IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

END CITIZENS UNITED PAC,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

and

NEW REPUBLICAN PAC,

Defendant-Intervenor.

Case No. 1:21-cv-2128-RJL

PLAINTIFF'S COMBINED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO NEW REPUBLICAN PAC'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT

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TABLE OF ABBREVIATIONS

CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
ECU	End Citizens United PAC
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
PAC	Political Committee

INTRODUCTION

This case challenges the dismissals of allegations raised in two administrative complaints filed with the Federal Election Commission ("FEC" or "Commission") by Plaintiff End Citizens United PAC ("ECU") alleging that its political competitors Rick Scott for Florida ("Scott Campaign"), New Republican PAC ("New Republican"), and then-Florida Governor (now U.S. Senator) Rick Scott (collectively, "the administrative respondents") had violated the Federal Election Campaign Act ("FECA" or "the Act"). ECU's complaints documented how Scott and his campaign failed to timely file documentation of Scott's candidacy and required financial disclosures ("the Candidacy Filing claims"), how the administrative respondents had violated FECA's soft-money prohibition, and how New Republican made unlawful in-kind contributions to the Scott Campaign in the form of coordinated communications. Despite the voluminous record evidence supporting ECU's claims, three Commissioners ("the controlling Commissioners") voted—contrary to the recommendation of the agency's General Counsel—to dismiss the complaints, relying in part on a purported invocation of the FEC's prosecutorial discretion.

In its response to Plaintiff's motion for default judgment or, in the alternative, summary judgment, New Republican, having intervened as a defendant in this action, makes only a cursory effort to defend those dismissals on the merits. Instead, as in its earlier motion to dismiss, Intervenor dedicates most of its energy to arguments that ECU lacks standing to bring this case and that the underlying FEC dismissals are not reviewable. Those arguments fail.

As Plaintiff's motion and its response to New Republican's motion to dismiss explained, ECU has standing because the dismissals of its allegations injure it both competitively and informationally. New Republican's response adds nothing new to its already-rebutted arguments on the former injury and fails to engage with ECU's submissions on the latter. In particular,

contrary to Intervenor's assertions, Plaintiff has repeatedly described the concrete information of which the dismissals deprive it.

Intervenor's efforts to cast the FEC's decision as unreviewable fare no better. New Republican submits that the D.C. Circuit's decisions in *Citizens for Resp. & Ethics in Wash.* [("*CREW*")] *v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*CREW 2021*"), and *CREW v. FEC*, 892 F.3d 434, 440-42 (D.C. Cir. 2018) ("*CREW 2018*"), preclude review here, but Plaintiff's earlier filings explain why review of the dismissals in this case is entirely consistent with those precedents. First, the controlling Commissioners purported to exercise the FEC's prosecutorial discretion with respect to only the Candidacy Filing claims, leaving ECU's other claims reviewable—notwithstanding New Republican's implausible argument that references to prosecutorial discretion in dismissing one allegation render the separate dismissals of distinct claims unreviewable. Second, the Commission—under its ordinary majority-vote procedures—explicitly declined to exercise its prosecutorial discretion in this case, making the controlling Commissioners' purported invocation of that discretion ineffective. Third, the controlling Commissioners' decision relied on erroneous legal reasoning, and Intervenor's attempts to defend that reasoning are unavailing. Finally, the controlling Commissioners' purported reliance on prosecutorial discretion was pretextual and therefore, under controlling Supreme Court precedent, contrary to law. The dismissals are therefore reviewable by this Court.

Intervenor closes with a brief effort to defend the dismissals on the merits, but that effort, too, falls short. The response neglects most of Plaintiff's argument and important portions of the factual record. Like the controlling Commissioners, for instance, Intervenor fails to discuss events during 2017, which were the primary focus of ECU's allegations. Moreover, the justifications that

Intervenor offers for the controlling Commissioners' decision are unpersuasive and, in places, irrelevant because the Commissioners did not offer those justifications at the time of their decision.

Accordingly, Plaintiff is entitled to default judgment because the sole defendant named in its complaint has failed to appear or defend this action and Plaintiff has established a "right to relief" on the administrative record. Fed. R. Civ. P. 55. Alternatively, ECU is entitled to summary judgment because there is no genuine dispute of material fact[1] and the underlying FEC dismissals were contrary to law. Correspondingly, because the dismissals were contrary to law, Intervenor's cross-motion for summary judgment must fail. Plaintiff therefore respectfully requests that the Court grant its motion for default judgment or, in the alternative, summary judgment and deny New Republican's cross-motion for summary judgment.

