COMMISSIONER ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

Majority

1. Since you were first appointed as a Commissioner, please provide a list of all travel you have done outside of the United States in your official capacity as a Commissioner. For each travel event, please provide the following information:

a. City and country of destination;
b. Reason for the visit;
c. Total cost of the travel (please provide an estimate if exact figures unavailable); and
d. Whether the cost was borne by the travel sponsor or by the Federal Election Commission ("FEC").

Answer:

Please see Exhibit A for a list of my travel. This information was compiled based on Commission records, which are unfortunately somewhat incomplete for some of the older listings. I made best efforts to be thorough.

As a general matter, the Commission votes to approve funding arrangements for official travel, and the process varies depending on the funding source. For expenses funded by the agency, the process begins when the Commission receives an appropriation of funds for a fiscal year, and it then considers and votes to approve a Management Plan for that fiscal year. Specified on each Management Plan is an allocation of funds for Commissioner travel expenses.

With respect to travel expenses funded by nonfederal sources, the Commission's Designated Agency Ethics Official reviews offers by a private organization to pay for travel-related expenses to be incurred by Commissioners and staff.[1] The Designated Agency Ethics Official determines pursuant to the Federal Travel Regulation (specifically, 41 C.F.R. §§ 304-5.1 and 304-5.3) whether there is a conflict of interest that would prevent the Commission from accepting the payment. The Commission then determines by no-objection ballot that the travel is in the interest of the government and that it relates to the employee's official duties.[2] With respect to such international trips described in the attached chart , the Commissioners made this determination by a no-objection vote following circulation of information about the proposed reimbursement and travel, which includes the conflict of interest analysis from the Designated Agency Ethics Official.

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[1] FEC Directive No. 30, Circulation Authority; Invitation Policy (Oct. 5, 2006), *available at* https://www.fec.gov/resources/cms-content/documents/directive_30.pdf.

[2] *See* 41 C.F.R. § 304.5.1(b) and (c).

Any official international travel by agency employees is first presented to the U.S. Department of State for review by the FEC's Office of Congressional, Legislative and Intergovernmental Affairs. Any information provided by the State Department is reviewed by Commissioners prior to approval of the payment of travel expenses or the acceptance of funding from a private organization.

2. You have regularly voted against motions to close the file in enforcement matters on which the Commission had fully considered and voted on the underlying merits. A federal district court recently held that this practice violated the Administrative Procedure Act in Heritage Action for America v. FEC, No. 22-1422, 2023 U.S. Dist. LEXIS 122680 (D.D.C. July 17, 2023). Please answer the following questions.

a. Please explain why you engaged in a practice of refusing to close enforcement case files after the Commission had fully considered a matter's legal merits.

b. Do you acknowledge that your past practice of failing to close the files of concluded enforcement matters violated the Administrative Procedure Act?

c. Will you commit to not engaging in this illegal practice in the future? If not, please explain under what circumstances you will vote in the future against motions to close the file.

Answer to 2.a, b, c:

Respectfully, the question contains a number of mistaken premises. I regularly vote to close the file in enforcement matters. I have done so in thousands of matters. And I deny that I have engaged in any illegal conduct.

As you may know, the Commission has received contradictory decisions from different district courts. Judge Cooper's recent decision in *CREW v. FEC* (Case No. 22-cv-3281 Mem. Opin. 9.20.23) meticulously exposed the flaws in the *Heritage Action* decision. Generally, district court opinions are not considered binding on other district courts or on courts of appeals.[3] Therefore, the *Heritage Action* opinion is not a controlling opinion. The conflict between the *CREW* decision and the *Heritage Action* opinion will likely be adjudicated at some point by the D.C. Circuit. I am confident the Commission will abide by whatever the D.C. Circuit decides.

In the meantime, the *CREW* decision is consistent with how the Commission functions now and historically. Judge Cooper found that the voting pattern of the Commission "demonstrates that the Commission does not view a deadlocked reason-to-believe vote as a

[3] *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting Moore's Federal Practice, "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. Many Courts of Appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity).

dismissal."[4] Judge Cooper went on to opine that Commission's long-standing practice of holding multiple unsuccessful reason-to-believe or probable-cause-to-believe votes, only to determine in a later vote that there was in fact reason to believe or probable cause to believe, is a "reasonable interpretation of the statutory and regulatory framework that comports with the Commission's long-standing approach [that] warrants some degree of deference."[5] My views, which are consistent with Judge Cooper's analysis, are set forth in more detail in my Statement on the Voting Decisions of FEC Commissioners (attached hereto as Exhibit B). In the few cases where I voted against closing a file, it was a thoughtful decision, deeply grounded in the Federal Election Campaign Act. And as Judge Cooper explained:

> Although oftentimes a deadlocked reason-to-believe vote will lead to a successful vote to close the file and dismissal of the complaint, that need not be the case. As the FEC's recent track record demonstrates, the Commission is free to keep the file open in the hopes of reaching some resolution on the matter. Thus, until the Commission affirmatively votes to close the file, the door remains open for further enforcement action because the complaint is not closed—viz., the Commission has not dismissed the complaint.[6]

Judge Cooper examined each of the reasons behind the *Heritage Action* decision's erroneous conclusion as to how cases get dismissed by the FEC and found none of those reasons persuasive.[7] The full opinion is attached hereto as Exhibit C for reference.

I will continue to give careful consideration to every decision I make as a commissioner and to base every decision on the unique facts and the law of each case before me.

3. You have regularly voted against recommendations by the Office of General Counsel to defend your agency in litigation under 52 U.S.C. § 30109(a)(8), and thereby caused the FEC to fail to appear in federal court. Please answer the following questions.

> a. Please provide a list, including case names, case numbers, and other relevant information, for every matter in which you have voted against a recommendation to defend the FEC in federal court for a lawsuit brought under 52 U.S.C.§30109(a)(8).

Answer:

Again, the premise of the question is mistaken. I have not regularly voted against recommendations to defend. To the contrary, the Commission's certification database includes certifications for at least 70 votes on authorization to defend the FEC in court in lawsuits brought under 52 U.S.C.§30109(a)(8) since I joined the Commission in 2002.[8] According to our search of the database, in only 15 matters, I voted not to authorize defensive litigation.

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4 *CREW v. FEC* at 19, Case No. 22-cv-3281 (D.D.C.) (Sept. 20, 2023).

5 *Id.*

6 *Id.* at 21.

7 *Id.* at 25.

8 Best efforts were made to be thorough, but the database is not designed for this type of search so there could well be more instances where I authorized defensive litigation.

Further, of those 15 matters, my vote was not dispositive in five matters, meaning that the Commission still authorized defensive litigation.

Section 30106(c) of FECA specifically requires an affirmative vote of four members of the Commission for the Commission to defend any civil action. This is a constructive provision to encourage bipartisan consensus and decision-making by the Commission: the best way to ensure there will be four votes to defend a civil action on the back end of an enforcement matter is to make sure there are four votes in support of the decision on the merits of the underlying legal matter on the front end.

1	Common Cause Georgia, et al. v. FEC	No. 22-3067 (DLF) (D.D.C. filed October 10, 2022)
2	Campaign Legal Center v. FEC	Civ. No. 22-1976 (JEB) (D.D.C. filed July 8, 2022)
3	AB PAC v. FEC	No. 22-cv-02139 (TJK) (D.D.C. filed July 20, 2022)
4	National Legal and Policy Center v. FEC	No. 22-822 (TNM) (D.D.C. filed March 25, 2022)
5	Campaign Legal Center v. FEC	Civ. No. 22-838 (TNM) (D.D.C. filed March 29, 2022)
6	CREW v. FEC	No. 22-cv-00035 (CRC) (D.D.C. filed January 6, 2022)
7	Free Speech for People, et al. v. FEC	Civ. No. 21-3206 (TNM) (D.D.C. filed Dec. 8, 2021)
8	End Citizens United PAC v. FEC	No. 21-cv-2128 (RJL) (D.D.C. filed August 9, 2021)
9	End Citizens United PAC v. FEC	No. 21-cv-1665 (TJK) (D.D.C. filed June 21, 2021)
10	Campaign Legal Center v. FEC	Civ. No. 21-406 (TJK) (D.D.C. filed Feb. 16, 2021)
11	Patriots Foundation V. FEC	Civ. No. 20-2229 (EGS) (D.D.C. filed Aug. 13, 2020)
12	Campaign Legal Center v. FEC	No. 20-1778 (D.D.C. filed June 30, 2020)
13	Campaign Legal Center v. FEC	No. 20-cv-809 (ABJ) (D.D.C. filed March 24, 2020)
14	Campaign Legal Center v. FEC	No. 20-cv-730 (CRC) (D.D.C. filed March 13, 2020)
15	Lieu v. FEC	Civ. No. 16-2201 (EGS) (D.D.C. filed Nov. 4, 2016)

b. For the list of matters in sub-question (a), please provide all vote certifications, if available.

Answer:

The vote certifications are attached hereto as Exhibit D.

c. Will you commit to voting to defend the agency in litigation under 52 U.S.C.§30109(a)(8) in the future? If not, please explain under what circumstances you

will decline to vote to defend the agency in such litigation.

Answer:

Section 30106(c) requires Commissioners to vote on whether to defend the agency in litigation and specifically requires a four-Commissioner vote to authorize defensive litigation. I have always made each of those decisions based on the law and the facts of each case before me. I will continue to make decisions on a case-by-case basis to uphold the law and protect the Constitution.

Question: Following the 2017 presidential inauguration, a wave of anonymous accounts claiming to have ties to federal government agencies cropped up on X, the social media service formerly known as Twitter. The account "handles" were styled as "@alt" followed by the particular agency's name. One such account was @altFEC. Please provide the following information about your knowledge and familiarity with @altFEC.

> d. Do you know the identity of the FEC employee(s), whether former or current, who created and operated @altFEC? If yes, please provide their names.
> e. When did you learn the identity of any creators or administrators of @altFEC?
> f. Did you, or have you ever, authorized or condoned FEC employees creating or operating @altFEC?

"The mission of the Federal Election Commission is to protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws."[9] FEC Commissioners are not the speech police. We have a specific mission to protect our electoral system from corruption by providing transparency about money in politics. As the Supreme Court has held:

> "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."[10]

Such transparency about campaign spending by moneyed interests "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[11]

Yet, the American people are not getting the transparency that the Supreme Court has promised. In the 13 years since Citizens United was handed down, more than $2.6 billion in

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[9] FEC FY 2022-2026 Strategic Plan at 7, *available at* https://www.fec.gov/resources/cms-content/documents/Draft-FEC-Strategic-Plan-2022-2026.pdf.

[10] *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

[11] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010).

dark money has flooded into our system.[12] The Commission has yet to do a substantive rulemaking addressing the dramatic changes to the campaign finance landscape wrought by that decision. I welcome the Committee's oversight and support with respect to how the Commission can do a better job of bringing legally required transparency to this flood of undisclosed money that is undermining the ability of the electorate to make informed decisions.

The Supreme Court's transparency jurisprudence is rooted in its anti-corruption rationale. Thus, when citizens speak without spending money, the First Amendment analysis shifts, and the government's interest in disclosure is harder to justify. Indeed, in its internet regulations, the Commission has specifically protected unpaid speech on the internet.[13]

It is my understanding that @alt_FEC is a Twitter/X account that is and has been under the control of a small number of FEC employees. (To be clear, it is not my account and it was not created at my behest.) To the best of my knowledge, all of the "alt_gov" accounts are anonymous. According to the public description of @alt_FEC, control of the account has changed over time. Also, according to information posted on the account, the Office of Special Counsel advised one of the account's authors that the Hatch Act did not prohibit this activity. To the best of my knowledge, the tweets posted there are not illegal, do not solicit funds, do not perpetrate any frauds, and do not incite violence. Like all accounts without blue check marks, the account does not require the expenditure of funds to maintain.

In the absence of any appreciable money being spent for the purpose of influencing an election and under the circumstances as I understand them, caselaw based on the need to prevent corruption and fraud provides limited guidance. The Supreme Court opinion that seems most relevant to this account and its anonymous managers is *McIntyre v. Ohio Elections Comm'n,* where the Supreme Court held that under the Constitution, anonymous political speech "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." The Court continued:

> Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.[14]

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[12] Anna Massoglia, *Record Contributions from Dark Money Groups and Shell Companies Flooded 2022 Midterm Elections*, Open Secrets (June 22, 2023), https://www.opensecrets.org/news/2023/06/record-contributions-dark-money-groups-shell-companies-flooded-midterm-elections-2022/.

[13] An uncompensated individual or group of individuals may engage in Internet activities for the purpose of influencing a federal election without restriction. The activity would not result in a "contribution" or an "expenditure" under the Act, and would not trigger any registration or reporting requirements with the FEC. This exemption applies to individuals acting with or without the knowledge or consent of a campaign or a political party committee. 11 CFR §§ 100.94 and 100.155. Possible Internet activities include, but are not limited to, sending or forwarding electronic mail, providing a hyperlink to a web site, creating, maintaining or hosting a web site and paying a nominal fee for the use of a web site. 11 CFR § 100.94(b).

[14] *McIntyre v. Ohio Elections Comm'n*, 514 US 334, 357 (1995).

As a commissioner on the FEC, I am particularly sensitive to First Amendment concerns. It is not my role to condone or not condone and certainly not to *authorize or ban* the First Amendment-protected speech of FEC employees. All American citizens, including government employees, even FEC employees, have First Amendment rights. No one who cares about the First Amendment should want government employees to have to seek permission to speak from the political appointees who run their agencies. The Supreme Court has robustly protected the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[15]

You or I may not agree with everything (or anything) @alt_FEC posts, but it is when government officials disagree with citizens' speech that the First Amendment protections are at their apex.

4. In your testimony before the committee, you stated that you have had at least one conversation with officials in the Biden Administration concerning your position on the FEC, your potential departure, or a potential nomination to replace you. Please answer the following questions.

a. How many times have you had contact with officials or staff in the Biden Administration concerning your position on the FEC, your potential departure, or a potential nomination to replace you? Please provide the date of the contacts, the name of the official you spoke with, and a summary of the communications.
b. How many times did you have contact with officials or staff in the Trump Administration concerning your position on the FEC, your potential departure, or a potential nomination to replace you? Please provide the date of the contacts, the name of the official you spoke with, and a summary of the communications.
c. How many times did you have contact with officials or staff in the Obama Administration concerning your position on the FEC, your potential departure, or a potential nomination to replace you? Please provide the date of the contacts, the name of the official you spoke with, and a summary of the communications.

Answer to a, b, and c:

It is routine for White House personnel officials to check in from time to time with political appointees. I have had one or two such conversations with staff of the Biden Administration. I do not recall any such conversation with anyone in the Trump Administration. I do not recall any such conversation with anyone in the Obama Administration.

d. How many times since January 1, 2021, have you had contact with officials or staffing the U.S. Senate concerning your position on the FEC, your potential departure, or a potential nomination to replace you? Please provide the date of the contacts, the name of the official you spoke with, and a summary of the communications.

[15] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Answer:

I do not recall any such conversations. I assume this question concerns contacts in my official capacity. As you may know, I am married to a Senate staffer. We speak every day, sometimes about our jobs.

e. Have you, or anyone else acting on your behalf, ever stated or communicated your unwillingness or opposition to your replacement on the FEC by a newly appointed Commissioner?
f. Do you oppose President Biden nominating a new Commissioner to the FEC to replace you?
g. Is there any reason President Biden should not nominate a new person to be appointed to the FEC and to replace you?

Answer to e, f, and g:

By law, my service as a commissioner ends when a new commissioner is nominated by the President for my seat, is confirmed by the Senate, and takes the oath of office.[16] Nominations are the prerogative of the President, and I leave them to his good judgment.

[16] 52 U.S.C. § 31016(a).

