court has held that a deadlock vote is a dismissal requiring prompt disclosure, and that the failure to close the file was unlawful. *See Heritage Action*, 682 F. Supp. 3d at 73-76. But another held that deadlock dismissals are merely "convenient shorthand," and that dismissal occurs only with the vote to close the file. *CLC-45Committee*, 118 F.4th at 382.

In following but attempting to temper the file-closure-as-dismissal position, another court demonstrated still further confusion about Commission procedures. Stating that a deadlock dismissal may not be "strictly speaking, a *final* dismissal," and that the Commission could "theoretically … take a successful vote in the future," one court held that a deadlock vote could still satisfy the requirement that the agency act within 120 days. *Iowa Values*, 691 F. Supp. 3d at 105-106. The court failed to recognize, however, that treating a deadlock vote as non-final action would be creating a secret proclamation, useless to prevent

improper § (a)(8) suits because the Commission does not reveal non-final acts.

C. Courts fail to understand the silence required by the Commission's confidentiality requirements.

The *Iowa Values* decision exemplifies the confusion about the scope and effect of FECA's confidentiality requirements. Indeed, other requirements might lead courts to discount the confidentiality requirements, and to assume that the Commission promptly publishes deadlock votes. FECA requires that the Commission "make public" any "determination that a person has not violated this Act." § 30109(a)(4)(B)(ii); *see also* 11 C.F.R. § 111.20(a). And the *Guidebook* implies quick disclosure: "If the Commission does not find 'probable cause to believe'" by the required "[f]our affirmative votes," then "the case is closed and the parties are notified." *Guidebook* at 20.

It is thus unsurprising that the court in *Iowa Values* believed that treating a deadlock vote as agency action—even if non-final—would solve the problem of § (a)(8) lawsuits. 691 F. Supp. 3d at 105-06. The court assumed that such votes would necessarily be made public.

Similarly, the court in *Campaign Legal Ctr. v. FEC*, No. 1:20-cv-809-ABJ, incorrectly believed that "[w]hen the FEC takes a vote on an

administrative complaint, the results are publicly announced," and that "it does not take a FOIA request to learn what transpired." Order at 5, ECF No. 32 (D.D.C. Apr. 21, 2022). Indeed, assuming that the Commission will notify complainants and respondents of a dismissal and make public any votes, the court refused to consider other evidence, believing "there is no reason for the Court to assume that the redacted portions of an otherwise unrelated document could report a vote that should have been publicly reported but was not." *Id*.

But comparing the redacted Amended Certification given to the respondent in that case with the unredacted document now on the Commission's website demonstrates the opposite: that votes are not automatically or even quickly made public and that a court may have to rely on hints from redacted FOIA requests to discover agency action. *Compare* FEC, *Amended Certification*, *id*., ECF No. 31-1 at 7-8, *with* FEC, *Amended Certification*, MUR 7486 (Aug. 14, 2020), https://perma.cc/3Z5R-6KYF. And even a FOIA request may be insufficient to reveal Commission votes, as the Commission may either deny the requests or heavily redact the documents. *See id.* (comparing redactions); Dickerson, *FOIA* at 1 (noting repeated denials of

respondents' FOIA requests). As seen in one commissioners' statement—detailing eight concluded matters not made public for over a year—some commissioners all too frequently keep the parties, public, and courts in the dark. Dickerson, *Concluded Enforcement* at 1; *see also Heritage Action*, 682 F. Supp. 3d at 71 ("never stated that it will disclose all similar votes in the future … insist[ing] that non-disclosure is … part of its normal practice").

And even the controlling commissioners, who might want to notify the court of their votes, are prohibited from doing so. The Commission may not defend any action brought under § (a)(8) or appeal any civil action without four affirmative votes. §§ 30106(c) and 30107(a)(6). And, as noted above, they would face substantial fines for violating confidentiality on their own.

Thus, despite some courts' faith that they would know about any Commission action on a complaint, certain commissioners may have acted to conceal any evidence that would eliminate jurisdiction for a § (a)(8) suit.

* * *

The Commission and the courts have created a Gordian knot in the implementation and interpretation of the four-vote requirement for enforcement and FECA's confidentiality protections. To cut through this confusion and properly protect First Amendment and due process rights, as well as implement Congressional intent, courts should 1) uphold the requirement prohibiting enforcement—requiring dismissal—if the Commission deadlocks; 2) treat the file-closing vote as the administrative formality that it is; and 3) hold that the Commission acts unlawfully if it fails to close and publicize denied-complaint files. The current practice of ordering the Commission to conform after a § (a)(8) suit is filed fails to protect respondents' constitutional rights, given certain commissioners' refusal to both make the file public and allow the Commission to defend itself in court. *See* Trainor, *Procedural Dysfunction* at 6 (discussing commissioners' refusal to allow the Commission to defend or respond); Dickerson, *Concluded Enforcement* at 1 (same).

II. PROPER REVIEW OF § (A)(8) SUITS REQUIRES UNDERSTANDING A COMPLEX, TIME-CONSUMING ENFORCEMENT PROCESS

A court may not treat the Commission's failure to render a final decision within 120 days as "per se contrary to law" under § 30109(a)(8).

CLC-45Committee, 118 F.4th at 383. Rather, courts must evaluate the alleged inaction using a variety of factors, *id.*, to determine whether the agency has been "arbitrary and capricious," *Common Cause v. FEC*, 489 F. Supp. 738, 744 (D.D.C. 1980), or not been "governed by a 'rule of reason,'" *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). Given current Commission practices, courts may have to compel commissioner testimony under seal to get needed evidence of actions and votes taken. But the court's analysis of that and other evidence must accurately account for a complex, time-consuming enforcement process.

A. Courts may incorrectly interpret FECA as creating a short, simple enforcement process.

On its face, FECA portrays the enforcement process as straightforward and prompt. Excluding knowing and willful violations, which the Commission refers to the Attorney General, § 30109(a)(5)(C), FECA establishes the following process:

- The Commission has 5 days to review a complaint for compliance and notify the respondent. § 30109(a)(1).
- The respondent has 15 days to respond. *Id.*

- The Commission votes on whether reason exists to believe a violation occurred and, if so, to notify the respondent and begin an investigation. § 30109(a)(2).
- If after investigation the Office of General Counsel believes a violation occurred, it gives the respondent a brief stating its position. § 30109(a)(3).
- The respondent has 15 days to respond to the brief. *Id.*
- The Commission votes on whether there is probable cause to believe a violation occurred. § 30109(a)(4)(A)(i).
- If it finds probable cause, the Commission must pursue conciliation, generally for 30 to 90 days. *Id.*
- If conciliation is reached, and approved by four or more commissioners, *id.*, the signed agreement must be made public, § 30109(a)(4)(B)(ii).
- If conciliation fails, the Commission votes on whether to pursue civil action in U.S. District Court. § 30109(a)(6)(A).
- "If the Commission [determines] that a person has not" committed a violation, it "shall make public such determination." § 30109(a)(4)(B)(ii).

- If the Commission fails to act on the complaint within 120 days of its filing, the complainant may file a petition in U.S. District Court. § 30109(a)(8)(A).
- If the court declares that the inaction was contrary to law, it may order that the Commission "conform with such declaration." § 30109(a)(8)C). If the Commission fails to conform, "the complainant may bring … a civil action to remedy the violation." *Id*.

These deadlines deceptively suggest that the Commission could render a final decision within 65 to 125 days of a complaint, within or near the minimum 120 days before a complainant may file a § (a)(8) suit. But that assumes no time needed to investigate, review documents, research novel issues, or schedule votes.

B. The actual enforcement process is complex and time-consuming.

The complaint-initiated enforcement process has become far more complex and time-consuming, as the discussion below and the figure following it illustrate.

Once a complaint is submitted, the General Counsel's Office of Complaints and Legal Administration ("CELA") has five days to verify

that the complaint complies with all requirements, assign a matter under review ("MUR") number, and notify the respondent—the "person alleged ... to have committed" the violation. § 30109(a)(1); *see* 11 C.F.R. § 111.5; *Guidebook* at 7, 9. Before the Commission can proceed with a vote to find reason to believe, it must give the respondent 15 days to respond in writing to demonstrate that "that no action should be taken against such person on the basis of the complaint." § 30109(a)(1); *see also* 11 C.F.R. § 111.6; *Guidebook* at 10.

The Commission has added two steps between the respondent's response and the RTB vote: a pre-RTB investigation (before the investigation authorized by the RTB vote) and a report. These intervening steps derive from a regulation authorizing CELA to "recommend to the Commission whether … it should find reason to believe" a violation occurred or to dismiss. 11 C.F.R. § 111.7. To prepare its recommendation, CELA may conduct a wide-ranging and time-consuming investigation. It may examine information already in the Commission's files and information cited to in the notarized complaint Allen Dickerson, *Statement of Reasons* at 4, 6, & 5 n.24, MUR 7527, FEC (Jan. 13, 2023), https://perma.cc/V72F-7X35. And it may search for

other "publicly available information that supplements or backfills a complaint." Allen Dickerson and James Trainor, *Statement of Reasons* at 1, MUR 7800, FEC (Sept. 10, 2024), https://perma.cc/2KML-HX2Q; *see also* Donald McGahn, *Background Information Regarding Proposed Enforcement Manual* at 5, FEC (July 25, 2013), https://perma.cc/4PRV-HM54 ("limitless searches of a broad range of materials").