Exhibit A

Purpose	Destination	3rd Party Cost	FEC Cost	Total Cost	Sponsor
Conference	Toronto, Canada		$2,006	$2,006	Web Summit
Conference	Stockholm, Sweden	$3,300		$3,300	International IDEA
Conference	Montreal, Canada		$1,434	$1,434	Council on Governmental Ethics Law (COGEL)
Conference	Brussels, Belgium	$4,146		$4,146	Atlantic Council's Digital Forensics Research Lab
Conference	Lisbon, Portugal		$2,064	$2,064	Web Summit
Conference	Cabo San Lucas, Mexico	$878		$878	Global Network on Election Justice and Federal Judiciary of Mexico
Election Observation	Tunis, Tunisia	$4,578		$4,578	International Republican Institute (IRI) and National Democratic Institute (NDI)
Conference	Ottawa, Canada		$1,876	$1,876	International Grand Committee on Disinformation and "Fake News"
Conference	Mexico City, Mexico		$1,083	$1,083	International Foundation for Electoral Systems (IFES)
Conference	Santo Domingo, Dominican Republic	$1,250	$512	$1,762	Organization of American States
Conference	Vilnius, Lithuania	$2,193		$2,193	Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights
Conference	Toronto, Canada		$1,941	$1,941	Council on Governmental Ethics Law (COGEL)
Conference	Paris, France		$2,217	$2,217	Organisation for Economic Co-operation and Development (OECD)
Conference	Santiago, Chile	$2,937		$2,937	Inter-American Union of Electoral Organizations (UNIORE), Center for Electoral Promotion and Assistance (CAPEL), and the Electoral Tribunal of Chile
Conference	Mexico City, Mexico	$1,001	$169	$1,170	The Electoral Tribunal of Mexico
Election Observation	San Salvador, El Salvador	$2,250		$2,250	Trbunal Supremo Electoral of El Salvador
Conference	Quebec, Canada		$901	$901	Council on Governmental Ethics Law (COGEL)
Election Observation	Tegucigalpa, Honduras	$2,096	$163	$2,259	The Inter-American Union of Electoral Organizations (UNIORE) and the Supreme Electoral Tribunal (TSE) of Honduras
Pre-election Assesment Mission	Tirana, Albania	$4,530	$140	$4,670	National Democratic Institute for International Affairs
Election Observation	Quito and Imbabura Province, Ecuador	$3,349		$3,349	Inter-American Union of Electoral Organizations (UNIORE) and the National Electoral Council of the Republic of Ecuador
Conference and meetings	Jakarta, Indonesia	$8,807	$59	$8,866	International Foundation for Electoral Systems (IFES)
Conference	Mexico City, Mexico	$1,603	$125	$1,728	Inter-American Union of Electoral Organizations (UNIORE)
Conference and meetings	Mexico City, Mexico	$1,485		$1,485	Inter-American Union of Electoral Organizations (UNIORE)
Conference and meetings	Manila, Phillippines	$4,039	$294	$4,333	International Foundation for Electoral Systems (IFES)

Conference	New Delhi, India	$1,048		$1,048	Election Commission of India (last minute replacement for then-Chair Matthew Petersen)
Election Observation	Amman, Jordan	$3,252		$3,252	National Democratic Institute
Conference	New Delhi, India	$2,855		$2,855	Government of India
Conference	Bangkok, Thailand	$4,741		$4,741	International Foundation for Electoral Systems (IFES) and King Prajadhipok's Institute
Conference	Gaborone, Botswana		$912	$912	Global Electoral Organization (GEO)
Election Observation	San Jose, Costa Rica		$2,611	$2,611	Supreme Electoral Tribunal of Costa Rica
Election Observation	Santo Domingo, Dominican Republic		$2,136	$2,136	DR Junta Central Electoral
Conference	Quito, Ecuador		$2,557	$2,557	Organization of American States (OAS)
Conference	London, England		$3,747	$3,747	UK Electoral Commission
Conference	Mexico City, Mexico		$1,073	$1,073	International Foundation for Electoral Systems (IFES), International IDEA, and various electoral authorities
Conference	Panama City, Panama		$150	Unknown	Organization of American States (OAS)
Conference	Mexico City, Mexico		$2,036	$2,036	Global Election Organizations Network
Election Observation	Asuncion, Paraguay		$1,017	$1,017	Supreme Court of Electoral Justice
Election Observation	Beirut, Lebanon			Unknown	The Carter Center
Conference and meetings	Kyiv- Crimea, Ukraine			Unknown	Department of Justice (DOJ paid)
Conference	Accra, Ghana			Unknown	International Foundation for Electoral Systems (IFES paid)
Conference	Neum, Bosnia and Herzegovina			Unknown	International Foundation for Elections Systems (IFES paid)
Conference	Oxford, England			Unknown	The British Council
Conference	Ottawa, Canada			Unknown	Organization of American States (OAS)
Conference	Cartagena, Colombia			Unknown	Organization of American States (OAS)
Conference and Election Visitors Study Program	Canberra, Australia			Unknown	Australian Electoral Commission (participated with then-Chair Brad Smith)

Exhibit B

COMMISSIONER ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Commissioner Ellen L. Weintraub
On the Voting Decisions of FEC Commissioners

October 4, 2022

Some interesting assertions are being made in federal court and around Washington these days regarding how, some say, FEC commissioners are required to vote. Now, I've been at this job for a while now. This is a curious concept to me. I have decisions before me. I consider them. I decide. Motions are made. I vote on those motions. And every single time, I use my judgment and my knowledge of the law and the facts of the matter to determine whether to vote Yes or No. That's the job.

Yet litigants are attempting to convince district courts that the Commission's dismissal motions are "simply managerial and legally immaterial" and that votes against litigation-defense motions are some sort of "malfeasance." Several of my Commission colleagues even suggest that when I decline to flip my position to theirs and a dismissal motion fails, the matter is dismissed anyway because enforcement dismissals can just somehow kind of happen on their own.[1]

These efforts are ignoring the very core of the Commission's authority: *The Commission acts only through its votes.* And commissioners are empowered to vote Yes or No on any motion before them. There are no magical dismissals.

Typical is a document filed just yesterday by a litigant against the Commission that purports to provide "Additional Evidence of the Federal Election Commission's Bad Faith and Improper Behavior."[2] The filing picks over tweets I published late last week that lamented the Commission's dismissal of a series of important matters I had voted against dismissing over the past several years.[3]

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[1] *See* Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters (May 13, 2022) ("Republican Enforcement Statement"), *found at* https://www.fec.gov/resources/cms-content/documents/Redacted_Statement_Regarding_Concluded_Matters_13_May_2022_Redacted.pdf. This statement is styled as being 'Regarding Concluded Enforcement Matters,' but their unsupported opinion on what constitutes a 'concluded enforcement matter' at the Commission is pure wishful thinking.

[2] Plaintiff's Notice of Additional Evidence of the Federal Election Commission's Bad Faith and Improper Behavior, *Heritage Action for America v. FEC,* No. 22-1422 ("Notice of Additional Evidence") (D.D.C.) (Oct. 3, 2022).

[3] These tweets, published under my account, @EllenLWeintraub, are found at https://twitter.com/EllenLWeintraub/status/1575981087427379202. The litigant provided several of the tweets in the series – but not all of them – to the Court; I have attached the entire thread as Attachment A. The omitted tweets linked to two statements of reasons I published on Friday regarding two dismissed matters. *See* Statement of Reasons of Commissioner Ellen L. Weintraub, MUR 6589R (American Action Network) (Sept. 30, 2022), *found at* https://www.fec.gov/files/legal/murs/6589R/6589R_31.pdf; Statement of Reasons of Commissioner Ellen L. Weintraub, MURs 6915 and 6927 (John Ellis Bush, Right to Rise, *et al.*) (Sept. 30, 2022), *found at*

The litigant's filing alleges a "concealment policy"[4] that "the Commission has not abandoned"[5] and asserts darkly that my votes involved "activating a previously unused, alternative enforcement path that Congress wrote into our governing statute"[6] that "allows those who file complaints to sue those they allege have violated the law when @FEC fails to act." [7]

The litigant's big conclusion was: "Plainly, the Commission has not abandoned using this 'alternative enforcement path' in the future to conceal votes and statements of reasons for the purpose of triggering citizen suits 'to get the law enforced' when Commissioner Weintraub is unable to persuade three other Commissioners to take enforcement action."

Now, I will take issue with the idea that the Commission is improperly concealing votes and statements of reasons – we are not[8] – but this much is true: "I make zero apologies for using every tool I can find to get the law enforced"[9] – including the alternative enforcement path that Congress wrote directly into the law that governs the Federal Election Commission, the Federal Election Campaign Act, as amended ("FECA" or the "Act").[10] It is neither bad faith nor improper for a commissioner to vote as she believes the law and her conscience dictate. It would be bad faith and a dereliction of duty to do anything else.[11]

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https://www.fec.gov/files/legal/murs/6915/6915_46.pdf. Notably, under D.C. Circuit caselaw, these statements of reasons explaining that these dismissals were, in fact, contrary to law will control as the Commission's position.

[4] Notice of Additional Evidence, *supra* note 2, at 1; *Id.* at 2 ("willful concealment"). Though litigants have alleged a general Commission "policy" of holding matters open, the truth is that the Commission dismisses the vast majority of the matters up for dismissal. *See* Federal Election Commission's Reply in Support of Its Motion to Dismiss, *Heritage Action for America v. FEC,* No. 22-1422 (Aug. 12, 2022). ("Indeed, in the roughly four years since the administrative complaint against plaintiff in MUR 7516 was filed, the agency has closed at least 594 MURs. Plaintiff alleges that seven MURs have been wrongly held open, but even assuming the truth of that claim, seven matters out of 594 is clearly insufficient to establish a general 'policy' to challenge under the APA"). Citing FEC, Status of Enforcement – Fiscal Year 2022, Second Quarter (01/01/22- 03/31/22) 4, *found at* https://www.fec.gov/resources/cms-content/documents/Status_of_Enforcement_Second_Quarter_2022_05-06-22_Redacted.pdf (reflecting matters closed in the agency's fiscal years 2019-21 and first two quarters of fiscal year 2022).

Moreover, the Commission has closed plenty of matters where complainants have alleged unlawful delay. *See, e.g.*, MUR 7207 (H. Russell Taub), *found at* https://www.fec.gov/data/legal/matter-under-review/7207/ (handling of matter challenged in *Free Speech for People, et al. v. FEC*, No. 21-3206 (D.D.C.); MUR 7422 (Greitens for Missouri), *found at* https://www.fec.gov/data/legal/matter-under-review/7422/ (handling of matter challenged in *CREW v. FEC*, No. 19-2753 (D.D.C)).

[5] *Id.* at 1 ("the Commission has not abandoned its policy of concealing its actions").

[6] *Id.* at 2.

[7] *Id.*

[8] *See* paragraph beginning with "Likewise," *infra* at 4.

[9] Notice of Additional Evidence, *supra* note 2, at 2.

[10] 52 U.S.C. § 30101 *et. seq.*

[11] It is not clear to me why this litigant continues to press this APA action, which is quite moot. The Commission not only dismissed the allegation against it, unanimously and with my vote in support (*see Certification,* MUR 7516 (Heritage Action) *found at* https://www.fec.gov/files/legal/murs/7516/7516_12.pdf), it appears to have dismissed the other matters this litigant had complained were held open improperly. *See* Federal Election Commission's Notice of Subsequent Developments, *Heritage Action for America v. FEC,* No. 22-1422 (Sept. 1, 2022), *found at*

I make zero apologies, but given the enthusiasm with which litigants and several of my colleagues are misrepresenting the law, some explanations would clearly be useful. Commissioners are voting on enforcement-complaint motions and dismissal motions and litigation-defense motions just as Congress provided for in the Act, and the results are just as Congress provided for in the Act.

Sometimes it takes four affirmative votes. Sometimes it takes a simple majority. But under the Act, the Commission acts only when more commissioners vote for a motion than vote against it. The law is really quite clear that until the Commission affirmatively votes to dismiss an enforcement complaint, it is not dismissed.[12]

The Act fully contemplates what happens when a majority of the Commission votes to take action on an enforcement complaint – and what happens when a majority of the Commission does *not* vote to take action.

It should shock no one when a commissioner does not vote to dismiss matters she does not believe should be dismissed. My votes on dismissal motions are deeply grounded in the Act's provisions, they were fully contemplated by Congress in the Act, and they aim to promote enforcement of the law.

It is no cause for alarm that a small number of enforcement complaints are being actively pursued in the courts instead of irrevocably dismissed by the Commission. As of this writing, five complainants are litigating directly against respondents to remedy the violation involved in the complaints they filed with the Commission ("third-party suits"): *CREW v. AAN*, No. 18-945 (D.D.C.),[13] *Giffords v. NRA Political Victory Fund*, No. 21-2887 (D.D.C.),[14] *Campaign Legal Center (CLC) v. Iowa Values*, No. 21-389 (D.D.C.),[15] *CLC v. 45Committee*, No. 22-1115 (D.D.C.),[16] *CLC v. Heritage Action*, No. 22-1248 (D.D.C).[17] These cases could be filed because the Act specifically provides for them.

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https://www.fec.gov/resources/cms-content/documents/fec_22_1422_notice_of_subsequent_developments_09-01-2022.pdf.

[12] The Act requires that all decisions exercising Commission duties or powers be made by a vote supported by at least a majority of commissioners. 52 U.S.C. §30106(c). *See also* 52 U.S.C. §§30109(a)(1) (referring to "a vote to dismiss"); 30109(a)(8)(A) (referring to "an order of the Commission dismissing a complaint").

[13] Underlying matters: *CREW v. FEC*, No. 16-2255 (D.D.C.); MUR 6589R (American Action Network).

[14] Underlying matters: *Giffords v. FEC*, No. 19-1192 (D.D.C.); MURs 7427, 7497, 7524, 7553 (NRA). This matter has resulted in two subsidiary FOIA lawsuits: *NRA Political Victory Fund v. FEC*, 22-1017 (D.D.C.) & *Josh Hawley for Senate v. FEC*, 22-1275 (D.D.C.).

[15] Underlying matters: *CLC v. FEC*, No. 20-1778 (D.D.C.); MUR 7674 (Iowa Values).

[16] Underlying matters: *CLC v. FEC*, 20-809 (D.D.C.); MUR 7486 (45Committee, Inc.). This matter has resulted in two subsidiary lawsuits: *45Committee v. FEC*, 22-502 (D.D.C.) (FOIA); *45Committee v. FEC*, 22-1749 (D.D.C.) (APA).

[17] Underlying matters: *CLC v. FEC*, 21-406 (D.D.C.); MUR 7516 (Heritage Action for America). This matter has resulted in a subsidiary FOIA lawsuit: *Heritage Action for Am. v. FEC, et al.*, 22-1422 (D.D.C.).

I have quite consciously and intentionally cast votes that put these matters on their current paths. It is indeed departing from past Commission practice, as litigants have pointed out,[18] but it is a departure that is a perfectly rational and proper response to changes the D.C. Circuit has made to the law underlying the Commission's dismissals.[19] It is neither "bad faith" nor "improper behavior."[20] It is simply a vote that a respondent does not like, because it kept an enforcement matter from being killed.

Likewise, when commissioners vote against waiving the Commission's legal privileges as to documents in open enforcement matters, it is not "unlawful concealment."[21] The Federal Election Commission is a law-enforcement agency. Until an enforcement complaint has been dismissed by a majority vote of the Commission, that enforcement matter remains open. The Commission holds a bevy of legal privileges over these documents. Despite the breathless statements of my colleagues and some litigants, there is nothing wrongful – nor unusual – about a law-enforcement agency holding close the contents of its file regarding an open enforcement matter. I have generally voted to protect the Commission's legal privileges regarding its open law-enforcement matters and I will continue to do so.

THE STRAIGHT-AHEAD PATH

Every substantive enforcement matter starts off the same. Under the Act's provisions, complaints received by the Commission move straight ahead to our Office of General Counsel, which analyzes them and prepares recommendations for the Commission. The complaint veers off in one direction when enough commissioners vote in favor of acting to pursue it.[22] The complaint veers off in the opposite direction when enough commissioners vote in favor of acting to dismiss it.[23]

And until a vote on a motion to take action is successful, the complaint's straight-ahead motion is unchanged. It doesn't matter whether commissioners have voted on zero motions or on a hundred motions that have failed. The Commission has not acted on the complaint until enough commissioners vote affirmatively to act one way or the other.

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[18] Plaintiff's Combined Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Cross-Motion for Summary Judgment, *Heritage Action for Am. v. FEC, et al.,* 22-1422 (D.D.C.), Aug. 5, 2022 ("Heritage Motion"), at 2.

[19] If an iceberg appears in front of a ship, the captain is under no obligation to hit it.

[20] Heritage Motion at 2.

[21] *Id*. at 1.

[22] 52 U.S.C. §30109(a)(2) ("If the Commission, upon receiving a complaint ... determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act ...").

[23] The Act requires certain decisions to garner the affirmative vote of at least four commissioners while other decisions may be made by majority vote. Long ago, the Commission bound itself to the principle of bipartisan decision-making. Commission Directive 10(E)(3) provides: "*Any* principal or secondary motion that exercises a duty or power of the Commission under the Act shall require four votes for approval" *(emphasis added.) See also* FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) ("As with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners"). When all six seats on the Commission are filled, as is currently the case, and all commissioners vote, whether four votes or a majority is required is a distinction without a difference.

The Act provides a specific destination for complaints that remain on the straight-ahead path. Congress knew full well that a Commission evenly divided along partisan lines might not always be able to reach consensus on enforcement matters. Accordingly, it enacted a provision that governs when commissioners have not mustered enough votes to act on the complaint one way or the other. It gives a complainant the right to sue the Commission 120 days after filing its complaint.[24]

If the court agrees that the Commission's failure to pursue or dismiss the complaint is contrary to law, it can order the Commission to act on the complaint. The court does not order the Commission to take any *particular* action on the complaint – if enough commissioners vote to find RTB and pursue the complaint, that conforms with the court's order just as well as when enough commissioners vote to close the file and dismiss it. The failure the court has identified is a failure to *act*, not a failure to *dismiss.*

Now, Congress also foresaw that the Commission might not always be able to muster enough votes to act one way or the other even in the face of a court's determination that it should. So it wrote a powerful provision into the Act that ensures that a meritorious complaint in this situation can still get acted upon. If the Commission does not have four votes to act one way or the other on a complaint within the amount of time the court sets (usually 30 days), the complainant can then directly sue the respondent in federal court "to remedy the violation involved in the original complaint,"[25] that is, sue them on the merits.

CHANGE

These citizen-suit provisions of the Act have been invoked several times lately, and the FEC's Republican commissioners appear disgruntled when their colleagues do not automatically agree to dismiss whichever cases they seek to dismiss. In a statement they released in May, they harken back to the days long before they served on the Commission when commissioners "agreed to certain collegial norms"[26] – when not enough commissioners voted to pursue a complaint, one or more would then turn around and vote for the motion to close the file and dismiss the complaint. Commissioners would then vote to defend any litigation that might result from the dismissal.

I remember those days. Those were pretty good days. Commissioners worked hard to find a place where four or more commissioners could compromise to achieve consensus. As a result, it was far easier to gather the requisite votes to pursue or dismiss matters. Three-three splits on enforcement votes were rare. In the occasional instance when fewer than four commissioners voted to find reason to believe a violation of law may have occurred (an "RTB vote," in Commission shorthand), even those who wanted to pursue the complaint usually voted to dismiss those matters to get the details in front of the public and to enable the complainant to challenge the dismissal in court. And

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[24] 52 U.S.C. § 30109(a)(8): "Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia."

[25] *Id.* at (a)(8)(C): "In any proceeding under this paragraph 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, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint."

[26] Republican Enforcement Statement at 1.

when the Commission was sued on such dismissals, the requisite four commissioners usually voted to instruct Office of General Counsel attorneys to defend against those lawsuits.

But in their rosy look back at Commission history, the FEC's Republican commissioners fail to note the elephant that has dominated the Commission's enforcement matters since 2008. That year, a fresh crop of anti-enforcement commissioners discovered and set about abusing their ability to block action on even the most meritorious and important complaints. Since then, blocking pursuit of complaints along partisan ideological lines has become the rule, *especially* regarding the Commission's most consequential matters.[27]

Worse, the legal rationales (even the absurd ones) put forward by these blocking commissioners then get defended by the Commission's litigators – and deferred to by courts – as if they were the reasoning of the entire Commission.