After concluding the investigation, CELA drafts and makes an RTB recommendation in the First General Counsel's Report. *Guidebook* at 12; James Trainor, Allen Dickerson, and Dara Lindenbaum, *Policy Statement Concerning Enforcement Procedures* at 1, FEC (Apr. 15, 2025), https://perma.cc/P5A3-JCZS. If recommending RTB, CELA must also recommend whether to offer pre-probable cause conciliation or to begin the statutory, post-RTB investigation. FEC, *Directive 74* ¶1 (Nov. 14, 2023), https://perma.cc/6CG5-5SWQ.[3] If recommending pre-PC conciliation, CELA must attach a proposed conciliation plan. *Guidebook* at 12. If recommending the statutory, post-RTB investigation, CELA

[3] FECA requires a conciliation process after at least four commissioners find probable cause of a violation. § 30109(a)(4)(A)(i). In its regulation implementing § (a)(4), the Commission adds this additional, pre-PC conciliation. 11 C.F.R. § 111.18(d).

must within two weeks submit a detailed proposed investigation plan. *Directive 74* ¶¶2-3.

Because of their "length and complexity" and the "deluge of complaints received," preparing these reports "consumes the bulk of the [Enforcement] Division's resources." Allen Dickerson and James Trainor, *Statement on the Petitions for Rehearing* En Banc *in* Campaign Legal Center v. FEC *and* End Citizens United PAC v. FEC at 2, FEC (Mar. 18, 2024), https://perma.cc/R646-M687. The investigations can produce many materials, in some cases exceeding 80 pages. *See* McGahn, *Background Information* at 8. And CELA can sometimes take almost two years to complete the investigation and another year to complete the report. Allen Dickerson and James Trainor, *Statement Regarding the Commission's Newly Adopted Directive Concerning Investigations Conducted by the Office of General Counsel* at 4, FEC (Nov. 2, 2023), https://perma.cc/V56K-LN8L.

Once completed, the First General Counsel's Report "is circulated to the Commission for a tally vote." *Guidebook* at 12. If any commissioner objects to the recommendation, or if it "receives fewer than four approvals," the matter will be "scheduled for a closed Executive Session,

during which the full Commission discusses the recommendations and votes on the disposition." *Id.*

In 2012, the Commission gave itself three possible outcomes for the RTB vote: reason to believe, dismissal, or no reason to believe. *Id.* at 12-13. The number of possible outcomes grew to seven, until with a recent policy statement the Commission pared it down to "the only actions contemplated by FECA": a vote "to find reason to believe, or to dismiss." FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 89 Fed. Reg. 55, 19730 (Mar. 20, 2024), https://perma.cc/3NCL-YYMN; *see also* Trainor, *Enforcement Procedures* at 1 ("will either vote to dismiss or find reason-to-believe").

If CELA recommends reason to believe and the Commission disagrees, the commissioner(s) voting against the recommendation must file a statement of reasons, such that a reviewing court can decide "whether reason or caprice determined the dismissal." *DCCC*, 831 F.2d at 1135; *see also Guidebook* at 14. To avoid being deemed an invalid post-hoc justification, this controlling commissioners' statement must be made after but near in time to the dismissal. Trainor, *Enforcement*

Procedures at 2 (citing cases); *see also id.* at 3 (noting practical difficulties, Sunshine Act concerns, and perceptions of "manufacture[d] contemporaneity" if prepared before vote (quotation marks omitted)).

FECA requires that if the Commission finds reason to believe, it "notify the [respondent] of the alleged violation," and in the notification "set forth the factual basis for such alleged violation." § 30109(a)(2); *see also* 11 C.F.R. §§ 111.9; 111.32.

If the Commission decides to pursue pre-PC conciliation, it sends a proposed agreement and fine with the RTB notification. 11 C.F.R. § 111.32(d); *Guidebook* at 17. The proposed agreement generally includes the Commission's reason to believe findings, relevant facts and law, a proposed admission of violation, an agreement to cease and desist from the violation in the future, and an agreement to pay a fine and/or take corrective action. *Guidebook* at 17.

The respondent must respond within seven days if agreeing to enter negotiations. *Id.* at 18. The Commission does not limit the time for review and negotiation, but it does try to finish the pre-PC conciliation within 60 days. *Id.*

The Commission has also added a step to the process if the parties do not enter pre-PC conciliation. If challenging the reason to believe finding or proposed fine, the respondent must "submit a written response … within forty (40) days of the Commission's reason to believe finding." 11 C.F.R. § 111.35(a).

To inform CELA's probable cause recommendation and the Commission's decision, CELA will require some time for additional fact gathering and legal analysis, subject to the Commission's control. Within two weeks of receiving the respondent's response, CELA must submit "a completed Investigative Plan," and it may not begin any investigation until at least four commissioners approve the plan. *Directive 74* ¶ 2. The Commission then requires periodic updates, monthly if the plan anticipates an investigation less than six months and quarterly if longer. *Id.* ¶ 4.

The post-RTB investigation may include the equivalent of interrogatories, as well as subpoenas for testimony and documents. 11 C.F.R. §§ 111.10-12. The Commission must approve all such compulsory process. *Directive 74* ¶ 6. CELA will notify the subject of the process once the commissioners approve the order or subpoena, and the subject

will have two weeks to voluntarily respond before CELA sends the formal process. *Id*. The subject has 30 days to respond to formal process, but it may request extensions. *Guidebook* at 14.

Once it completes the post-RTB investigation, and in the absence of any pre-PC conciliation, CELA must draft a probable cause brief. *Id*. at 18; Trainor, *Enforcement Procedures* at 2. The office notifies the respondent of a recommendation to find probable cause and includes this second General Counsel's report. 11 C.F.R. § 111.16(b); Trainor, *Enforcement Procedures* at 2.

The respondent has 15 days to respond with a brief. § 30109(a)(3); *see also Guidebook* at 18. The respondent may also request an oral hearing, which two or more commissioners must approve. *Guidebook* at 18-19.

After any hearing or response, CELA must notify the Commission and the respondent whether it still recommends probable cause. 11 C.F.R. § 111.16(b); *Guidebook* at 19; Trainor, *Enforcement Procedures* at 2. If the notice includes new arguments or new evidence, the respondent has five days to request to file a supplemental reply, and the Commission has five days to approve or deny the request. *Guidebook* at

19. The respondent has at most 10 days from any notice of approval to submit the reply. *Id*. at 20.

After considering the briefing and argument, at least four commissioners must vote to find probable cause that a violation occurred. § 30109(a)(4)(A)(i); *Guidebook* at 20. As with the reason to believe vote, the controlling commissioners must file a statement of reasons if they reject a General Counsel recommendation that they find probable cause. *Guidebook* at 20; Trainor, *Enforcement Procedures* at 2 (citing authority).

If the Commission finds probable cause, then it must send an approved conciliation agreement and attempt conciliation for 30-90 days, unless an election would occur within 45 days. § 30109(a)(4)(A); 11 C.F.R. § 111.18; *Guidebook* at 20. The conciliation agreement is final if approved by at least four commissioners and signed by the respondent and the General Counsel. § 30109(a)(4)(A)(i); *Guidebook* at 21. The "Commission shall make public [the signed] conciliation agreement." § 30109(a)(4)(B)(ii); *see also* 11 C.F.R. § 111.20(b).

If conciliation fails, the Commission may vote to file an action in U.S. District Court. § 30109(a)(6)(A). As with all other votes to continue

enforcement, four or more commissioners must approve. *Id.*; *see also* 11 C.F.R. § 111.19.

At any of these decision points, a commissioner may request a holdover. "As a matter of professional courtesy, it has been institutional practice for the Chairman to grant a commissioner's informal request to 'hold over' a matter on the executive session agenda until the next executive session." Dickerson, *Statement* at 3 n.21, MUR 6589R. If the Chair does not agree, three or more commissioners may vote to approve the postponement. *Id.*

With regard to the recent spate of § (a)(8) suits, however, these courtesy holdovers serve little purpose other than delay and concealment. "Once the controlling commissioners have signed and issued a statement of reasons," there is no further "open and frank discussion among" the commissioners. Dickerson, *FOIA* at 3 (quotation marks omitted). Indeed, several commissioners state that where they have thus "already adjudicated the merits … nothing resembling reconsideration has ever taken place." *Id.*

These holdovers harm innocent respondents who not only wait for their names to be cleared, but who incur reputational harm and

significant litigation costs when the confidentiality framework's protections for respondents are used to bring improper § (a)(8) suits by concealing agency action. *See Guidebook* at 22 (noting intended protection for "those involved in a complaint"). The breakdown of norms treating the votes as pro forma, ministerial matters has delayed file closure in some matters for years. *See, e.g.*, Dickerson, *Statement* at 3, MUR 6589R.