The breaking point was the D.C. Circuit's 2018 *CREW v. FEC ("CHGO")* decision, a stunning blow to the Commission's ability to enforce the law.[28] The decision barred judicial review of *any* dismissals where the blocking commissioners' explanation cites "prosecutorial discretion" – if they write, more or less, 'We didn't think this matter was worth enforcing.' At the moment, the *CHGO* rule is bulletproof in dismissal cases.[29]

Before *CHGO,* pro-enforcement commissioners chose to vote to dismiss many matters they believed should be pursued on the theory that complainants had a shot at convincing a court that the Commission's dismissal action had been contrary to law, and the law could then be enforced. It would have been far better for the Commission itself to enforce the law, but they held their noses and swallowed their frustration and voted Yes.

But post-*CHGO*, voting to dismiss worthy complaints, rather than providing a chance for the law to be enforced, now empowers those who seek to *block* enforcement of the law. Because no matter how outlandish and contrary to law a dismissal might be, under *CHGO,* that dismissal cannot be challenged in court so long as those blocking action have sprinkled a few words of prosecutorial discretion into their explanatory statement. Until the D.C. Circuit overturns *CHGO,* voting to dismiss a matter in the hopes that a court will enforce the law is an exercise in futility.

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[27] In every matter where the Commission's Office of General Counsel has recommended RTB and the Commission has split on the recommendation, the voting line-up has been the same: the Republican commissioners have voted against enforcement and the Democratic and Independent commissioners have voted to approve our counsel's recommendations to proceed.

[28] *CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) *("CHGO")*.

[29] *See, e.g.*, Memorandum Opinion and Order, *CREW v. American Action Network* (No. 1:18-cv-00945-CRC), March 2, 2022 (dismissing third-party suit stemming from Commission dismissal and noting that a quick "rhetorical wink to prosecution discretion" was "fatal to CREW's claim." Mem. Op. at 16). The D.C. Circuit is currently considering whether to undo the series of unfortunate precedents it has set in this area. *See* Ellen L. Weintraub, *Statement On the Opportunities Before the D.C. Circuit in the New Models Case To Re-Examine* En Banc *Its Precedents Regarding 'Deadlock Deference'* (March 2, 2022), *found at* https://www.fec.gov/documents/3674/2022-03-02-ELW-New-Models-En_Banc.pdfm ("*New Models En Banc* Statement"); *see also* MUR 7784 (Make America Great Again PAC), Supplemental Statement of Reasons of Commissioner Ellen L. Weintraub (July 14, 2022), *found at* https://www.fec.gov/files/legal/murs/7784/7784_44.pdf.

So now, when one or more votes on RTB motions have failed and a commissioner makes a motion to dismiss the matter, the calculus behind the vote on the dismissal motion is quite different than it once was.

It is crystal-clear how everyone voting Yes on a motion to dismiss a complaint serves the interests of those commissioners who voted to block enforcement on the complaint. When a dismissal motion gets the fourth vote it needs to succeed, the blocking commissioners win. The complaint goes away. Whatever they cite as their reason automatically gets taken as the Commission's rationale by the D.C. Circuit. And if they sprinkle a few magic words of prosecutorial discretion into their statement, the dismissal they sought is invincible from challenge. Of *course* they want to maintain that unchecked power.

What's unclear, though, is how a Commissioner who votes Yes on a motion to dismiss a complaint she wants to pursue serves the public's interest in robust enforcement of our federal campaign-finance laws. That Yes vote truly kills the complaint – the dismissal lawsuit a Yes vote sets up is virtually doomed to fail.

Doing what pro-enforcement commissioners used to do – flipping their votes and supporting the position they had *opposed* on the matter – now does active harm to the law. Taking the novel step of *sticking to voting in support of their own position* provides a real opportunity under the Act to get the law enforced.

And from time to time, I have done just that. When I consider a motion to dismiss a complaint, I look at the facts and I look at the law and if I truly believe that complaint should not be dismissed, I stand my ground and vote No. When a sufficient number of commissioners (usually three) decide to vote No on a motion to dismiss, the motion fails and the complaint is not dismissed.

NO FECA MULTIVERSE

The existence of the Commission's dismissal votes is clearly a thorn in the Republican commissioners' sides. They would prefer a world in which their side always wins, so they have concocted an alternate universe, one where once a motion to find RTB fails, the matter is simply concluded.[30]

The Republican commissioners write, "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."[31] One third-party-suit defendant argued recently that "the reason to believe vote was a self-actuating dismissal, and the vote to 'close the file' was a legal nullity, not required by statute or regulation."[32]

These statements have no basis in the version of the Act that exists in this universe and they are utterly alien to uninterrupted decades of the practice of the Commission in this universe. As discussed, under FECA, the Commission only acts when more commissioners vote for a motion

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[30] *See, e.g.*, Republican Enforcement Statement at 3 (once an RTB vote has failed, "the Commission *has already passed judgment* on the entirety of the merits in these matters and has explained its reasoning."); Republican FOIA Statement at 3 (once an RTB vote has failed, "the Commission has passed judgment on the entirety of a matter's merits").

[31] *Id.* at 2.

[32] Mem. of Points and Authorities in Supp't of the NRA Defendants' Mot. to Dismiss Pl.'s Compl., *Giffords v. NRA Political Victory Fund,* No. 21-2887 (D.D.C.) (Jan. 28, 2022) at 15.

than vote against it. The Act distinguishes between RTB motions and motions to dismiss.[33] And the Act clearly contemplates the dismissal of a complaint as an affirmative decision of the Commission that commissioners must vote upon.[34]

A number of litigants who want to live in a universe where they are not facing third-party lawsuits are also pressing this argument throughout the U.S. District Court for the District of Columbia in suits brought against the Commission under the Freedom of Information Act ("FOIA")[35] and the Administrative Procedure Act ("APA").[36] They are eagerly repeating and quoting the arguments put forward by my colleagues.

But there is something wrong when these statements are dripping with, for lack of a better term, fake news. D.C.'s federal judges can undoubtedly withstand relentless and well-funded gaslighting, even if it comes from well-known D.C. law firms. But there is always a danger that unanswered fallacious arguments, especially when they are layered atop one another, could get more attention than they deserve, both inside and outside the courthouse.

Here is how the arguments generally have gone. Respondents sued the Commission under FOIA and the APA in order to – they asserted – assist in defending themselves against third-party lawsuits filed against them by FEC administrative complainants. They claimed the Commission was improperly refusing to hand over what they said were exculpatory documents.[37] The documents sought were generally (1) certifications of Commission votes and (2) statements of reasons from Republican commissioners explaining why they voted to dismiss matters.

The respondents argued that these documents, if *only* they could have been seen by the judges overseeing the third-party lawsuits, would have *proven* that the third-party suits were without merit and should have been dismissed immediately, because, as they argued with great conviction, as soon as a Commission vote on an RTB motion has failed, the matter is terminated,[38] and anyone

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[33] *Compare* 52 U.S.C. § 30109(a)(1) (referencing "a vote to dismiss") *with* § 30109(a)(2) (discussing RTB votes).

[34] *See* 52 U.S.C. §§30109(a)(1) (referring to "a vote to dismiss"); 30109(a)(8)(A) (referring to "an order of the Commission dismissing a complaint").

[35] 5 U.S.C. § 552 *et seq.*

[36] 5 U.S.C. § 551 *et seq.*

[37] As of this writing, the Commission has two lawsuits filed against it alleging Freedom of Information Act violations: *NRA Political Victory Fund v. FEC,* No. 22-1017, and *Josh Hawley for Senate v. FEC,* No. 22-1275; and one suit alleging violations of the Administrative Procedure Act: *Heritage Action for Am. v. FEC,* No. 22-1422. The Commission also facing subpoena requests in a third-party lawsuit, *CLC v. Iowa Values,* 21-389. All cases have been filed in U.S. District Court for the District of Columbia. One litigant has dismissed its FOIA and APA suits: *45Committee v. FEC,* No. 22-502 (FOIA); *45Committee v. FEC,* No. 22-1749 (APA).

[38] *See, e.g.,* Defendant's Opposition to the FEC Motion to Quash Defendant's Subpoena Ad Testificandum, *CLC v. Iowa Values,* No. 21-389 (D.D.C. 2021) (July 25, 2022) at 7 ("The FEC's deadlocked vote on whether to find reason to believe is the substantive action that rejects further enforcement activities and terminates the proceeding"); Complaint, *NRA Political Victory Fund v. FEC,* No. 22-1017 (D.D.C. 2022) (April 12, 2022) at ¶3 ("The Commission long ago held votes on the administrative complaints in the MURs and lacked the necessary four votes to proceed with an investigation, thereby terminating the administrative complaints."); Complaint, *45Committee, Inc. v. FEC,* No. 22-502 (D.D.C. 2022) (Feb. 25, 2022) at ¶2 ("45Committee believes that the six-member Commission held a vote on the administrative complaint long ago and lacked the necessary four votes to proceed with an investigation – thus terminating the administrative complaint."); Complaint, *Josh Hawley for Senate v. FEC,* No. 22-1275 (D.D.C. 2022) (May 10, 2022) at ¶5 ("The FEC long ago held votes on the administrative complaints in the MURs and lacked the

who argues otherwise is lying. "Simply put," one litigant said, "the FEC is being coy, if not outright dishonest, in pretending that the underlying MURs are still 'open.'" [39] It was not coy, or dishonest, or pretending. Those matters *were* open.

This is the faulty premise upon which the rest of the arguments sit. Assuming, *arguendo,* that the vote certifications requested *did* show that an RTB motion has failed, it simply is not true that such a failed motion would have acted to dismiss a matter. When a vote on an RTB motion fails, a specific motion to pursue the complaint in a specific manner has failed. And that's it. Perhaps individual commissioners have passed judgment, but the Commission itself has not done so. The Commission, which acts only by majority vote of its commissioners, has not done anything.[40]

There is zero legal support for the argument that a complaint can be dismissed by default or by a motion that has failed. Standard parliamentary procedure, the Act, and common sense all agree that when a vote on a motion – *any* motion – fails, no action has taken place.[41] The world is not different the moment after that vote is taken from what it was the moment before.

After an RTB motion fails, *any* sort of motion can come next; frequently, commissioners will craft multiple RTB motions, sometimes over a series of Commission meetings, to try to find four votes. Sometimes, commissioners will offer multiple motions to dismiss the matter. If all these motions fail, the complaint stays on the straight path it started on.

None of this is a novel concept. Courts have recognized over and over that the Commission's vote to close the file is the vote that dismisses enforcement complaints:

- Exhibit A: Under the Act, a complainant must challenge the Commission's dismissal of its complaint "within 60 days after the date of the dismissal."[42] Courts start that 60-day clock on the day the Commission successfully votes on a motion to close the file, *not* the day an

necessary four votes to proceed with an investigation, thereby terminating the administrative complaints."); Complaint, *Heritage Action for Am. v. FEC,* 22-1422 (D.D.C. 2022) (May 20, 2022) at ¶2 ("The concealment policy's purpose is to convey the false impression to complainants, respondents, and the courts that the FEC has not yet taken action on administrative complaints in its enforcement matters and to manipulate the courts into enforcing FECA against respondents when in fact the agency has already voted on the merits of the administrative complaint and terminated the matter because fewer than four Commissioners voted in favor of taking enforcement action."); Defendants The National Rifle Association Of America Political Victory Fund, The National Rifle Association Of America, And Josh Hawley For Senate's Joint Motion To Hold Proceedings In Abeyance, *Giffords v. National Rifle Association Political Victory Fund, et al.,* 21-2887 (D.D.C.) (July 29, 2022) at ¶2 ("The administrative complainant then sues the FEC under the guise that the FEC has failed to act on the administrative complaint, and those same Commissioners that refused to close the file for the sake of shielding the Commission's final disposition from public view then hamstring the FEC's ability to defend itself in Court, which then results in a court order permitting that same administrative complainant to sue the respondent directly in federal court – despite that respondent having prevailed before the Commission as a result of the undisclosed Commission decision not to proceed with an investigation.").

[39] Mem. of Points and Authorities in Supp't of the NRA Defendants' Mot. to Dismiss Pl.'s Compl., *Giffords v. NRA Political Victory Fund,* No. 21-2887 (D.D.C.) (Jan. 28, 2022) at 15.

[40] *See New Models En Banc* Statement at 9-10, where this is developed more fully.

[41] *See* 52 U.S.C. § 30106(c).

[42] 52 U.S.C. § 30109(a)(8)(B).

RTB motion fails.[43]

- Exhibit B: An RTB motion that fails can be followed by a subsequent RTB motion months later.[44] The very matter that caused dismissals pursuant to prosecutorial discretion to be invincible to challenge, *CHGO,* was itself the product of MUR votes spread over more than a year. The vote on the underlying MURs, 6391 & 6471, the RTB motion failed 3-3 on Sept. 16, 2014 and then again on Oct. 1, 2015. The Commission's subsequent 5-1 vote on the latter date to close the file dismissed the matter.[45] When, under the "automatic dismissal" theory, would this case have been dismissed?

- Exhibit C: Courts recognize that third-party suits are not a short-circuiting of the Act, but an essential element of the Act. The *Iowa Values* court turned back an attempt by the defendant to delegitimize third-party suits filed under the Act. "Defendant fails to reckon with the fact that the § 30109(a)(8)(C) citizen suit is a part of the 'long and cumbersome process' Congress created. A citizen suit is not a bypass of the process"[46]:

> *While defendant paints the FEC's regulatory breakdown as the unforeseeable and unintended result of FECA's citizen suit provision, it would be more accurate to say that the citizen suit provision was created in anticipation of FEC's regulatory breakdown or inaction. If there was no citizen suit provision, the FEC's inaction would hinder public access to information necessary to make informed choices in the political marketplace and would allow organizations to run election-related*

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[43] *See, e.g., CHGO* at 436 (FEC's dismissal occurred "in 2015," the year the Commission voted to close the file, even though the Commission's RTB vote had failed in 2014; s*ee* Amended Certification, MURs 6391 & 6471 (CHGO) (Sept. 16, 2014) (reflecting multiple failed 3-3 votes on RTB motions), *found at* https://eqs.fec.gov/eqsdocsMUR/15044380338.pdf; Certification, MURs 6391 & 6471 (CHGO) (Oct. 1, 2015) (reflecting a failed 3-3 vote on an RTB and a successful 5-1 vote on the motion to close the file), *found at* https://www.fec.gov/files/legal/murs/6391/15044380175.pdf; *Jordan v. FEC*, 68 F.3d 518, 519 (D.C. Cir. 1995) (holding plaintiff's dismissal challenge untimely because it was filed more than 60 days after "[t]he Commission voted to dismiss Jordan's complaint on July 24, 1991," the date the FEC voted to close the file); *See* Certification, MUR 3178 (Handgun Control, Inc.) (July 24, 1991), *found at* https://www.fec.gov/files/legal/murs/3178.pdf; *Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993) (holding that "the date of dismissal was January 9, 1991," the date the Commission successfully voted to close the file); *see* Certification, MUR 2163 (American Jewish Committee) (Jan. 9, 1991), *found at* https://www.fec.gov/files/legal/murs/2163.pdf; *CREW v. FEC*, 799 F. Supp. 2d 78, 83 (D.D.C. 2011) (Commission "voted to dismiss MUR 5908 on June 29, 2010," the date it voted to close the file, "thereby triggering Plaintiffs' 60-day clock in which to appeal the dismissal"); s*ee* Certification, MUR 5908 (Peace Through Strength PAC) (June 29, 2010), *found at* https://www.fec.gov/files/legal/murs/5908/10044274525.pdf.

[44] *See, e.g.*, MURs 7350, 7351, 7357, and 7382 (Cambridge Analytica LLC, *et al.*). An RTB vote failed 2-0 in April 2019, *see* Certification (Apr. 12, 2019), *found at* https://www.fec.gov/files/legal/murs/7350/7350_27.pdf; another RTB motion and then passed 4-0 at the end of that summer, *see* Certifications (July 30, 2019 and Aug. 22, 2019), *found at* https://www.fec.gov/files/legal/murs/7350/7350_29.pdf and https://www.fec.gov/files/legal/murs/7350/7350_37.pdf. *Also see, e.g.*, Plaintiff's Combined Memorandum of Points and Authorities in Opposition to All Defendants' Motions to Dismiss, *Giffords v. NRA Political Victory Fund,* No. 21-2887 (D.D.C.) at 38, c*iting, e.g.*, MURs 7350, 7351, 7357, and 7382 (Cambridge Analytica LLC, *et al.*); MUR 6623 (Scalise for Congress, *et al.*); MUR 5754 (MoveOn PAC, *et al.*); MUR 4012 (Freedom's Heritage Forum, *et al.*).

[45] *See* Amended Certification, MURs 6391 & 6471 *(CHGO)* (Sept. 16, 2014); Certification, MURs 6391 & 6471 *(CHGO)* (Oct. 1, 2015).

[46] *CLC v. Iowa Values,* 573 F. Supp. 3d 243, 257 (D.D.C. 2021) (internal references omitted).

> *advertisements while hiding behind dubious and misleading names. Congress foresaw potential issues with the FEC's process and added a safeguard to protect the First Amendment rights of complainants.*[47]

One colleague has written to decry "the Commission's continued and inexcusable failure" to perform what he termed "the ministerial act" of closing the file in a matter.[48] He is simply factually incorrect to characterize a Commissioner's vote to dismiss an enforcement complaint as ministerial. A *ministerial act* "involves obedience to instructions or laws instead of discretion, judgment, or skill; of, relating to, or involving a duty that is so plain in point of law and so clear in matter of fact that no element of discretion is left to the precise mode of its performance."[49]

Needless to say, nothing in the Act instructs commissioners to obediently vote one way or the other on *any* motion.[50] Each commissioner exercises their judgment and discretion in every vote they cast, including those on motions to dismiss enforcement matters. Particularly over the past two years, I have devoted quite a bit of my discretion, judgment, and skill to determining my votes on dismissal motions. These have been some of the most carefully considered votes I have cast on this Commission.

Votes on RTB motions and votes on dismissal motions are two separate votes, taken at two separate times, with two different voting lineups.[51] Whether the Republican commissioners like it or not, whether respondents like it or not, if not enough commissioners vote for a motion to close the file, the Commission does not act on that complaint and that complaint is not dismissed. The world has not changed.