This discussion shows that the Commission's enforcement will often require significantly more time than the 120-day minimum for a § (a)(8) petition alleging unlawful failure to act. In evaluating whether the Commission's enforcement has been arbitrary or capricious or followed a rule of reason, a court should factor in the complexity of the enforcement process and the effect on potentially innocent parties in initiating public cases. "[T]he Commission may be taking action on the allegations … that it may not disclose to the public (including the complainant) until the conclusion of the matter." *Guidebook* at 22. Premature approval of a § (a)(8) petition may expose respondents to unnecessary expense and embarrassment, chilling fundamental First Amendment rights. And courts may incorrectly hold that the

Commission has failed to act when it has in fact already satisfied § (a)(8)(A)'s action requirement.

CONCLUSION

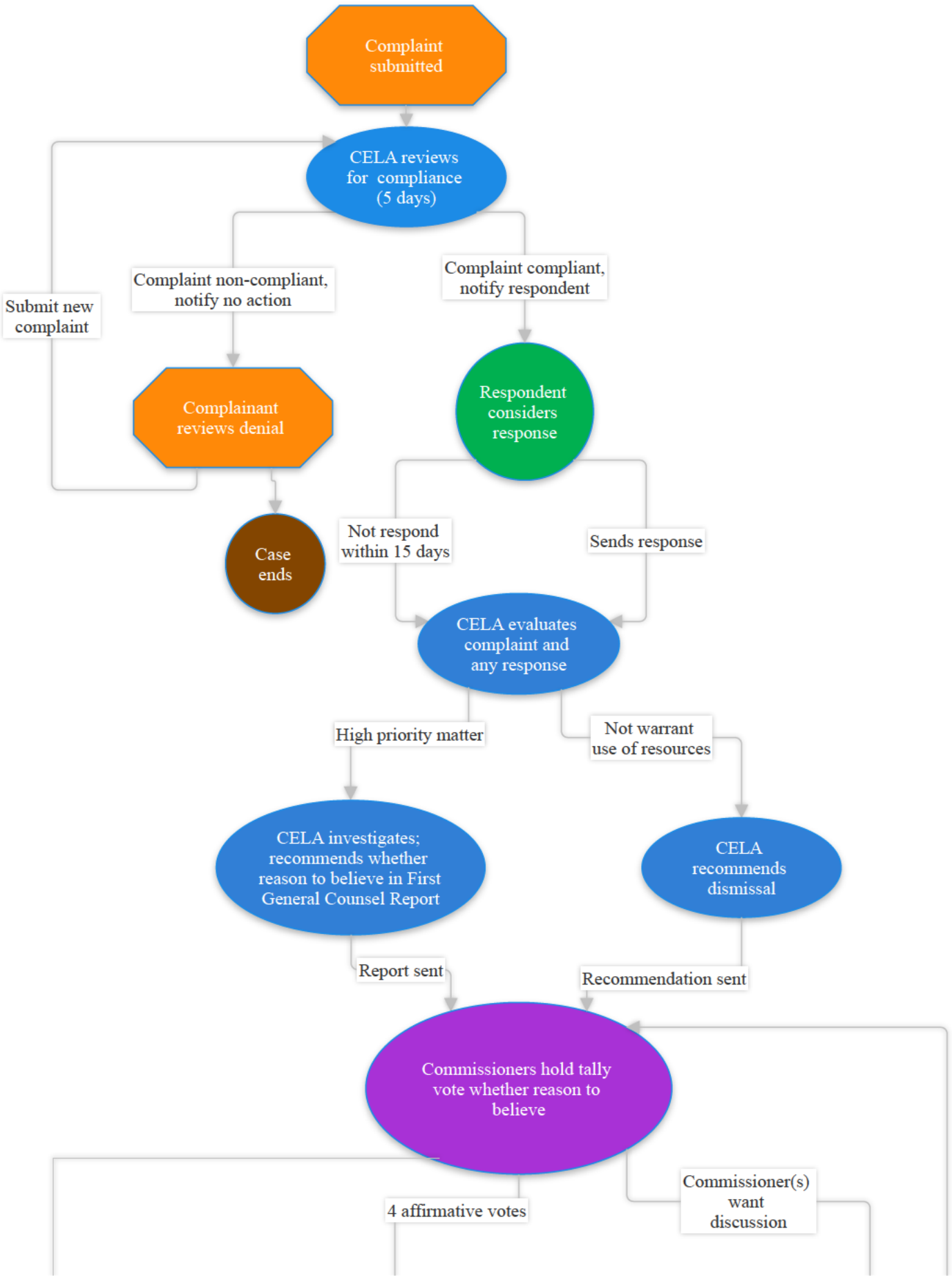
For the reasons above, a proper understanding of FECA's four-vote requirement for enforcement and its confidentiality protections, as well as of the enforcement process in general, is critical to evaluating any petition for a § (a)(8) suit.