THE LIMITS OF CONTROL

The shift in votes on dismissal motions revealed, to the Republican commissioners' acute dismay, that they do not control the outcome of every Commission enforcement matter. Part of the problem

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[47] *CLC v. Iowa Values,* 573 F. Supp. 3d 243, 257 (D.D.C. 2021) (internal references omitted).

[48] Statement of Chairman Allen J. Dickerson, MUR 7422 (Greitens for Missouri), May 13, 2022, *found at* https://www.fec.gov/files/legal/murs/7422/7422_82.pdf.

[49] *Ministerial,* Black's Law Dictionary (11th ed. 2019).

[50] The Commission's worst "continued and inexcusable failure" is its failure to pursue meritorious and important enforcement complaints before it.

[51] The notion that they are one and the same stems from the D.C. Circuit's conflation, in *dicta,* of two entirely separate Commission votes: *failed* votes on RTB motions and *successful* votes on dismissal motions. *New Models En Banc* Statement at 2 (The D.C. Circuit "accomplishes this by muddying the distinction between a *failed* vote to proceed with enforcement in a matter and the Commission's separate *majority* vote to dismiss the matter, leading some to suggest that the Commission's enforcement matters are magically dismissed when an enforcement vote splits. This is just not the case, nor *can* it be under the Commission's governing statute, which requires all decisions to be made by at least a majority vote. Though the Court has, in dicta, analytically conflated split enforcement votes and dismissal votes, they are two separate votes, taken at two separate times, with two different voting lineups").

may be the term the Republican commissioners have embraced for themselves: "controlling commissioners."[52] The concept appears to have gone to their heads.[53]

But the D.C. Circuit has granted the obstructive half of the Commission control over the fate of the Commission's enforcement matters in *one very specific situation only:* When courts are trying to discern whether the Commission acted contrary to law in the context of a lawsuit challenging the Commission's dismissal of a complaint, they will evaluate my colleagues' Statement of Reasons as "the agency's reasons for acting as it did."[54]

Their reasoning is granted this deference *if* their collective No votes prevented an RTB motion from succeeding against the recommendations of the Commission's professional legal staff; *if* a majority of the Commission then voted to dismiss the matter; and then *if* the complainant then sued the Commission, citing that dismissal.

But *until* a majority of commissioners votes to dismiss the matter, there *is* no action. There *is* no dismissal. There *is* no dismissal lawsuit. There *is* no control group. There *are* no controlling commissioners. And *no* statement of reasons has been anointed as the agency's reasons for a dismissal, *because there has been no dismissal.*

The Republican commissioners are spilling a tremendous number of words into the world without bothering to acknowledge that last and truly important detail: their statements of reasons only have *any* legal control in the context of *dismissals* and *dismissal lawsuits*.[55] Defendants in third-party

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[52] *See, e.g.*, Republican Enforcement Statement at 3.

[53] Anyone interested in seeing the dangerous effects of the D.C. Circuit's dubbing a bare half of the Commission as "controlling commissioners" should study carefully their June 8, 2022 "policy statement" regarding *CREW v. FEC*, 971 F.3d 340 (D.C. Cir. 2020), *aff'g* 316 F. Supp. 3d 349 (D.D.C. 2018). *See* Policy Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Concerning the Application of 52 U.S.C. § 30104(c) (June 8, 2022) ("Republican Policy Statement"), *found at* https://www.fec.gov/resources/cms-content/documents/CREW_contributions_earmarked_political_purposes_Dickerson_Cooksey_Trainor_06082022.pdf.

The styling of this document as a "policy statement" seemed overstated at first blush, as policy statements are ordinarily issued by the Commission itself after a majority of the Commission has voted to do so – and not by a group of individual commissioners. But the title turned out to be wildly understated. My colleagues' intent is not to impersonate the Commission. It is to impersonate the U.S. Supreme Court and overturn a binding D.C. Circuit opinion. In *CREW v. FEC*, the D.C. Circuit had affirmed the district court's characterization of the Act's reporting mandates. But my colleagues dismissed this as "vague and imprecise" and announced that they would be enforcing the law as they – not the D.C. Circuit – saw it. They embraced the Second Circuit's reasoning in *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995) and announced their intent to enforce 52 U.S.C. § 30104(c)(1) only as to contributions earmarked to independent expenditures. They would, they announced airily, dismiss other activity pursuant to their powers of prosecutorial discretion. Republican Policy Statement at 6.

This amazingly arrogant statement (a) directly contradicted the binding holding in *CREW v. FEC* that the term "earmarked for political purposes" applies more broadly and (b) ignored that the district and circuit courts in *CREW v. FEC* had *expressly rejected* the Second Circuit's reasoning *on exactly that point*. *See* 971 F.3d. at 353; 316 F. Supp. 3d at 401 n.43. But as outrageous as all that is, what's more outrageous is that they can likely get away with it under the *CHGO* and *New Models* decisions.

[54] *FEC v. NRSC ("NRSC")*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

[55] *See, e.g.*, Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Freedom of Information Act Litigation ("Republican FOIA Statement") at 2, June 28, 2022, *found at* https://www.fec.gov/resources/cms-content/documents/Statement-re-FOIA-Litigation-6.28.2022-Dickerson-Cooksey-Trainor.pdf.

actions also cling to the fiction that the Republican commissioners' statements gain their magical powers to make lawsuits go away and become "controlling for purposes of judicial review" as soon as they lift their quills from the page, no matter the status of the matter.[56]

But even if they are wearing their lucky "Controlling Commissioners" baseball caps, my three Republican colleagues do not control the dismissal of an enforcement complaint they might seek to dismiss. Those three do not control the waiver of Commission privileges they might seek to waive.

And they do not control whether the Commission defends itself against litigation filed pursuant to 52 U.S.C. §30109(a)(8) that they might seek to defend.

LITIGATION

That last one cropped up because of the second adjustment some commissioners had made in their voting: When complainants sued the Commission when it had not voted to take action on a complaint, these commissioners did not automatically vote to instruct OGC's attorneys to defend against the lawsuit. When three commissioners decide to vote No on a motion to defend litigation pursuant to §30109(a)(8), the motion fails and the Commission does not appear in court to defend itself.

On just a single page of a statement they have written recently, Republican commissioners wailed about "the scandalous spectacle" of failed motions to instruct the Commission's attorneys to defend against enforcement-related lawsuits[57] and gnashed their teeth over what they describe as "chaos and an escalating collapse of institutional norms."[58]

But this is not about spectacle or chaos or collapse. It is simply about the three commissioners on this Commission who oppose robust enforcement of federal campaign-finance law discovering that the Act does not give them control over the outcome of every enforcement matter, and they do not like it.

The so-called "controlling commissioners" can be unhappy about their lack of control here all they want, but substantive objections to votes against litigation-defense motions are misplaced. A commissioner who decides to vote No on a litigation-defense motion is acting well within her authority under the Act. Congress specifically chose to require that four or more commissioners affirmatively vote to defend against such litigation. Congress thus specifically subjected the question to commissioners' discretion. Congress could well have had the Commission automatically defend itself against these suits (as it did for every other type of lawsuit we face). It did not. In requiring four votes to defend (a)(8) litigation, Congress plainly anticipated that sometimes, there

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[56] Defendants The National Rifle Association of America Political Victory Fund, The National Rifle Association of America, and Josh Hawley for Senate's Joint Motion To Hold Proceedings In Abeyance, *Giffords v. NRA Political Victory Fund*, 21-2887 (D.D.C.) (July 29, 2022), at 9. These litigants breathlessly told the court, "FEC counsel revealed to the Court in a hearing that the Commissioners who voted to dismiss the administrative complaints had submitted a statement of reasons to the record, but did not mention that this statement of reasons is legally controlling under D.C. Circuit precedent." *Id.* at 19. Well, sure. The Commission's litigators neglected to mention that the statement of reasons in an open enforcement matter is legally controlling under D.C. Circuit precedent because it *isn't.*

[57] Republican Enforcement Statement at 1.

[58] *Id.*

would *not* be four votes to defend. The necessity of amassing those four votes should put some pressure on intransigent commissioners to work to find consensus.

One district court has referred to "the failure of a federal agency to appear" in court to defend against an (a)(8) lawsuit as "troubling," but in the next breath acknowledged that "the agency's failure to defend this litigation was not 'unprecedented,' and it grew out of the FEC's unique structure and enacting legislation."[59] The Court's latter comment hits the mark, and it is the key to why courts ought not be troubled when the Commission fails to appear to defend itself in these lawsuits.

Votes on motions to defend against suits filed pursuant to § 30109(a)(8) did not fail due to carelessness or a lack of respect for judicial process – or by accident.

The votes on those motions failed because the Commission's enacting legislation, the Act, requires a bipartisan majority of commissioners to vote affirmatively to defend against these lawsuits. If three commissioners believe that the reasons given for a dismissal are contrary to law, or that a failure of the Commission to act on a complaint has indeed been contrary to law, the Act fully empowers them to vote against defending against lawsuits alleging exactly that.

This is not, again, "bad faith" or "improper behavior," as some litigants argue.[60] It is not some sinister and lawless conspiracy cooked up in the dead of night. Every bit of it draws directly from the Act. One or more commissioners voted against dismissing a matter they did not believe should be dismissed, which is a vote perfectly proper under the Act.[61] When the complainant sued the Commission for neither garnering four votes to dismiss the matter – nor four votes to pursue it, mind you – which is a lawsuit authorized by the Act,[62] one or more commissioners voted against defending against that lawsuit, which is a vote perfectly proper under the Act.[63] The agency thus lost that lawsuit, which is a possibility contemplated by the Act,[64] and when it did, the Commission had 30 days to choose another course.[65] Since the Commission again garnered neither four votes to

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[59] Memorandum Opinion and Order, *CLC v. FEC*, No. 20-809 (D.D.C) (May 13, 2022), at 2.

[60] Heritage Motion at 2.

[61] The Act requires that all decisions exercising Commission duties or powers be made by a vote supported by at least a majority of commissioners. 52 U.S.C. § 30106(c). Dismissal votes are such a vote. *See* 52 U.S.C. §§ 30109(a)(1) (referring to "a vote to dismiss"); 30109(a)(8)(A) (referring to "an order of the Commission dismissing a complaint").

[62] 52 U.S.C. § 30107(a)(8)(A) ("Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.")

[63] 52 U.S.C. § 30107(a) ("The Commission has the power…(6) to … defend (in the case of any civil action brought under section 30109(a)(8) of this title) … any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel"). Such defense requires "the affirmative vote of 4 members of the Commission." 52 U.S.C. §30106(c).

[64] 52 U.S.C. § 30107(a)(8)(C) ("In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law").

[65] *Id.* (court "may direct the Commission to conform with such declaration within 30 days").

dismiss the matter nor four votes to pursue it, the complainant was authorized to sue the respondent directly in federal court, which is exactly the path specified by the Act.[66]

Simply put, under the Act, if three commissioners vote No on a litigation-defense motion, their votes control. And unlike failed RTB votes and any attendant successful dismissal votes, this outcome is unreviewable.

The four-votes-to-defend-lawsuits standard requires just as much bipartisanship as the four-votes-to-pursue-complaints standard. In the era when commissioners worked to avoid 3-3 splits, it was easy to find four votes to defend the agency's position in litigation. After all, the easiest way to ensure there are four votes to *defend* the Commission's position is to ensure there are four votes that *support* the Commission's position. The Commission fails so often to garner the requisite four or more commissioners to vote to find RTB on enforcement complaints that it is taken as a given that the requirement was designed to be difficult to meet. No one should be surprised, then, that a sharply divided Commission that splits on many RTB votes would also sometimes split on its litigation-defense votes.

CONCLUSION

The fundamental duty conferred upon every commissioner of the United States Federal Election Commission is to exercise our best judgment in every vote we take. No decision that I make in that capacity is thoughtless or automatic.

Some motions require four affirmative votes to succeed. Sometimes it takes a simple majority. But under the Federal Election Campaign Act, the Commission only acts when more commissioners vote for a motion than vote against it.

Commissioners who want majority support for their dismissal motions or want their litigation-defense motions to get four votes have a simple task: Craft a motion that enough commissioners will vote for.

Instead, the Republican commissioners complain that they somehow deserve the votes of their colleagues to provide majority support for lawless dismissals. They complain that they are owed all their colleagues' votes to defend those lawless dismissals in federal court. They are making a weak attempt to convince the public and, presumably, the courts, of these alternative facts. But what they describe is simply not how Congress built the Commission to work.

Oct. 4, 2022

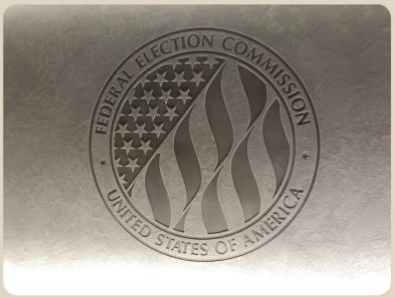
Ellen L. Weintraub
Commissioner

[66] *Id.* ("failing which [conformance] the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint").

ATTACHMENT A: @EllenLWeintraub Tweets

Sent Sept. 30, 2022 beginning at 6:49 pm, *found at:* https://twitter.com/EllenLWeintraub/status/1575981087427379202

Ellen L. Weintraub @EllenLWeintraub 3d
Sad to report: @FEC announced today the dismissal of a slew of important cases on key issues like dark money, soft money & coordination. Several of us had worked hard over the past few years to keep these matters alive in the face of obstructionist colleagues and bad caselaw. 🧵



Ellen L. Weintraub @EllenLWeintraub 3d
@FEC These efforts involved a activating a previously unused, alternative enforcement path that Congress wrote into our governing statute.

There is still hope that the American people's interests can be vindicated, at least in these matters.

Ellen L. Weintraub @EllenLWeintraub 3d
@FEC This path allows those who file complaints to sue those they allege have violated the law when @FEC fails to act. The strategy was working. Today's dismissals should not affect those existing lawsuits – the dismissals have not cured the injury that allowed those suits to proceed.

Ellen L. Weintraub @EllenLWeintraub 3d
@FEC It's not surprising that this alternative enforcement strategy bugged the heck outta some of my colleagues, who thought they held all the cards.

I make zero apologies for using every tool I can find to get the law enforced.

Ellen L. Weintraub @EllenLWeintraub 3d
@FEC The matters that have been shut down are: MUR 6589R (American Action Network); MURs 6915 and 6927 (John Ellis Bush); MURs 7427, 7497, 7524, and 7553 (National Rifle Association of America Political Victory Fund, et al.); ...

Ellen L. Weintraub @EllenLWeintraub 3d
@FEC ... MURs 7558, 7560, and 7621 (Donald J. Trump, MAGA PAC, et al.); MUR 7486 (45Committee); MURs 7654 and 7660 (America First Action), MURs 7672, 7674, and 7732 (Iowa Values), and MUR 7726 (David Brock, et al.).

Ellen L. Weintraub @EllenLWeintraub 3d
@FEC My statements on many of these closed matters are also being released today.

Two with @ShanaMBroussard:

Iowa Values: fec.gov/files/legal/mu...
45 Committee: fec.gov/files/legal/mu...

Two regular statements on my own:

NRA: eqs.fec.gov/eqsdocsMUR/742...
Brock: fec.gov/files/legal/mu...

Ellen L. Weintraub @EllenLWeintraub 3d
@FEC @ShanaMBroussard Two more statements are worthy of special note:

Jeb Bush: fec.gov/files/legal/mu...
AAN: fec.gov/files/legal/mu...

D.C. Circuit distortions of the @FEC's enforcement process have actually resulted in *my* being the "controlling" commissioner to explain these dismissals.

Ellen L. Weintraub @EllenLWeintraub 3d
@FEC They should be an intriguing read for election-law and administrative-law nerds everywhere. For the first time *ever*, the controlling rationale in two @FEC dismissals is that those dismissals *are* contrary to law, which should make the next round of lawsuits quite interesting.

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. **FEDERAL ELECTION COMMISSION**, Defendant.	Case No. 22-cv-3281 (CRC)

MEMORANDUM OPINION AND ORDER

The eleven-year history of this case encapsulates the bureaucratic morass that has become the Federal Election Commission ("FEC" or "Commission"). In 2012, Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") filed an administrative complaint with the Commission, alleging that Intervenor American Action Network's ("AAN") expenditures on political advertisements during the 2010 midterm election cycle rendered it an unregistered political committee. In 2014, the FEC dismissed CREW's complaint. CREW petitioned this Court for review. And this Court remanded. In 2016, the FEC dismissed CREW's complaint again on remand. CREW again petitioned this Court for review. And, in 2018, this Court again remanded. After the FEC failed to act on the remand, CREW sued AAN directly, as it was permitted to do under the Federal Election Campaign Act ("FECA"). But because the FEC's initial decision dismissing CREW's administrative complaint invoked, in passing, the Commission's prosecutorial discretion, this Court held in 2022 that CREW's latest complaint against AAN must be dismissed.

Meanwhile, following the second remand in 2018, CREW's administrative complaint sat dormant before the agency for four years. Finally, in August 2022, the FEC voted for a third

time to close the file and issued a letter to CREW informing it of its right to petition this Court for review once more. CREW did so, and the FEC and AAN have now move to dismiss CREW's latest petition. The Court will deny the motions.

First, because CREW's complaint alleges a cognizable informational injury, the Court rejects AAN's argument that CREW lacks standing to sue. Next, the Court concludes that CREW brought this action within 60 days of the FEC's dismissal of its administrative complaint. Although the FEC deadlocked on a vote to initiate enforcement proceedings against AAN years ago, the Court holds that the Commission did not "dismiss" CREW's complaint under the statute until it closed the casefile last fall. Next, the Court rejects the FEC's contention that any remand here would be futile. Finally, at least for now, the Court defers consideration of AAN's argument that the FEC's invocation of its prosecutorial discretion to dismiss CREW's complaint in 2014 renders non-reviewable the FEC's current dismissal, which disclaims any reliance on prosecutorial discretion. Because the D.C. Circuit may address that question in its review of CREW's appeal of this Court's dismissal of its citizen suit against AAN, the Court will stay this case pending the outcome of that appeal.

I. Background

The extensive history of this case has already been recounted in four prior opinions. See CREW v. FEC ("CREW I"), 209 F. Supp. 3d 77 (D.D.C. 2016); CREW v. FEC ("CREW II"), 299 F. Supp. 3d 83 (D.D.C. 2018); CREW v. AAN ("CREW III"), 410 F. Supp. 3d 1 (D.D.C. 2019); CREW v. AAN ("CREW IV"), 590 F. Supp. 3d 164 (D.D.C. 2022). The Court provides only a limited summary of the relevant background here.

In 2012, CREW, a non-profit government watchdog organization, filed an administrative complaint with the FEC concerning AAN, a 501(c)(4) organization which spent millions of

dollars on political advertising in the lead-up to the 2010 midterms. Compl. ¶¶ 30, 40–41. In particular, CREW's complaint alleged that the content of AAN-sponsored ads run in the 2010 midterms showed that the organization's "major purpose" was federal campaign activity, a finding that would require AAN to register as a political committee under the FECA. Id. ¶¶ 40–41. Two years later, over the advice of its General Counsel, the FEC deadlocked 3-3 on whether to investigate CREW's complaint and voted 6-0 to close the file. CREW I, 209 F. Supp. 3d at 83. In the Statement of Reasons explaining the decision not to proceed with an investigation, the so-called "controlling Commissioners"—those whose votes prevented a finding of reason to believe a violation had occurred—stated, among other things, that "constitutional doubts raised [t]here militate[d] in favor of cautious exercise of [their] prosecutorial discretion." In re AAN, Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen ("First Statement of Reasons") at 23–24 n.137, MUR No. 6589 (July 30, 2014);[1] see CREW v. FEC (CHGO), 892 F.3d 434, 437–38 (D.C. Cir. 2018) (explaining that, "for purposes of judicial review," the statement of reasons from controlling Commissioners is "treated as if they were expressing the Commission's rationale for dismissal").

Displeased with this result, CREW filed a complaint in this Court challenging the FEC's dismissal as contrary to law. See 52 U.S.C. § 30109(a)(8)(A), (C) (providing right to sue for party aggrieved by order of the FEC dismissing a complaint). This Court granted summary judgment to CREW, finding the FEC's substantive analysis contrary to law, and remanded the matter to the agency with instructions to conform to the Court's declaration. See CREW I, 209 F. Supp. 3d at 92–93, 95.

[1] Available at https://eqs.fec.gov/eqsdocsMUR/14044362004.pdf.

On remand, the FEC again deadlocked over the recommendation of its General Counsel, failing for a second time to find reason to believe that AAN violated FECA, and once more voted 5-1 to close the file. Compl. ¶ 47. The Statement of Reasons accompanying the FEC's second dismissal, while updating the FEC's analysis in light of this Court's opinion, also "incorporate[d] by reference" the "analysis and discussion" of its First Statement of Reasons "on all points except for aspects deemed contrary to law by the court." In re AAN, Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen ("Second Statement of Reasons") at 2, MUR No. 6589R (Oct. 19, 2016).[2] CREW again filed suit in this Court, and again, this Court granted summary judgment to CREW and remanded to the FEC to conform to its decision. CREW II, 299 F. Supp. 3d at 95.

This time, however, the FEC took no action within 30 days of remand. Compl. ¶ 52. Accordingly, CREW filed suit against AAN directly, as it is permitted to do under 52 U.S.C. § 30109(a)(8)(C). AAN filed a motion to dismiss arguing, as relevant here, that the FEC's fleeting invocation of prosecutorial discretion in its First Statement of Reasons (which was incorporated by reference into the FEC's Second Statement of Reasons) rendered the FEC's dismissal of CREW's administrative complaint unreviewable under the D.C. Circuit's then recent decision in CHGO, 892 F.3d at 437–38. This Court rejected that argument, holding that "[n]othing in CHGO suggests that the mere invocation of the phrase 'prosecutorial discretion' precludes judicial review" and that what precludes review is instead "reliance by the FEC on factors particularly within its expertise in exercising that discretion." CREW III, 410 F. Supp. 3d at 16. The Court therefore denied the motion to dismiss.

[2] Available at https://www.fec.gov/files/legal/murs/6589/16044401031.pdf.

While discovery was ongoing in that case, the D.C. Circuit issued a new decision elaborating on CHGO's analysis of when the FEC's invocation of prosecutorial discretion bars judicial review. Specifically, in CREW v. FEC (New Models), 993 F.3d 880 (D.C. Cir. 2021), the Circuit held that "a Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review." Id. at 884. In light of that intervening precedent, AAN filed a motion for reconsideration, again asking the Court to dismiss CREW's action as unreviewable. CREW IV, 590 F. Supp. 3d at 165–66. The Court observed the similarities between CREW's suit against AAN and New Models, including that the FEC's stalemate in the AAN case "resulted in the dismissal of CREW's administrative complaint," that the "controlling FEC Commissioners issued a lengthy Statement of Reasons that applied a 'thoroughgoing legal analysis' to support the dismissal," and that the Statement of Reasons included "only a fleeting, conclusory reference to prosecutorial discretion." Id. at 173 (quoting New Models, 993 F.3d at 896 (Millett, J., dissenting)). In light of those "parallel circumstances," the Court concluded that New Models rendered the FEC's dismissal of CREW's administrative complaint unreviewable. Id. at 174–75. The Court acknowledged that, unlike in New Models, the controlling Commissioners in CREW's action against AAN "issued two separate Statements of Reasons, one after a remand from this Court, and the second statement did not mention prosecutorial discretion at all." Id. at 174 n.7. Those distinctions, however, were immaterial, as under New Models, the Court "lacked the power to issue the remand order that resulted in the second statement" and, "[i]n any event, the second Statement of Reasons 'incorporate[d] by reference' the first one 'on all points except for aspects deemed contrary to law' by this Court." Id. (second alteration in original). Accordingly, the Court dismissed CREW's suit against AAN. Id. at 175.

But just when the Court thought it was out of the fray, CREW and the FEC have pulled it back in. As it turned out, about a month after CREW filed its citizen suit against AAN, on May 10, 2018, the FEC took a third reason-to-believe vote on CREW's administrative complaint, which failed by a vote of 3-0, with Commissioner Ellen Weintraub (the sole Democratic appointed member at the time, due to appointment delays) voting to abstain. See Compl., Ex. 5, In re AAN, Statement of Reasons of Commissioner Ellen L. Weintraub ("Third Statement of Reasons") at 4, MUR No. 6589R (Sept. 30, 2022).[3] Ordinarily, after a failed reason-to-believe vote, the FEC immediately follows up with a vote to close the file on the administrative complaint. See, e.g., In re AAN, Certification, MUR No. 6589R (Oct. 19, 2016).[4] But here, the Commission's subsequent vote to close the file likewise failed by a vote of 3-1. In re AAN, Certification, MUR No. 6589R (May 14, 2018) ("May 2018 Certification").[5] Because votes are only published after the FEC has "closed" a matter, the parties were not informed of the Commission's failed reason-to believe vote taken in May 2018. See 11 C.F.R. §§ 111.20–111.21 (providing that Commission's findings shall not be made public until the Commission "makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings"); id. § 5.4(a)(4) (documents "shall be placed on the public record of the Agency no later than 30 days from the date on which all respondents are notified that the Commission has voted to close such an enforcement file."). Instead, a week after the failed May 2018 reason-to-believe and file-closure votes, the FEC sent the parties a letter stating that, pursuant to this Court's remand, "the underlying enforcement matter, MUR 6589R, is currently open before the

[3] Available at https://www.fec.gov/files/legal/murs/6589R/6589R_31.pdf.

[4] Available at https://www.fec.gov/files/legal/murs/6589R/6589R_17.pdf.

[5] Available at https://eqs.fec.gov/eqsdocsMUR/6589R_22.pdf.

Commission" and explaining that the Commission "will notify you immediately regarding any determination the Commission makes with regard to" the case. In re AAN, Notification to American Action Network, MUR No. 6589R (May 17, 2018).[6]

Then, for nearly four years, CREW's administrative complaint sat in FEC purgatory. The now-public administrative record shows that the FEC took another vote to close the case file in January 2022, but that vote deadlocked 3-3. In re AAN, Certification, MUR No. 6589R (Jan. 11, 2022).[7] Finally, on August 29, 2022, the Commission voted 5-1 to close the file. In re AAN, Certification, MUR No. 6589R (Aug. 29, 2022).[8] A few days later, the FEC sent CREW and AAN a letter informing them that on "May 10, 2018, the Commission considered the matter, and there was an insufficient number of votes to find reason to believe that American Action Network violated" FECA and that the Commission had now (four years later) "closed its file in this matter." In re AAN, Notification to CREW at 1, MUR No. 6589R (Sept. 1, 2022).[9] The letter attached a Statement of Reasons by the three Republican-appointed Commissioners, which was authored in May 2022, expressing remorse at the Commission's failure, to that point, to close the file in the case. Id. at 3–8. Additionally, the letter informed CREW that FECA "allows a complainant to seek judicial review of the Commission's dismissal of this action," citing 52 U.S.C. § 30109(a)(8). Id. at 2. About thirty days later, the FEC published its record of the AAN proceedings. Compl. ¶ 54.

[6] Available at https://www.fec.gov/files/legal/murs/6589R/6589R_24.pdf.

[7] Available at https://www.fec.gov/files/legal/murs/6589R/6589R_26.pdf.

[8] Available at https://www.fec.gov/files/legal/murs/6589R/6589R_27.pdf.

[9] Available at https://www.fec.gov/files/legal/murs/6589R/6589R_28.pdf.

A final twist: About a month after the FEC finally voted to close the AAN administrative file and notified the parties of that decision, Commissioner Weintraub, whose abstention in 2018 prevented the FEC from obtaining four votes to find reason to believe a violation had occurred, issued a Statement of Reasons explaining the basis for her vote. See generally Third Statement of Reasons. Because Commissioner Weintraub's abstention caused the FEC to "fail[] to muster four votes in favor of initiating an enforcement proceeding," her statement, as the FEC concedes here, is treated as "expressing the Commission's rationale for dismissal." CHGO, 892 F.3d at 437. But contrary to the norm that "those explaining a dismissal's rationale agree with the outcome and explain all the ways the dismissal was not contrary to law," Commissioner Weintraub's statement did the opposite, instead explaining "why dismissing the complaint in this matter was *absolutely* contrary to law." Third Statement of Reasons at 8. And apparently seeking to ensure that the FEC could not insulate its dismissal of CREW's administrative matter from judicial review, Commissioner Weintraub's statement explicitly disclaimed "in its entirety the reasoning contained in" the prior Statements of Reasons in this case, declared that the FEC "did *not* dismiss this matter pursuant to prosecutorial discretion," and added that the Commission "did *not* dismiss this matter because the statute of limitations had elapsed." Id. at 8–9 (emphasis in original). Commissioner Weintraub concluded that "the dismissal of this matter was unreasonable, given the facts before the Commission, the law governing this activity, and the reasoning referenced" in the statement, and therefore the dismissal was contrary to law. Id. at 11.

Armed with Commissioner Weintraub's statement, CREW filed this new suit against the FEC under 52 U.S.C. § 30109(a)(8) in October 2022, alleging that the Commission's most recent dismissal of their administrative complaint was, as Commissioner Weintraub's controlling

statement maintains, contrary to law. Compl. ¶¶ 61–65. The Court granted AAN's motion for leave to intervene in the case. Both the FEC and AAN filed motions to dismiss, raising distinct arguments for dismissal. The motions to dismiss are now ripe for the Court's consideration.

II. Legal Standards

When evaluating a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the Court must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting plaintiff[s] the benefit of all inferences that can be derived from the facts alleged.'" Am. Nat'l Ins. Co. v. FDIC, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting Thomas v. Principi, 394 F.3d 970, 972 (D.C. Cir. 2005)). The plaintiff bears "the burden of proving by a preponderance of the evidence that the Court has subject matter jurisdiction." Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 176 (D.D.C. 2004). The Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

Under Rule 12(b)(6), a motion to dismiss must be granted if the complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In deciding a 12(b)(6) motion, the Court "must accept as true all of the factual allegations contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citing Twombly, 550 U.S. at 555–56). Any ambiguities must be viewed in a light most favorable to the Plaintiff, giving it the benefit of every reasonable inference drawn from the facts and allegations in the complaint. In re Interbank Funding Corp. Sec. Litig., 668 F. Supp. 2d 44, 47 (D.D.C. 2009) (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

III. Analysis

Altogether, the FEC and AAN move to dismiss CREW's claim on four grounds. While the FEC posits that any remand would be futile, AAN asserts that CREW lacks standing, that its suit is time-barred, and that the FEC's invocation of prosecutorial discretion in the First Statement of Reasons, as incorporated in the second, precludes any review. The Court will first address AAN's arguments regarding standing and the timeliness of CREW's complaint, both of which go to the Court's subject matter jurisdiction, before turning to the parties' remaining grounds for dismissal.

A. Standing

To show the "irreducible constitutional minimum" of standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)). An injury in fact must be both "concrete and particularized." Id. at 339 (quoting Lujan, 504 U.S. at 560). AAN contends that CREW has not alleged injury in fact because it "has not plausibly pled 'that the alleged information deficit,'" stemming from AAN's failure to disclose certain information under FECA, has "'hindered' its activities," as an "asserted informational injury that causes no adverse effects cannot satisfy Article III." AAN Mot. Dismiss at 15 (quoting TransUnion v. Ramirez, 141 S. Ct. 2190, 2214 (2021)). This Court addressed and rejected a largely identical argument in its opinion denying AAN's initial motion to dismiss CREW's citizen suit. CREW III, 410 F. Supp. 3d at 12–14. The Court sees no basis to alter its previous conclusion.

As this Court explained in CREW III, the "Supreme Court has long recognized that FECA creates an informational right—the right to know who is spending money to influence elections, how much they are spending, and when they are spending it." CREW III, 410 F. Supp. 3d at 12. Deprivation of this right to information that should be disclosed under FECA, therefore, inflicts an injury in fact "when the plaintiff fails to obtain information which must be publicly disclosed pursuant to [the] statute." Id. (quoting FEC v. Akins, 524 U.S. 11, 21 (1998)). Moreover, as Akins explained, injury in fact exists where the information to which the plaintiff claims entitlement "would help them (*and others to whom they would communicate it*) to evaluate candidates for public office." Id. (quoting Akins, 524 U.S. at 21). For that reason, courts in this district, including this one, have conferred standing to "groups who, like CREW, 'engage[] in a number of campaign-finance related activities—including public education, litigation, administrative proceedings, and legislative reform efforts—where the sought-after information would likely prove useful.'" Id. at 13 (quoting Campaign Legal Ctr. v. FEC, 245 F. Supp. 3d 119, 127 (D.D.C. 2017)).

Just as the Court found "no reason to doubt" CREW's previous "claim that the information sought would help it in its activities," it comes to the same conclusion here. Id. (quoting Friends of Animals v. Jewell, 824 F.3d 1033, 1040–41 (D.C. Cir. 2016)). Similar to the allegations in CREW's citizen suit against AAN, CREW's present complaint pleads that the organization "uses a combination of research, litigation, and advocacy to advance its mission" of empowering voters and exposing corruption, that it "does this . . . by educating citizens regarding the integrity of the electoral process and our system of government," and that, "[t]oward this end, CREW monitors the campaign finance activities of those who run for federal and state office and those who support or oppose such candidates," relying on information to which it alleges it is

entitled under FECA. Compl. ¶¶ 8–10. Thus, "when an individual, candidate, political committee, or other regulated entity fails to disclose or provides false information in reports required by the FECA," CREW "is hindered in its programmatic activity," including its ability to publicize "those who violate federal campaign finance laws through its website, press releases, and other methods of distribution," which in turn serves "CREW's mission of keeping the public informed" about unethical or illegal campaign activities. Id. ¶¶ 9–10; see CREW III, 410 F. Supp. 3d at 13 (finding standing where CREW pleaded "it regularly reviews disclosure reports required by FECA and uses the information they contain regarding campaign expenditures for a host of programmatic activities, such as 'look[ing] for correlations between . . . spending on independent campaign activity that . . . benefits a candidate, and that member's subsequent congressional activities'").

As the Court found previously, "[t]hat's all Akins and Jewell require." Id. at 13. Were there any doubt, the D.C. Circuit has, since CREW III, endorsed exactly this reasoning. In Campaign Legal Ctr. & Democracy 21 v. FEC, 952 F.3d 352 (D.C. Cir. 2020), the Circuit held that two organizations committed to "supporting and enforcing campaign finance law" had informational standing to challenge the FEC's dismissal of their complaints. Id. at 355–56. Like CREW, the organizations alleged that they participated in "public education, litigation, regulatory practice, and legislative policy" and that the accurate disclosure of contributor information they sought "would further their efforts to defend and implement campaign finance reform." Id. at 356 (citation omitted). That is precisely CREW's goal here. Contrary to AAN's characterization, CREW's alleged injury does not stem from a bare desire that others comply with the law but rather its own, individualized interest in carrying out its organizational goals of

educating the public about the integrity of the electoral process and conducting research, litigation, and advocacy to reduce government corruption.[10]

AAN appears to suggest that the Supreme Court's recent decision in TransUnion v. Ramirez somehow changed this landscape. AAN Mot. Dismiss at 17. It did not. AAN points to TransUnion's statements—in a case not involving "a public-disclosure law" like FECA—that plaintiffs asserting an informational injury must identify "'downstream consequences' from failing to receive the required information" and must demonstrate "that the alleged information deficit hindered their ability to" engage in some activity. 141 S. Ct. at 2214. Those statements, however, do not change but rather encapsulate the analysis this Court already employed—assessing whether CREW's failure to receive the requested disclosures would harm its ability to advance its organizational mission. Accepting "as true all of the factual allegations contained in the complaint," Erickson, 551 U.S. at 94, CREW plausibly states an informational injury sufficient to confer standing.