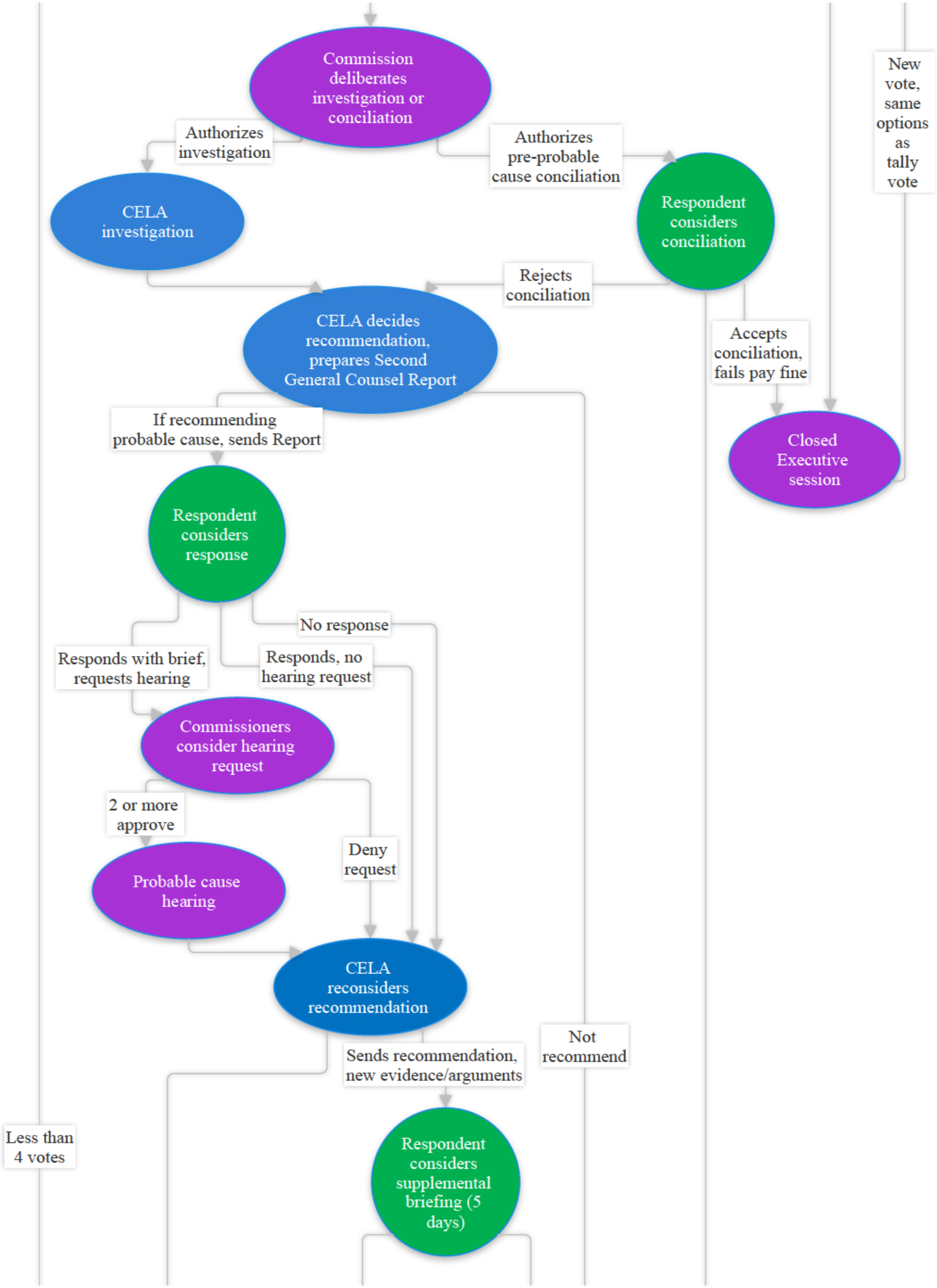
January 20, 2026 Respectfully submitted,