B. Timeliness

The Court next turns to AAN's contention that CREW's suit is time barred. FECA provides that a party "aggrieved by an order of the Commission dismissing a complaint" may petition for review of that decision "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(A), (B). AAN contends that CREW has missed this 60-day window and that, as a result, the Court cannot consider the merits of its petition. See AAN Mot. Dismiss at 17–22. In

[10] The Court is not persuaded by AAN's argument that the age of the information CREW seeks—AAN's donors for activities that took place over ten years ago—renders that information useless to CREW's mission. AAN Mot. Dismiss at 16–17. Even if the disclosures CREW seeks would be so limited, a point CREW disputes, Opp'n at 22, donor information from a decade ago could easily prove useful to CREW's efforts to report on public corruption, for instance, by exposing past political corruption or campaign finance violations by donors or political figures who are still active today.

making this argument, however, AAN does not identify when exactly the statute of limitations period ran. It instead advances only a negative argument that the Commission's August 2022 vote to close the file could not have started the clock because this vote was simply a ministerial act, not a "dismissal" under § 30109(a)(8). Id. Thus, in AAN's telling, whenever the clock actually began to tick, the 60-day deadline had long passed by the time CREW filed the current action in October 2022.

The Court disagrees. The August 2022 vote to close the file was indeed a dismissal that triggered the 60-day window, and thus CREW's petition was timely in the first place. But even if the dismissal had occurred at some earlier point in time—namely, when the FEC deadlocked on the 2018 reason-to-believe vote—it is likely that equitable tolling would apply here.

1. When was CREW's administrative complaint dismissed?

To address the merits of AAN's argument, the Court first must pinpoint when the FEC dismissed CREW's administrative complaint—and thereby triggered § 30109(a)(8)'s window—after the Court remanded the matter to the Commission in CREW II. There are two possibilities: (1) the deadlocked reason-to-believe vote in May 2018; or (2) the successful vote to close the file in August 2022. CREW's claim is time barred if it is the former, but it is timely if the latter was the relevant dismissal. With two recent exceptions, which are discussed further below, the Court is unaware of any opinion squarely addressing this question. The Court suspects that is because, until recently, the FEC's vote declining to pursue enforcement proceedings and its vote to close the case file have, almost always, occurred at the same time, the latter following logically from the former. See, e.g., In re Am. Jewish Comm., Certification at 618, MUR No. 2163 (Jan. 10, 1991) (voting to take "no further action" as to the complaint and voting to "[c]lose the file in this

matter");[11] In re Duncan Hunter, Certification, MUR No. 5908 (June 30, 2010) (same).[12] But that is no longer the case anymore, as this case demonstrates, forcing the Court to pick a start date here. Having considered the relevant materials, the Court concludes that the Commission dismissed CREW's complaint for purposes of the application of the statute of limitations at the latter date when it voted to close the file in August 2022.

The Court begins with the statute itself, which provides only moderate assistance. As stated above, § 30109(a)(8)(A)–(B) provides that any party "aggrieved by an order of the Commission dismissing a complaint filed by such party" may file a petition in this court "within 60 days after the date of the dismissal." Although the statute does not define "dismissal," at least two textual clues suggest to the Court that the deadlocked reason-to-believe vote here, on its own, does not suffice. First, other subsections of the statute refer to the Commission's decisions whether to proceed with enforcement actions or not. Section 30109(a)(2) provides that if the Commission, by an "affirmative vote of 4 of its members" finds "reason to believe" a violation has occurred, then it should notify the respondent and make an investigation of the alleged violation. Other sections similarly discuss what follows if the Commission finds "probable cause" to believe that a violation occurred. 52 U.S.C. § 30109(a)(4)(A)(i), (5)(C). But when describing the event that triggers the 60-day clock for filing a petition, the statute refers neither to the "reason to believe" event nor the "probable cause" event, instead using the terms "dismissing" and "dismissal." Id. § 30109(a)(8)(A)–(C). This variation suggests at least that a "dismissal" is not the same thing as a failed reason-to-believe or probable-cause vote. See Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1789 (2022) ("[W]here [a] document has used one term

[11] Available at https://perma.cc/92CJ-6UD2.

[12] Available at https://perma.cc/VZ5R-NWNU.

in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." (alterations in original) (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 170 (2012))).

Second, § 30109(a)(8)(A) refers not to "dismissal" in the abstract but to a party "*aggrieved* by an *order* of the Commission dismissing a complaint." 52 U.S.C. § 30109(a)(8)(A) (emphasis added). An "order," in common parlance, is a "command, direction, or instruction" that "generally embraces final decrees" or "interlocutory directions or commands." Order, Black's Law Dictionary (11th ed. 2019). That is, an "order" typically is directed *to* someone or something. Likewise, a person "aggrieved" is one "having legal rights that are adversely affected." Aggrieved, Black's Law Dictionary (11th ed. 2019). When the FEC here deadlocked on its reason-to-believe vote in 2018, however, it is difficult to see how anything was "commanded" or anyone was "aggrieved." Neither CREW nor AAN was notified of the failed reason-to-believe vote; rather, both parties were simply sent letters informing them that "[p]ursuant to the court's remand, the underlying enforcement matter, MUR 6589R, is currently open before the Commission" and that the Commission "will notify you immediately regarding any determination the Commission makes." Notification to American Action Network, supra, at 1. Such a letter hardly strikes the Court as an order. Moreover, although the Commission filed a certification of the vote describing its outcome, that file was not made public until after the case was closed in 2022. Whether or not a tree that falls in an empty forest makes a sound, the Court struggles to see how CREW can be "aggrieved" by a vote that is never made known to it.

The Commission's regulations, policy statements, and practices bolster this conclusion. The FEC's Statement of Policy on Commission Action states that, "[a]s with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners." 72

Fed. Reg. 12,545, 12,545–46 (Mar. 16, 2007). Treating deadlocked reason-to-believe votes as dismissals obviously conflicts with this position, which the D.C. Circuit implicitly recognized in End Citizens United PAC v. FEC, 69 F.4th 916 (D.C. Cir. 2023). After quoting from the Policy Statement for the proposition that four votes are needed to dismiss a complaint, the court noted that, "before the Commission's unanimous vote to 'close the file,' several other votes also failed to get the requisite four votes for the Commission to act, and there is no suggestion that those votes impart the Commission's reason for the dismissal." Id. at 921. This appears to distinguish between failed votes (including a deadlocked reason-to-believe vote) and successful votes for file closure, and it indicates that only the latter constitutes dismissal. To be sure, this analysis is in tension with the D.C. Circuit's earlier decision in New Models, which rejected the plaintiff's argument that four votes are required to dismiss a complaint because dismissal does not appear in 52 U.S.C. § 30107(a)(6)'s enumerated list of actions that require four votes, suggesting that it is governed by the "general rule that the Commission must make decisions by majority vote." 993 F.3d at 891. But whether dismissal requires four votes or merely a bare majority, accepting deadlocks as dismissals would violate even the majority-vote rule because it would authorize dismissals when the Commissioners are evenly divided or even when, as in the third reason-to-believe vote here, three of the Commissioners vote in favor and none vote against finding probable cause.

Another subsection of the FECA, § 30109(a)(4)(B)(ii), sets forth the conditions under which the Commission may make public its actions and determinations, stating that if "the Commission makes a determination that a person has not violated this Act[,] . . . the Commission shall make public such determination." The Commission promulgated 11 C.F.R. §§ 111.20, 111.21, and 5.4(a)(4) to implement this provision. See AFL-CIO v. FEC, 333 F.3d 168, 171

(D.C. Cir. 2003). Section 111.20, as relevant here, provides that if "the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent." 11 C.F.R. § 111.20(a). Until then, the investigation file remains confidential. Id. § 111.21(a). The other provision, 11 C.F.R. § 5.4, which harmonizes these confidentiality rules with the Freedom of Information Act, AFL-CIO, 333 F.3d at 171, provides that various investigatory materials, including "[o]pinions of Commissioners rendered in enforcement cases," should be placed on the public record of the Commission no later than 30 days from the date that the Commission notifies the parties it "has voted to close" the enforcement file, 11 C.F.R. § 5.4(a)(4). Putting all this together, the regulations equate the statutory "determination that a person has not violated this Act," 52 U.S.C. § 30109(a)(4)(B)(ii), with the moment that the commission "terminates its proceedings," an event which typically (at least in the past) coincides with a finding of no reason to believe or no probable cause, 11 C.F.R. § 111.20(a).

Here, however, the Commission clearly had not "terminate[d] its proceedings" as to CREW's administrative complaint as of May 2018. It took two more votes on the matter in January and August 2022, and the complaint continued to sit on its docket. And, as far as the Court can tell, nothing would have stopped the Commission from reconsidering its deadlocked 2018 reason-to-believe vote before it finally closed the file later in 2022. Matter of fact, the Court is aware of another FEC case on its own docket where precisely that happened—with the Commission taking two identical reason-to-believe votes a week apart before the file was closed in a subsequent vote. See In re John Ellis Bush, Certification, MUR Nos. 6915 & 6927 (Dec. 7,

2018);[13] In re John Ellis Bush, Certification, MUR Nos. 6915 & 6927 (Dec. 14, 2018).[14] The Court's docket is far from unique, as this appears to be a standard practice for the Commission these days. See, e.g., Heritage Action for Am. v. FEC, No. 22-cv-1422 (CJN), 2023 WL 4560875, at *3 (D.D.C. July 17, 2023) (describing the Commission's multiple reason-to-believe votes over a period of several weeks). This pattern demonstrates that the Commission does not view a deadlocked reason-to-believe vote as a dismissal.

Indeed, the Commission has stated that position in explicit terms. In Heritage Action for America, the Commission refuted the plaintiff's "unsustainable premise" that a failed reason-to-believe vote terminated proceedings before the agency. See Opp'n Mot. Summ. J. at 23–31, No. 22-cv-01422, ECF No. 26. It began by describing the agency's "long-standing practice of terminating matters only through successful votes to close the file." Id. at 24. This practice made sense, it explained, because "a 'deadlocked' vote that fails to reach a four Commissioner majority is not a 'determination' under the FECA" and because reliance on an affirmative vote to close the administrative file "allows the Commissioners to further consider a matter after a single inconclusive vote. In fact, the Commission has often held one reason-to-believe or probable-cause-to-believe vote that does not pass, only to determine in a later vote that there was in fact reason to believe or probable cause to believe on the same claim." Id. at 24–25. It then cited a plethora of cases involving reversals after initial failed reason-to-believe votes, id. 27 & nn.4–6, and detailed why this practice is perfectly consistent with the FECA and the relevant regulations, see id. at 23–31. This reasonable interpretation of the statutory and regulatory framework that comports with the Commission's long-standing approach warrants some degree of deference.

[13] Available at https://www.fec.gov/files/legal/murs/6927/6927_15.pdf.

[14] Available at https://www.fec.gov/files/legal/murs/6927/6927_16.pdf.

See, e.g., Drake v. FAA, 291 F.3d 59, 69 (D.C. Cir. 2002) (noting courts should defer to agency interpretations of regulations presented in the course of litigation if consistent with past practice); Landmark Legal Found. v IRS, 267 F.3d 1132, 1136 (D.C. Cir. 2001) (granting Skidmore deference to an agency's interpretation of a statute advanced during litigation).

One additional fact here is more damning still to AAN's argument. The statute requires that the Commission "shall make public" its "determination that a person has not violated" FECA. 52 U.S.C. § 30109(a)(4)(B)(ii). But here, as already discussed, the only public disclosure following the Commission's deadlocked reason-to-believe vote was its May 17, 2018 letter stating that the matter remained open. By contrast, after the FEC finally voted to close the file in August 2022, it informed the parties—for the first time—about the May 2018 vote that resulted in "an insufficient number of votes to find reason to believe." Notification to CREW, supra, at 2. Most striking, the letter also finally informed CREW that it was entitled "to seek judicial review *of the Commission's dismissal of this action*" pursuant to § 30109(a)(8). Id. (emphasis added). In other words, both the Commission's regulatory framework and its treatment of the events in this case support the conclusion that the file closure, not the reason-to-believe vote on its own, was the moment the case was "dismissed."

Turning to case law, both AAN and CREW point to statements in various opinions of this court and the D.C. Circuit which, in their view, prove the meaning of the words "dismissal." As noted above, however, those cases uniformly involve instances where the Commission voted not to pursue enforcement and voted to close the file at the same moment. The cases, therefore, are only minimally instructive. But to the extent they point in any direction, they support CREW's understanding that a dismissal follows or results from—and is not one and the same as—a deadlocked reason-to-believe vote. In describing the "deadlock dismissal" phenomenon,

Democratic Congressional Campaign Committee v. FEC (DCCC), 831 F.2d 1131 (D.C. Cir. 1987), framed the case as asking what happens when the FEC "deadlocks and for that reason dismisses a complaint." Id. at 1132; see also id. (describing "dismissal due to a deadlock"). The next year, in Common Cause v. FEC, 842 F.2d 436 (D.C. Cir. 1988), the D.C. Circuit again described deadlock dismissals in the following terms: "dismissal of a complaint resulting from a 3-3 deadlock vote," id. at 448, "dismiss[ing] the complaint for lack of the requisite four votes in favor of pursuing the investigation," id. at 449, requiring a statement of reasons "at the time when a deadlock vote results in an order of dismissal," id., and "orders of dismissal based on deadlock votes," id. at 451. And in FEC v. National Republican Senatorial Committee, 966 F.2d 1471 (D.C. Cir. 1992), the court again described its holding in DCCC as explaining what happens "when the Commission deadlocks 3-3 and so dismisses a complaint." Id. at 1476. In other words, although these cases did not hold one way or another on the issue before this Court, they all contemplated that the reason to believe deadlock and the dismissal itself were two separate events, the latter brought about by the former.

The Circuit's recent decision in End Citizens United PAC reaffirms this understanding when stating that, "[i]n the absence of four votes to proceeding, the Commission *may* dismiss the administrative complaint and close the file." 69 F.4th at 918 (emphasis added). "May" is not "must." Although oftentimes a deadlocked reason-to-believe vote will lead to a successful vote to close the file and dismissal of the complaint, that need not be the case. As the FEC's recent track record demonstrates, the Commission is free to keep the file open in the hopes of reaching some resolution on the matter. Thus, until the Commission affirmatively votes to close the file, the door remains open for further enforcement action because the complaint is not closed—*viz.*, the Commission has not dismissed the complaint.

Finally, background principles of claim accrual and administrative law compel the conclusion that the FEC's closure of the case file triggered the 60-day clock here. General common law principles hold that "the standard rule" is that a claim accrues "when the plaintiff has 'a complete and present cause of action,'" that is, when "the plaintiff can file suit and obtain relief." Wallace v. Kato, 549 U.S. 384, 388 (2007) (citation omitted); see also Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Calif., Inc., 522 U.S. 192, 201 (1997) ("Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."). Here, there is no way that CREW "could have filed" a petition challenging the Commission's dismissal of its administrative complaint within 60 days of the 2018 reason-to-believe vote because it did not, and it appears could not, have known about the deadlocked vote until after the Commission closed the case file. Moreover, concluding that the deadlocked reason-to-believe vote, on its own, triggers § 30109(a)(8)'s 60-day clock would render "meaningful judicial review of the Commission's decision not to proceed" impossible in cases like this one. Common Cause, 842 F.2d at 449. Considered alongside the statute, regulations, and agency practice, the Court concludes that CREW's complaint here was timely filed.

Before the Court ends on the question of timeliness, it must acknowledge that two other courts in this district have recently come to conclusions that are either in some tension or direct conflict with this decision. In Campaign Legal Center v. 45Committee, Inc., No. 22-cv-1115 (APM), 2023 WL 2825704 (D.D.C. Mar. 31, 2023), after the FEC failed to act on Campaign Legal Center's ("CLC") administrative complaint against 45Committee, the court found that the Commission's delay was contrary to law and ordered the Commission to conform within 30 days, pursuant to § 30109(a)(8)(C). Id. at *2. After the FEC remained silent, the court gave

CLC permission to sue 45Committee directly, which it did. Id. After that suit had commenced, however, the FEC voted to close the file in CLC's administrative complaint, revealing for the first time that the Commission had deadlocked on a reason-to-believe vote within the 30-day period specified under § 30109(a)(8)(C). Id. at *2–4. Based on the revelation of that information, and despite the fact that the FEC had voted to close the case file *after* the deadlocked reason-to-believe vote, the court held that the previous deadlocked vote had "conform[ed]" with its earlier order and that it therefore lacked jurisdiction under FECA. Id. at *4. In so holding, the court rejected CLC's argument that the failed reason-to-believe vote did not constitute "action" under FECA. Id. The court reasoned that the D.C. Circuit "has repeatedly acknowledged that Commission deadlocks, usually by a 3-3 vote, constitute 'deadlock dismissal[s],'" citing Common Cause, DCCC, and other cases for support. Id. (alteration in original).

Respectfully, the Court disagrees with this analysis. For one, as stated above, cases like Common Cause and DCCC repeatedly distinguished between deadlocked votes, on the one hand, and dismissals, on the other—a distinction that End Citizens United PAC recently reiterated. Additionally, the Court is not persuaded by CLC's reading of the D.C. Circuit's decision in Public Citizen, Inc. v. FERC, 839 F.3d 1165 (D.C. Cir. 2016). The CLC court cited Public Citizen's observations that "FECA deadlocks as agency action . . . is baked into the very text of" FECA and that the FEC, accordingly, "engages in final agency action when, after receiving a complaint alleging certain types of campaign finance violations, it deadlocks." CLC, 2023 WL 2825704, at *4 (quoting Public Citizen, 839 F.3d at 1170). Although Public Citizen does, indeed, characterize "FECA deadlocks as agency action," Public Citizen was a case not about the FEC deadlock phenomenon but rather about similar deadlocks by FERC. 839 F.3d at 1169–72.

Accordingly, in its relatively brief discussion of FEC deadlocks, the Public Citizen court had no occasion to distinguish between the distinct phenomena of reason-to-believe votes, file closures, and dismissals or to analyze any overlap between those concepts. Moreover, the court in Public Citizen did not express any awareness of the Commission's practice of declining to close the case file after a deadlocked reason-to-believe vote. In that context, the Court reads Public Citizen's statements about deadlocks and its aside that FECA contains a "legal requirement to dismiss complaints in deadlock situations" to be a shorthand for the facts that (1) pursuing enforcement proceedings in FECA cases requires a four-vote majority, and (2) as a practical matter, a dismissal is virtually always the result, even if not the immediate result, of a deadlocked reason-to-believe vote. Public Citizen, 839 F.3d at 1171.

More recently, the court in Heritage Action for America fully embraced the argument that deadlocked reason-to-believe votes are themselves dismissals, regardless of any separate vote to close the file. 2023 WL 4560875, at *7–9. That case involved a now familiar set of facts. CLC had filed a complaint with the Commission contending that Heritage Action had failed to disclose donor names. Id. at *2. The Commission took a reason-to-believe vote on the matter, which deadlocked 3-3, and then deadlocked on the subsequent vote to close the file. Id. Consistent with recent agency practice, none of these votes were disclosed. Id. After 120 days of apparent inaction, CLC filed suit alleging that such neglect was contrary to law. Id. The district court agreed and remanded to the Commission, which again deadlocked on subsequent reason-to-believe and file-closure votes which were once more kept secret. Id. At that point, there were a flurry of lawsuits as CLC sued Heritage Action for alleged FECA violations and Heritage Action sued the Commission for its delay and non-disclosure of votes (which it had accessed through FOIA requests). Id. at *3. Both cases turned on the same question: At what

point had the Commission dismissed the complaint and thus triggered its obligation to notify? The court in Heritage Action answered that the critical moment was the deadlocked reason-to-believe vote. Id. at *7–9. As a result, it found that the Commission had violated its obligation to disclose its deadlocked votes but dismissed CLC's petition as untimely because the organization failed to file its petition within 60 days of that undisclosed vote. Id. at *10–11.

The Court again respectfully disagrees. Heritage Action provided four reasons for why a deadlocked reason-to-believe vote constitutes dismissal, but none persuade the Court here. First, it reasoned that, because the Commission cannot investigate without four votes, the necessary effect of deadlock must be dismissal because "any future reason-to-believe votes would be based on the exact same evidence already before the Commission for the first vote." Id. at *8. But experience has shown that the Commission routinely changes course after an initial failed reason-to-believe vote either because Commissioners are convinced by their colleagues or based on later negotiations to narrow the charges. Second, although Heritage Action maintained that the D.C. Circuit long has treated deadlocked votes as final agency action, id., the cases that it cites for that proposition are the same opinions discussed above. These cases may treat a deadlocked vote as leading to dismissal in some cases, but they do not hold that the two events are one and the same. Third, Heritage Action contends the regulations equate a deadlocked reason-to-believe vote with the termination of proceedings when stating that if "the Commission finds no reason to believe, *or otherwise terminates its proceedings*, the General Counsel shall so advise both complainant and respondent by letter." Id. at *9 (emphasis in original). As the FEC explained in its briefing in that case, however, the Commission does not "find" that there is no reason to believe when it deadlocks, as any such finding would require the affirmative vote of four members. Opp'n Mot. Summ. J., supra, at 29. Fourth, Heritage Action reasoned that, "if a

deadlocked reason-to-believe vote does not constitute dismissal, some complaints could remain indefinitely in limbo before the Commission." 2023 WL 4560875, at *8. The Court sympathizes with these policy concerns and acknowledges there are real costs associated with the Commission refusing to close a file when it is deadlocked indefinitely. But that is the price of a deeply divided Commission, and it is not the judiciary's role to rectify the matter by changing the rules.

2. Is the 60-day limitations period subject to equitable tolling?

Even if the Court were to agree with Heritage Action's determination that a deadlocked reason-to-believe vote counts as dismissal, that does not necessarily mean that CREW's petition here must be dismissed as untimely because it did not file a petition within 60 days of a vote that CREW did not know (and could not know) had taken place. The Court acknowledges that the D.C. Circuit has referred to the 60-day limitations period as "jurisdictional and unalterable," see NRA v. FEC, 854 F.2d 1330, 1334 (D.C. Cir. 1988) (quoting Carter/Mondale Presidential Comm. v. FEC, 711 F.2d 279, 283 (D.C. Cir. 1983)), and that subsequent cases have repeated this jurisdictional label, see, e.g., Spannaus v. FEC, 990 F.2d 643, 644 (D.C. Cir. 1993); Jordan v. FEC, 68 F.3d 518, 518–19 (D.C. Cir. 1995). Yet it is doubtful that these determinations are still in good standing because subsequent Supreme Court decisions appear to have "eviscerate[d] [their] reasoning." Attias v. CareFirst, Inc., 344 F.R.D. 38, 46 (D.D.C. 2023) (citation and quotation marks omitted). Time and time again, the Supreme Court has cautioned against the overuse of jurisdictional limits and routinely reversed courts for "misus[ing] the term 'jurisdictional' to refer to nonjurisdictional prescriptions." Wilkins v. United States, 143 S. Ct. 870, 877 (2023) (citation and quotation marks omitted). This is especially true in the context of filing deadlines, such as the 60-day limit here, as the Supreme Court has reiterated that such

deadlines are presumptively "nonjurisdictional claims-processing rules [which] simply instruct parties [to] take certain procedural steps at certain specified times without conditioning a court's authority to hear the case on compliance with those steps." Robinson v. Dep't of Homeland Sec. Off. of Inspector Gen., 71 F.4th 51, 56 (D.C. Cir. 2023) (cleaned up). To rebut this presumption, there must be a "clear statement" that Congress intended the time limit to be jurisdictional. Id. Applying that stringent standard, the D.C. Circuit has reversed several of its prior "jurisdictional" determinations. See, e.g., id. at 56–58.

There is ample reason to believe that it would do the same in this case. The court in NRA did not analyze the FECA's text or comb through the Congressional Record to identify Congress's intent to make the 60-day window "jurisdictional and unalterable." It simply quoted that line from an earlier decision dealing with a separate FECA limitations period, which had cut and pasted the slogan from a case involving a Federal Power Act filing deadline, which in turn had grabbed the quote from cases involving still other statutes. See NRA, 854 F.2d at 1334 (quoting Carter/Mondale, 711 F.2d at 283 (quoting, in turn, Cities of Batavia v. FERC, 672 F.2d 64, 72–73 (D.C. Cir. 1982) (quoting other unrelated statutes))). This citation chain sheds no light on what Congress intended when enacting the 60-day time limit at issue here. Cases on the other end of the chain citing back to NRA fare no better, as they insist that "[s]tatutory time limits on judicial review are traditionally considered jurisdictional." Jordan, 68 F.3d at 518; see also Spannaus, 990 F.2d at 644 ("Consistently, this court has declared mandatory, i.e., 'jurisdictional and unalterable,' statutes that fix the time for seeking judicial review." (citations omitted)). While that may have been traditionally true, times have changed. It is now well-established that Congress "must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it," United States v. Wong,

575 U.S. 402, 410 (2015), and there is no evidence that the 60-day deadline to file a petition is anything other than an ordinary claims-processing rule.

If the 60-day window is non-jurisdictional and thus alterable, AAN's timeliness argument surely fails because this is a textbook example of where equitable tolling is necessary. A party seeking equitable tolling must show "(1) that [it] has been pursuing [its] rights diligently, and (2) that some extraordinary circumstance stood in [its] way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). CREW satisfies both requirements. A quick skim through the procedural history in this case shows that CREW has been more than diligent in pursuing its rights, and the fact that the FEC kept its deadlocked reasoned to believe votes under wraps certainly qualifies as "circumstances that caused a litigant's delay [that] are both extraordinary and beyond its control." Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 257 (2016).

In short, there is ample "reason to believe" that CREW's petition would be subject to equitable tolling if need be. The Court need not definitively decide that question now, however, because, for the reasons explained above, it finds that CREW's petition was timely filed after the Commission dismissed its complaint by voting to close the file.

* * *

Although it agrees with CREW that this case was timely filed, the Court also must raise two ambiguities that, because they were not briefed, it will not resolve at this time.

First, because nobody has briefed this question, the Court does not decide whether the Commission erred by failing to close the file and dismiss the case after its May 2018 vote. The Commission's certification for its May 2018 vote states that it "[f]ailed by a vote of 3-1 to" close the file, with three Commissioners voting affirmatively and only Commissioner Weintraub dissenting. May 2018 Certification, supra, at 3. New Models, in particular, calls that result into

question when it held that the text of FECA "states that four members are necessary only 'to initiate,' 'defend,' 'or appeal any civil action,'" and thus "the affirmative vote of four members" is *not* needed for dismissals. New Models, 993 F.3d at 891 (quoting 52 U.S.C. § 30107(a)(6)); see also 52 U.S.C. § 30106(c) (stating the general rule that the Commission must make decision by majority vote). As mentioned earlier, however, this analysis conflicts with the D.C. Circuit's later decision in End Citizens United PAC relying on the Commission's Statement of Policy on Commission Action for the proposition that four votes are needed to dismiss a case. 69 F.4th at 921 (quoting 72 Fed. Reg. 12,545, 12,545–46 (Mar. 16, 2007)). Given the opposing rulings, the Court will refrain from wading into these waters at this juncture to afford the parties an opportunity to brief this issue, should they choose.

Second, the Court does not address at this time whether Commissioner Weintraub's Statement of Reasons is itself untimely under End Citizens United PAC. There, the day after the Commission failed to reach four affirmative votes on reason to believe, it voted unanimously to close the file "and dismissed" the administrative complaint. Id. at 919. Neither Chairman Dickerson nor Commissioner Cooksey, whose votes prevented a reason to believe finding, filed a statement of reasons explaining their votes, however. Id. Two months after the dismissal, End Citizens United PAC filed a complaint challenging the dismissal under § 30109(a)(8)(A), and four days after that, Chairman Dickerson and Commissioner Cooksey filed a statement of reasons, stating that they had voted not to find reason to believe pursuant to their prosecutorial discretion. Id. Relying on that invocation of prosecutorial discretion, the district court dismissed End Citizen United PAC's case. Id. On appeal, the Circuit reversed, explaining that "[a]s the controlling Commissioners," Chairman Dickerson and Commissioner Cooksey "were obligated to issue a contemporaneous statement 'explaining their votes,' which the court would treat as the

Commission's reason for the dismissal." Id. at 921. That obligation, the court explained, means that "the controlling Commissioners' explanation" must be issued "at the time when a deadlock vote results in an order of dismissal." Id. (quoting Common Cause, 892 F.2d at 449). Because the Dickerson/Cooksey statement was not so issued, it could not be squared "with the prohibition on *post hoc* rationalizations." Id. at 922. But although the court concluded that the Dickerson/Cooksey statement was "non-contemporaneous," it did not explain just how "contemporaneous" a "contemporaneous" statement must be. End Citizens United PAC stands at least for the conclusion that a statement issued after both "the commencement of the underlying litigation and the expiration of the statutory deadline to challenge the dismissal" is contrary to law and must be remanded. Id. at 921, 923–94. But the Court is not sure where that leaves statements, such as Commissioner Weintraub's here, that are issued weeks *after* the file-closure vote but *before* either the filing of a lawsuit or the expiration of the 60-day clock.

Because the parties have not briefed these questions, the Court leaves them for another day. For now, the Court is satisfied that CREW's complaint was brought within the 60-day timeline prescribed by § 30109(a)(8)(B).

C. Futility

In its motion to dismiss, the FEC contends that "remand would serve no purpose other than necessitating yet another round of administrative proceedings, but the outcome of agency consideration of enforcement is preordained"—in other words, that remand would be futile. FEC Mot. Dismiss at 11–12. In particular, the FEC points to a non-controlling statement in this case issued by three Commissioners which, in the FEC's view, suggests that the Commission would not have four votes on remand to find reason to believe a violation occurred and,

presumably, would dismiss a remanded administrative complaint pursuant to the Commission's prosecutorial discretion. Id. at 12–13. The Court is not convinced by this argument.

For one, the statement cited in the FEC's brief does not speak one way or another about how the authoring Commissioners would decide the merits of a reason-to-believe vote on remand. The FEC primarily points to a May 2022 statement by Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. Trainor, III. In re AAN, Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, MUR No. 6589R (May 13, 2022).[15] This statement, however, expresses the Commissioners' views only as to the Commission's "failure to perform th[e] ministerial act" of closing the file in the AAN case after the 2018 reason-to-believe vote had failed. Id. at 1. The statement observes that the Commission took a file-closure vote on the AAN case "with an eye toward resolving stale matters and ensuring responsible use of agency resources," id. at 3, but the context suggests that the Commissioners viewed the matter as "stale" and a waste of "agency resources" only insofar as the Commission had already taken its substantive vote. Indeed, the statement explains that the underlying reason-to-believe vote "predates our service on the Commission," and adds that, "as such," the authors "*take no position on the merits of that decision*." Id. at 6 (emphasis added). It is a bedrock principle of administrative law that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983); see also SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action."). It would be entirely speculative for the Court to guess from Chairman Dickerson's statement how the Commission might vote if this

[15] Available at https://www.fec.gov/files/legal/murs/6589R/6589R_30.pdf.

case were remanded, let alone what its reasons for voting might be or whether those reasons would be subject to judicial review.

The D.C. Circuit, moreover, recently rejected virtually the same argument in End Citizens United PAC, the holding of which was discussed previously. In addition to holding that the non-contemporaneous statement of reasons there was contrary to law, the Circuit also rejected the "fallback position that reversing the district court's judgment would be 'pointless' because Dickerson and Cooksey's prosecutorial discretion reason," expressed in the tardy statement of reasons, "would prevail on remand." 69 F.4th at 922. Requiring an agency to provide "contemporaneous explanations for agency action," the court reasoned, "promotes 'agency accountability' by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority" and advances "the orderly functioning of the process of review." Id. at 922–23 (quoting Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020)). The court stressed, moreover, that the Supreme Court had "determined that remand was appropriate in Regents notwithstanding the agency's representation that there was 'no basis for concluding that [its] position might change'" and "that the matter would be considered by the 'same agency personnel' on remand." Id. at 923 (citations omitted). Thus, even if the May 2022 statement discussed above did speak to the Commission's view of the merits of the CREW complaint against AAN, which it did not, End Citizens United PAC and Regents would likely require remand here anyway.

The cases on which the FEC relies miss the mark. For instance, Fogg v. Ashcroft, 254 F.3d 103 (D.C. Cir. 2001), held that remand would be futile where, although the agency had committed a legal error, "its ultimate conclusion" was "legally inevitable" under the correct legal analysis. Id. at 111–12; see also NLRB v. Am. Geri-Care, Inc., 697 F.2d 56, 63–64 (2d Cir.

1982) (declining to remand because the outcome would be the same whether or not the agency had applied a possibly erroneous legal framework). These cases, then, essentially stand for the unremarkable principle that if "the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." PDK Lab'ys Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004). By contrast, the Court here cannot say that it is "legally inevitable" that the FEC on remand would invoke its prosecutorial discretion to decline to pursue enforcement proceedings, as such a determination is inherently tied up with time- and context-bound questions of when enforcement would "be an appropriate use" of agency "resources." New Models, 993 F.3d at 882. In a word, there is a difference between declining to remand because of a harmless legal error and declining to remand based on the potentiality that the FEC might invoke its prosecutorial discretion based on the facts and state of agency resources at the present moment.[16]

Also inapposite is FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996). There, although the FEC had violated the Constitution by voting to pursue enforcement proceedings with two congressional officers sitting as *ex officio* members of the Commission, the D.C. Circuit nevertheless held that remand was not warranted because the Commission had cured any constitutional violation by reconstituting itself, excluding *ex officio* members, and taking a constitutionally proper vote to find probable cause that the Defendant had violated the law. Id. at 706, 709. Here, if the FEC's decision not to find reason to believe AAN violated FECA was contrary to law (a question not yet before the Court), there is no basis to conclude that the Commission has already cured that violation and that this Court's remand holds no prospect of

[16] Lest there be doubt on this point, the Commission's rather unpredictable treatment of CREW's administrative complaint in this case gives the Court good reason not to hazard a guess as to how it may vote in the future.

relief for CREW. See also Nat'l Parks Conservation Ass'n v. United States, 177 F. Supp. 3d 1, 35 n.10 (D.D.C. 2016) (explaining that, even if the court had found the Forest Service's action arbitrary and capricious, it "harbor[ed] doubts" that it could provide the plaintiff relief, as remand to the agency to produce an environmental impact statement after the passage of six years "would be near impossible to square" with the requirement that the agency act expeditiously).

Accordingly, the Court will not dismiss CREW's complaint on the grounds that remand would be futile.

D. Prosecutorial Discretion

Finally, the Court turns once again to the impact of New Models on this litigation, namely whether the Commission's brief reference to prosecutorial discretion in its very first Statement of Reasons in this case—way back in 2014—bars the Court's review of Commissioner Weintraub's statement here.

As a refresher, after the FEC failed to conform to this Court's second remand following CREW II, CREW filed a suit directly against AAN. CREW III, 410 F. Supp. 3d at 11. The Court initially denied AAN's motion to dismiss, but it granted reconsideration and ultimately dismissed the case in light of New Models. CREW IV, 590 F. Supp. 3d at 165–66, 173–75. As in New Models, the Court explained, the Commission's "fleeting, conclusory reference to prosecutorial discretion" in its 2014 Statement of Reasons was "fatal to CREW's claim." Id. at 173–74. In a footnote, the Court acknowledged that, unlike the 2014 Statement of Reasons, the 2016 Statement of Reasons then on review "did not mention prosecutorial discretion at all." Id. at 174 n.7. But the Court then observed that "if the passing reference to prosecutorial discretion in the initial statement made the first dismissal unreviewable under New Models, then the Court

lacked the power to issue the remand order that resulted in the second statement." Id. "The result would have been a dismissal of CREW's case, and the Commissioners never would have issued a second statement." Id. "In any event," the Court added, the 2016 Statement of Reasons "incorporate[d] by reference" the first one, which was sufficient to conclude that CREW's citizen suit must be dismissed under New Models. Id. (citation omitted).

Returning to the present case, it is clear that Commissioner Weintraub read the Court's last opinion carefully. Because her lone abstention from the 2018 reason-to-believe vote caused the Commission to "fail[] to muster four votes in favor of initiating an enforcement proceeding," her explanation for that abstention is entitled to controlling weight for purposes of this petition for review. CHGO, 892 F.3d at 437.[17] Apparently seeking to evade any roadblocks to a remand set by New Models or CREW IV, Commissioner Weintraub disclaims both any reliance on prosecutorial discretion and any incorporation of the reasoning of the FEC's prior statements.