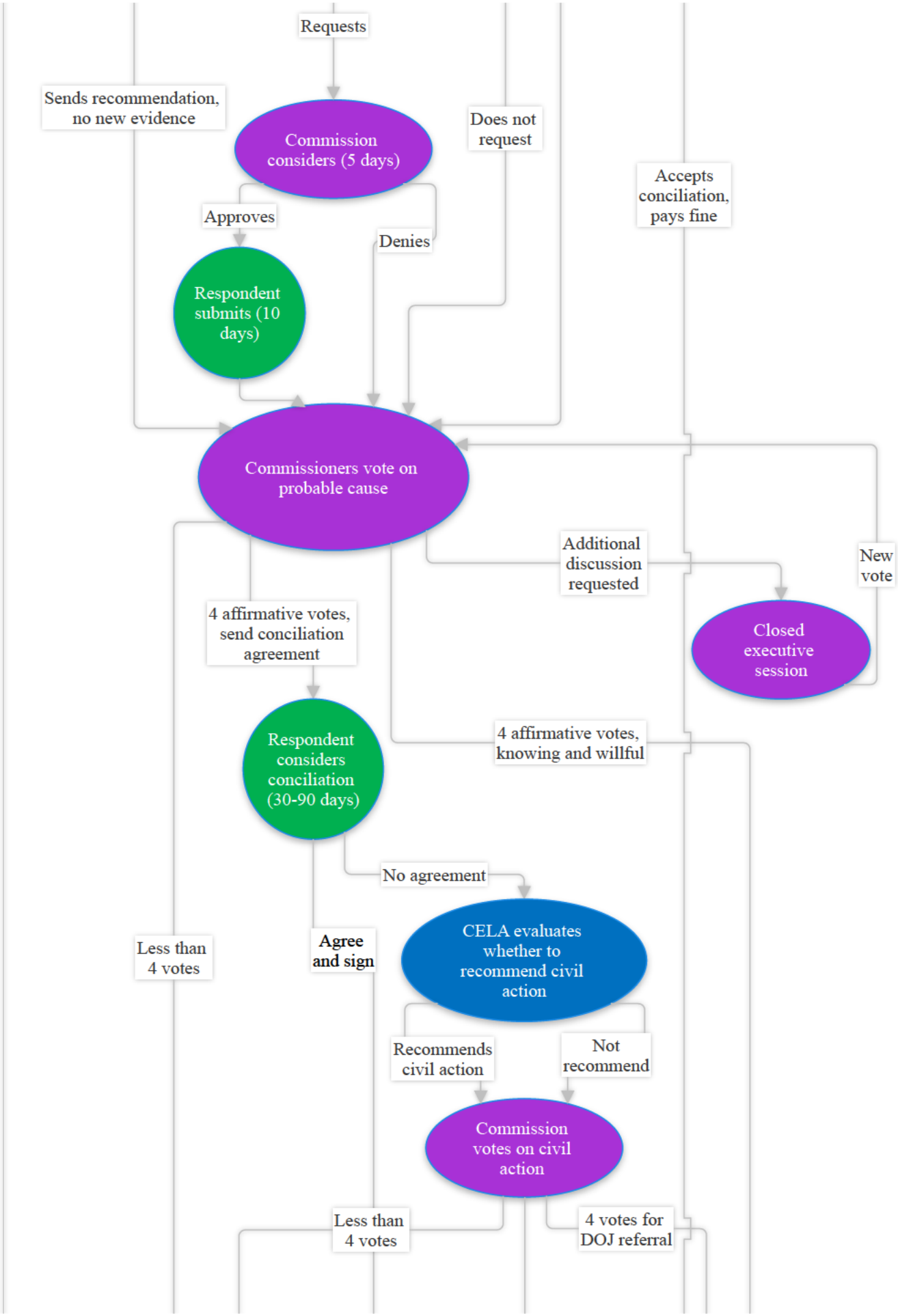
/s/ Owen Yeates
Owen Yeates
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W., Ste. 801
Washington, DC 20036
Telephone: 202-985-1644
oyeates@ifs.org