[17] The FEC concedes that Commissioner Weintraub's statement is controlling, although it notes that it "is unaware of any previous case in which a single abstaining Commissioner caused the FEC to lack the required four votes to find reason to believe." FEC Mot. Dismiss at 9 n.4. Stressing that the statement does not even purport to justify her vote as it is singularly aimed at condemning the Commission's failure to proceed as contrary to law, AAN vigorously contests the conclusion that Commissioner Weintraub's statement is controlling. AAN Mot. Dismiss at 25–28. The Court sympathizes with AAN's confusion on this count. But, although Commissioner Weintraub's statement is no doubt unorthodox, the Court can find no basis to depart from the D.C. Circuit's repeated holdings that the "statement of reasons by the declining-to-go-ahead Commissioner[]," in this case Commissioner Weintraub, speaks for the Commission. Common Cause, 842 F.2d at 449; see also CHGO, 892 F.3d at 437–38 (explaining that "for purposes of judicial review, the statement or statements of those naysayers—the so-called 'controlling Commissioners'—will be treated as if they were expressing the Commission's rationale for dismissal, a rather apparent fiction raising problems of its own"); Nat'l Republican Senatorial Comm., 966 F.2d at 1476 ("Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."). Moreover, if Commissioner Weintraub's statement is, indeed, the "equivalent of a boxer taking a dive," as AAN contends, AAN Mot. Dismiss at 27, the Court does not see why that fact would require dismissal of CREW's complaint, as opposed to remand to the Commission for a new statement.

Third Statement of Reasons at 8–9. Accordingly, Commissioner Weintraub's statement maintains that this Court has the authority to review her statement and must remand this case to the FEC because her statement is contrary to law. Id. at 11.

Notwithstanding Commissioner Weintraub's abandonment of any reliance on prosecutorial discretion, AAN maintains that CREW's suit must be dismissed because, had the Court decided the first two petitions in accordance with New Models, the case would have been dismissed, and Commissioner Weintraub never would have been in a position to issue the present statement. AAN Mot. Dismiss at 24–25. In response, CREW maintains that the Court "did not rely" on this hypothetical, alternative-timeline reasoning but instead dismissed CREW's last suit based on the Second Statement of Reasons' incorporation of the first. Opp'n at 28–29.

The Court will save this vexing question for another day. As the parties in this case are well aware, CREW has filed an appeal of this Court's decision in CREW IV to dismiss its complaint under New Models. Both CREW's and AAN's briefs in that appeal directly address the Court's hypothetical reasoning from CREW IV. CREW maintains that any consideration of the counter-factual world where New Models prevented the birth of the FEC's Second Statement of Reasons would improperly revive a dead letter agency decision, Public Brief for Plaintiff-Appellant at 29–31, CREW v. AAN, No. 22-7038 (D.C. Cir. Mar. 29, 2023), Doc. No. 1992359, whereas AAN maintains that "the first statement cuts off all further review" whether subsequent statements incorporated it or not, Brief for Appellee at 31–32, CREW v. AAN, No. 22-7038 (D.C. Cir. June 30, 2023), Doc. No. 2006015. Thus, although the Circuit may not need to reach this question, it is reasonably possible that it will provide instruction that could govern the Court's treatment of the FEC's past statements of reasons in this case. Rather than leapfrog the Circuit's potential decision on this uncertain question, the Court believes it more prudent to deny

AAN's motion to dismiss on this ground, without prejudice to renewal after a decision is rendered in CREW's pending appeal.[18] In the meantime, to avoid the expenditure of unnecessary resources, the Court will stay this case.

IV. Conclusion

For these reasons, it is hereby

ORDERED that [Dkt. No. 12] Defendant Federal Election Commission's Motion to Dismiss is DENIED without prejudice to renewal. It is further

ORDERED that [Dkt. No. 15] Intervenor American Action Network's Motion to Dismiss is DENIED without prejudice to renewal. It is further

ORDERED that this case is stayed pending the decision of the D.C. Circuit in CREW v. American Action Network, No. 22-7038.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: September 20, 2023

[18] The Court does, however, reject CREW's extended argument that the Court must disregard New Models and CHGO as in conflict with prior binding precedent. Although CREW is correct that, "when a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail." Sierra Club v. Jackson, 648 F.3d 848, 854 (D.C. Cir. 2011). But the prior cases which CREW maintains conflict with CHGO and New Models—Akins, DCCC, Chamber of Commerce of U.S. v. FEC, 69 F.3d 600 (D.C. Cir. 1995), and Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986)—were all considered by New Models, and the court either "harmonize[d]" them or concluded that they "conform[]" with its reasoning. 993 F.3d at 893–95. That New Models is consistent with those prior cases, then, is the law of the Circuit and binding on this Court.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	Civ. No. 22-3067 (DLF) (D.D.C. filed
Common Cause Georgia, et al. v. FEC:	)	October 10, 2022)
	)	
	)	
	)	

CERTIFICATION

I, Vicktoria J. Allen, Acting Deputy Secretary of the Federal Election Commission, do hereby certify that on December 01, 2022, the Commission decided by a vote of 4-1 to authorize to the Office of General Counsel to defend the Commission in *Common Cause Georgia, et al. v. FEC*, Civ. No. 22-3067,

Commissioners Broussard, Cooksey, Dickerson, and Trainor voted affirmatively for the decision. Commissioner Weintraub dissented. Commissioner Lindenbaum recused herself with respect to this matter and did not vote.

Attest:

Vicktoria J Allen Digitally signed by Vicktoria J Allen
Date: 2022.12.02 17:31:56 -05'00'

December 2, 2022
Date

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	Civ. No. 22-1976 (JEB) (D.D.C. filed July
Campaign Legal Center v. FEC:	)	8, 2022)
	)	
	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary for the Federal Election Commission executive session on August 30, 2022, do hereby certify that the Commission decided by a vote of 5-1 to grant authority to the Office of General Counsel to defend *Campaign Legal Center v. FEC,* Civ. No. 22-1976 (JEB) (D.D.C. filed July 8, 2022)

Commissioners Broussard, Cooksey, Dickerson, Lindenbaum, and Trainor voted affirmatively for the decision. Commissioner Weintraub dissented.

Attest:

August 31, 2022
Date

Vicktoria J Allen
Digitally signed by Vicktoria J Allen
Date: 2022.08.31 12:12:48 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	No. 22-cv-02139 (TJK) (D.D.C. filed July
AB PAC v. FEC: Notification	)	20, 2022)
	)	
	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary for the Federal Election Commission executive session on August 30, 2022, do hereby certify that the Commission decided by a vote of 5-1 to grant authority to the Office of General Counsel to defend *AB PAC v. FEC,* No. 22-cv-02139,

Commissioners Broussard, Cooksey, Dickerson, Lindenbaum, and Trainor voted affirmatively for the decision. Commissioner Weintraub dissented.

Attest:

August 31, 2022
Date

Vicktoria J Allen
Digitally signed by Vicktoria J Allen
Date: 2022.08.31 19:30:21 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	No. 22-822 (TNM) (D.D.C. filed March
National Legal and Policy Center v. FEC,	)	25, 2022)
	)	
	)	
	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary of the Federal Election Commission executive session, do hereby certify that on May 10, 2022, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 3-3 to:

> Authorize the Office of General Counsel to defend the Commission against the portion of *National Legal and Policy Center v. FEC,* Civ. No. 22-822 (TNM) (D.D.C. filed March 25, 2022) brought under 52 U.S.C. § 30109(a)(8)(A).

Commissioners Cooksey, Dickerson, and Trainor voted affirmatively for the motion. Commissioners Broussard, Walther, and Weintraub dissented.

Attest:

Vicktoria J Allen Digitally signed by Vicktoria J Allen
Date: 2022.05.11 18:16:44 -04'00'

May 11, 2022
Date

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	Civ. No. 22-838 (TNM) (D.D.C. filed
Campaign Legal Center v. FEC:	)	March 29, 2022)
	)	
	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary of the Federal Election Commission executive session, do hereby certify that on May 10, 2022, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 3-3 to:

   > Authorize the Office of General Counsel to defend the Commission in *Campaign Legal Center v. FEC,* Civ. No. 22-838 (YNM) (D.D.C. filed March 29, 2022).

Commissioners Cooksey, Dickerson, and Trainor voted affirmatively for the motion. Commissioners Broussard, Walther, and Weintraub dissented.

May 11, 2022
Date

Attest:

Vicktoria J Allen
Digitally signed by Vicktoria J Allen
Date: 2022.05.11 18:35:45 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	No. 22-cv-00035 (CRC) (D.D.C. filed
Citizen for Responsibility and Ethics in	)	January 6, 2022)
Washington v. FEC: Notification	)	Agenda Document No. X22-03
Regarding Lawsuit Filed Pursuant to 52	)	
U.S.C. § 30109(a)(8)	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary of the Federal Election Commission executive session, do hereby certify that on February 15, 2022, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 3-3 to:

   > Authorize the Office of General Counsel to defend the Commission in *Citizens for Responsibility and Ethics in Washington v. FEC,* No. 22-cv-00035 (CRC) (D.D.C. filed January 6, 2022).

Commissioners Cooksey, Dickerson, and Trainor voted affirmatively for the motion. Commissioners Broussard, Walther, and Weintraub dissented.

2. Decided by a vote of 6-0 to:

   > Publish the vote certification for this matter on the relevant FEC litigation webpage.

Commissioners Broussard, Cooksey, Dickerson, Trainor, Walther, and Weintraub voted affirmatively for the decision.

Attest:

Vicktoria J Allen Digitally signed by Vicktoria J Allen
Date: 2022.02.18 17:01:46 -05'00'

February 18, 2022
Date

Vicktoria J. Allen
Acting Deputy Secretary of the
Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	Civ. No. 21-3206 (TNM) (D.D.C. filed
Free Speech for People, et al. v. FEC:	)	Dec. 8, 2021)
Notification Regarding Lawsuit Filed	)	
Pursuant to 52 U.S.C. § 30109(a)(8)	)	

CERTIFICATION

I, Vicktoria J. Allen recording secretary of the Federal Election Commission executive session, do hereby certify that on January 25, 2022, the Commission took the following actions in the above-captioned matter:

1. Decided by a vote of 4-2 to:

   Authorize the Office of General Counsel to defend the Commission in *Free Speech for People, et al., v. FEC,* Civ. No. 21-3206 (TNM) (D.D.C. filed Dec. 8, 2021).

Commissioners Broussard, Cooksey, Dickerson, and Trainor voted affirmatively for the decision. Commissioners Walther and Weintraub dissented.

2. Decided by a vote of 5-1 to:

   Publish the vote certification on the relevant FEC webpage related to *Free Speech for People, et al., v. FEC,* Civ. No. 21-3206 (TNM) (D.D.C. filed Dec. 8, 2021).

Commissioners Broussard, Cooksey, Dickerson, Trainor, and Weintraub voted affirmatively for the decision. Commissioner Walther dissented.

Attest:

Vicktoria J Allen Digitally signed by Vicktoria J Allen
Date: 2022.01.28 14:40:11 -05'00'

January 28, 2022
Date

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	No. 21-cv-2128 (RJL) (D.D.C. filed
End Citizens United PAC v. FEC	)	August 9, 2021)
(Notification Regarding Lawsuit Filed	)	
Pursuant to 52 U.S.C. § 30109(a)(8))	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary of the Federal Election Commission executive session, do hereby certify that on September 28, 2021, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 3-3 to:

> Authorize the Office of General Counsel to defend the Commission in End Citizens United PAC v. FEC, No. 21-cv-2128 (RJL) (D.D.C. filed August 9, 2021), as recommended in the Memorandum to the Commission dated September 8, 2021.

Commissioners Cooksey, Dickerson, and Trainor voted affirmatively for the motion. Commissioners Broussard, Walther, and Weintraub dissented.

2. Decided by a vote of 6-0 to:

> Publish the vote certification for this matter on the Commission website's litigation page associated with this case.

Commissioners Broussard, Cooksey, Dickerson, Trainor, Walther, and Weintraub voted affirmatively for the decision.

Attest:

Vicktoria Allen Digitally signed by Vicktoria Allen
Date: 2021.09.30 18:05:29 -04'00'

September 30, 2021
Date

Vicktoria J. Allen
Acting Deputy Secretary of the
Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	No. 21-cv-1665 (TJK) (D.D.C. filed June
End Citizens United PAC v. FEC:	)	21, 2021)
	)	
	)	

CERTIFICATION

I, Laura E. Sinram, Acting Secretary and Clerk of the Federal Election Commission, having reviewed the audio recording of the executive session of the Federal Election Commission for July 29, 2021, do hereby certify that on July 29, 2021, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 2-3 to:

   Authorize the Office of General Counsel to defend the Commission in *End Citizens United PAC v. FEC,* No. 21-cv-1665 (TJK) (D.D.C. filed June 21, 2021).

Commissioners Cooksey and Dickerson voted affirmatively for the motion. Commissioners Broussard, Walther, and Weintraub dissented. Commissioner Trainor was recused and did not vote.

2. Decided by a vote of 4-0 to:

   Publish the vote certification related to to authorize defense in *End Citizens United PAC v. FEC,* No. 21-cv-1665, on the appropriate Commission webpage.

Commissioners Broussard, Cooksey, Dickerson, and Weintraub voted affirmatively for the decision. Commissioner Walther abstained. Commissioner Trainor was recused and did not vote.

August 12, 2021
Date

Attest:

Laura Sinram

Digitally signed by Laura Sinram
Date: 2021.08.12 10:42:18 -04'00'

Laura E. Sinram
Acting Secretary and Clerk of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	Civ. No. 21-406 (TJK) (D.D.C. filed Feb.
Campaign Legal Center v. FEC	)	16, 2021)
	)	
	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary for the Federal Election Commission executive session on April 06, 2021, do hereby certify that the Commission failed by a vote of 3-3 to authorize the Office of General Counsel to defend the Commission in *Campaign Legal Center v. FEC,* Civ. No. 21-406 (TJK) (D.D.C. filed Feb. 16, 2021),

Commissioners Cooksey, Dickerson, and Trainor voted affirmatively for the motion. Commissioners Broussard, Walther, and Weintraub dissented.

Attest:

April 23, 2021
Date

Vicktoria Allen Digitally signed by Vicktoria Allen Date: 2021.04.23 15:01:39 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	Civ. No. 20-2229 (EGS) (D.D.C. filed
Patriots Foundation v. FEC:	)	Aug. 13, 2020)
	)	
	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary for the Federal Election Commission executive session on February 23, 2021, do hereby certify that the Commission failed by a vote of 3-2 to authorize the Office of General Counsel to defend the Commission in *Patriots Foundation v. FEC,* Civ. No. 20-2229 (EGS) (D.D.C. filed Aug. 13, 2020)

Commissioners Cooksey, Dickerson, and Trainor voted affirmatively for the motion. Commissioners Broussard and Weintraub dissented. Commissioner Walther was not present and did not vote.

Attest:

April 1, 2021
Date

Vicktoria Allen Digitally signed by Vicktoria Allen Date: 2021.04.01 18:41:29 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	No. 20-1778 (D.D.C. filed June 30,
Campaign Legal Center v. FEC	)	2020)
	)	
	)	

AMENDED CERTIFICATION

I, Vicktoria J. Allen, recording secretary of the Federal Election Commission executive session, do hereby certify that on July 02, 2020, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 2-0 to:

   Authorize the Office of General Counsel to defend the Commission in *Campaign Legal Center v. FEC,* Civ. No. 20-1778 (D.D.C. filed June 30, 2020).

Commissioners Hunter and Trainor voted affirmatively for the motion. Commissioners Walther and Weintraub abstained.

Attest:

July 15, 2021
Date

Vicktoria Allen Digitally signed by Vicktoria Allen
Date: 2021.07.15 19:22:08 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the
Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of) [redacted]
[redacted])
)

AMENDED CERTIFICATION

I, Vicktoria J. Allen, recording secretary of the Federal Election Commission executive session, do hereby certify that on June 23, 2020, the Commission took the following actions [redacted]:

1. [redacted]

2. [redacted]

[redacted]

3. Failed by a vote of 2-2 to:

> Authorize the Office of General Counsel to defend the Commission in *Campaign Legal Center v. FEC,* No. 20-809.

Commissioners Hunter and Trainor voted affirmatively for the motion. Commissioners Walther and Weintraub dissented.

[redacted]

August 14, 2020
Date

Attest:

Vicktoria Allen Digitally signed by Vicktoria Allen
Date: 2020.08.14 18:37:56 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	No. 20-cv-730 (CRC) (D.D.C. filed March
Campaign Legal Center v. FEC	)	13, 2020)
	)	
	)	

CERTIFICATION

I, Vicktoria J. Allen, recording secretary for the Federal Election Commission executive session on June 23, 2020, do hereby certify that the Commission failed by a vote of 2-2 to authorize the Office of General Counsel to defend the Commission in *Campaign Legal Center v. FEC,* No. 20-cv-730.

Commissioners Hunter and Trainor voted affirmatively for the motion. Commissioners Walther and Weintraub dissented.

July 28, 2020
Date

Attest:

Vicktoria Allen
Digitally signed by Vicktoria Allen
Date: 2020.07.28 19:17:46 -04'00'

Vicktoria J. Allen
Acting Deputy Secretary of the Commission

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	Civ. No. 16-2201 (EGS) (D.D.C. filed
Lieu, et al. v. FEC:	)	Nov. 4 2016)
	)	

CERTIFICATION

I, Shelley E. Garr, recording secretary for the Federal Election Commission executive session on December 06, 2016, do hereby certify that the Commission decided by a vote of 5-1, on an amended pre-meeting tally, to authorize the Office of General Counsel to defend the Commission in Lieu, et al. v. FEC, Civ. No. 16-2201 (EGS) (D.D.C. filed Nov. 4, 2016).

Commissioners Goodman, Hunter, Petersen, Ravel, and Walther voted affirmatively for the decision. Commissioner Weintraub objected for the record.

Attest:

December 9, 2016
Date

Shelley E Garr
Shelley E. Garr
Deputy Secretary of the Commission