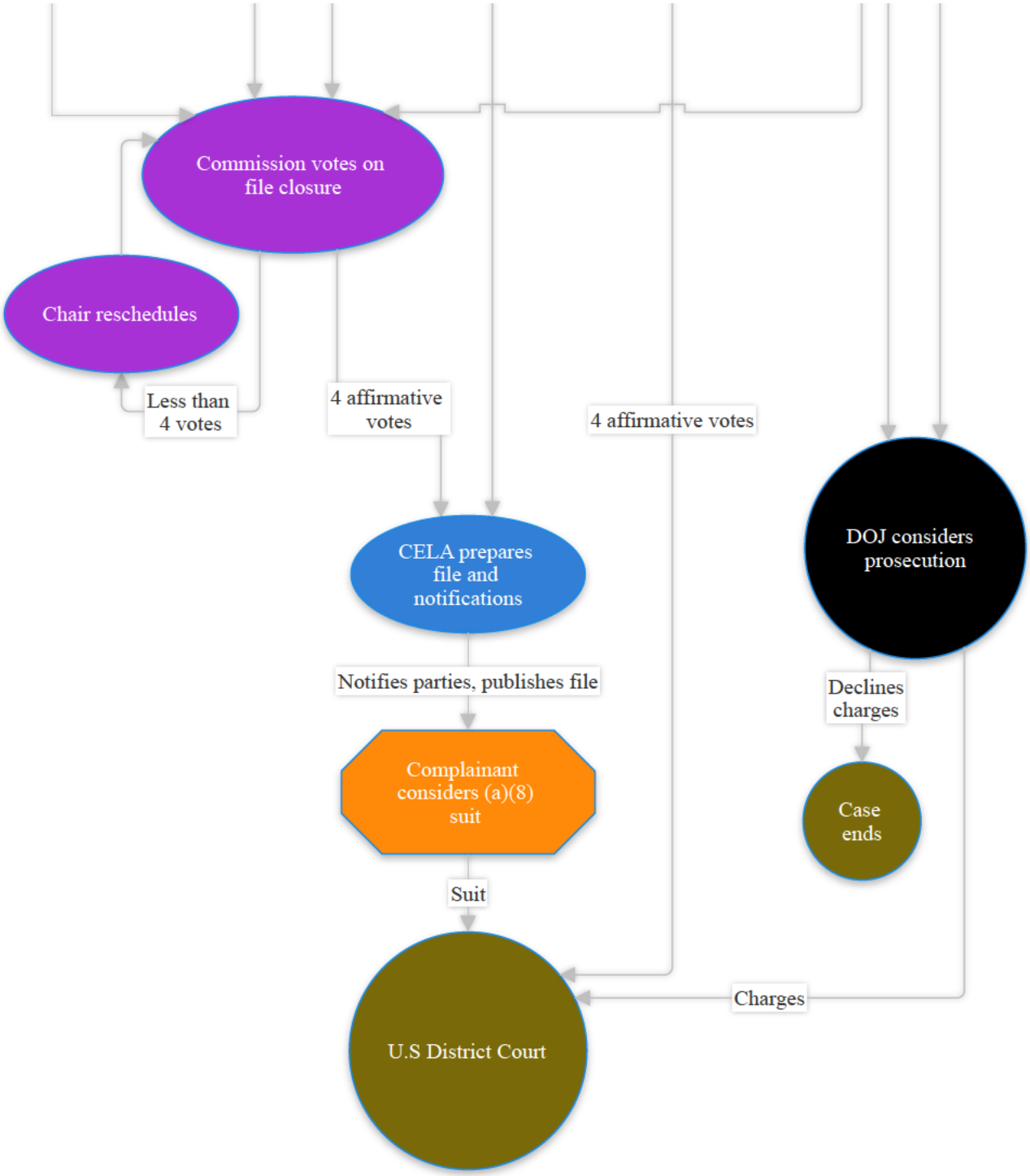
Counsel for amicus curiae

Figure A--Complaint-Initiated Enforcement Process




Commission deliberates investigation or conciliation
Authorizes investigation
Authorizes pre-probable cause conciliation
CELA investigation
Respondent considers conciliation
New vote, same options as tally vote
Rejects conciliation
Accepts conciliation, fails pay fine
CELA decides recommendation, prepares Second General Counsel Report
Closed Executive session
If recommending probable cause, sends Report
Respondent considers response
No response
Responds with brief, requests hearing
Responds, no hearing request
Commissioners consider hearing request
2 or more approve
Deny request
Probable cause hearing
CELA reconsiders recommendation
Not recommend
Sends recommendation, new evidence/arguments
Less than 4 votes
Respondent considers supplemental briefing (5 days)


Requests
Sends recommendation, no new evidence
Commission considers (5 days)
Does not request
Accepts conciliation, pays fine
Approves
Denies
Respondent submits (10 days)
Commissioners vote on probable cause
Additional discussion requested
New vote
4 affirmative votes, send conciliation agreement
Closed executive session
Respondent considers conciliation (30-90 days)
4 affirmative votes, knowing and willful
No agreement
Less than 4 votes
Agree and sign
CELA evaluates whether to recommend civil action
Recommends civil action
Not recommend
Commission votes on civil action
Less than 4 votes
4 votes for DOJ referral


Commission votes on file closure
Chair reschedules
Less than 4 votes
4 affirmative votes
4 affirmative votes
CELA prepares file and notifications
Notifies parties, publishes file
Complainant considers (a)(8) suit
Suit
U.S District Court
DOJ considers prosecution
Declines charges
Case ends
Charges

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) and 32(a)(7)(B) and Circuit Rule 32(e)(3) because it contains 6,434 words, as automatically counted by Microsoft Word in the document and by hand in the figure, 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 January 20, 2026, 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