ARGUMENT

I. Plaintiff Has Standing

As Plaintiff explained in its motion and in its response to Intervenor's motion to dismiss, ECU has standing to seek judicial review of the underlying FEC dismissals because those dismissals injure it both competitively and informationally. *See* ECF No. 25 at 14-22; ECF No. 23 at 17-23. Intervenor's response largely repeats the standing arguments raised in its motion to dismiss, which posit that ECU has not suffered any injury. As explained below, as well as in Plaintiff's earlier filings, Intervenor's arguments are meritless.

[1] Intervenor's response claims that "genuine issues of material fact" preclude summary judgment for Plaintiff. ECF No. 26-1 at 16-17. However, New Republican never identifies what those issues are. Indeed, it is not clear what those issues *could* be, since, as Intervenor acknowledges, "FEC dismissals of administrative complaints are reviewed *on the administrative record*." ECF No. 26-1 at 16 (emphasis added). Plaintiff's motion explained why, on that record, the Commission's actions were contrary to law.

A. Plaintiff Has Suffered Competitive Injuries

Plaintiff's motion and its response to Intervenor's motion to dismiss explain why ECU has suffered competitive injuries under *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). *See* ECF No. 23 at 17-19; ECF No. 25 at 15-22. New Republican's response fails to engage with Plaintiff's arguments on this point. *See* ECF No. 26-1 at 17-18. Although Intervenor cites the *dissent* in *Shays* to argue that this form of standing is rare, *see* ECF No. 26-1 at 17 (citing *Shays*, 414 F.3d at 120 n.4 (Henderson, J., dissenting)), the *Shays* majority opinion and decisions from this district and circuit applying it belie that conclusion and confirm that ECU has competitor standing in this case, *see, e.g.*, *La Botz v. FEC*, 889 F. Supp. 2d 51, 56 (D.D.C. 2012); *see also* ECF No. 25 at 15-17 (collecting cases).

As Plaintiff noted in its response to New Republican's motion to dismiss, *Nader v. FEC*, 725 F.3d 226 (D.C. Cir. 2013), the holding of which Intervenor again misrepresents, *see* ECF No. 26-1 at 17, supports ECU's standing in this case. *See* ECF No. 25 at 16-17. *Nader* explained that an individual whose administrative complaint was dismissed by the FEC may be able to claim competitor standing as long as he can satisfy the causation and redressability requirements for standing by showing that the dismissal impairs his ability to compete politically in the future. *See* 725 F.3d at 229 ("Nader might have been able to establish standing as a competitor if he had shown that the FEC's determination injured his ability to fight the next election."). ECU has documented how the dismissals in this case injure it in its ongoing competitive relationship with the administrative respondents, which will extend through at least the 2024 election cycle. *See, e.g.*, ECF No. 25 at 17; Corrected Decl. of Tiffany Muller, ECF No. 24-1, ¶¶ 6, 11-14. Far from precluding Plaintiff's argument for competitor standing, then, *Nader* buttresses it.

For these reasons, and those described in its earlier filings, ECU has therefore suffered competitive injuries that give it standing to bring this action.

B. Plaintiff Has Suffered Informational Injuries

"The law is settled that a denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Campaign Legal Ctr.* [("*CLC*")] *v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (quoting *Env't Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019)). Plaintiff has described how the dismissals deprived ECU of information of which FECA requires disclosure, and Intervenor's arguments that Plaintiff has not suffered any informational injury miss the mark.

1. The Dismissals Deprive ECU of Information About Scott and the Scott Campaign's Fundraising and Spending After Scott Became a Candidate in 2017

First, ECU has been denied the information contained in disclosure reports that Scott and the Scott Campaign should, on Plaintiff's view of the law, have begun filing after Scott became a candidate as early as May 2017. *See* ECF No. 25 at 22-24; ECF No. 23 at 19-20. Scott did not declare candidacy and start reporting his campaign's financial activity until April 2018, and so, under Plaintiff's allegations, Scott failed to file up to four quarterly reports that would have disclosed months of the Scott Campaign's financial activity. *See* ECF No. 25 at 23-24. Intervenor's repeated suggestions that this case involves only an alleged failure to report pre-candidacy, testing-the-waters expenses, *see* ECF No. 26-1 at 18-20, therefore misunderstands and understates the nature of Plaintiff's injury.

As Plaintiff's motion explained, a plaintiff suffers an informational injury when a campaign fails to file financial disclosures covering the period after the candidate entered the race or began

testing the waters. *CLC v. FEC*, 520 F. Supp. 3d 38, 45-46 (D.D.C.) ("To the extent that Bush was *either* a de-facto candidate *or* testing the waters at some point prior to June 2015, then plaintiffs have alleged an informational injury because further disclosures would be required."), *reconsidered*, No. 20-cv-00730, 2021 WL 6196985 (D.D.C. Dec. 30, 2021). In *CLC*, the plaintiffs alleged that Jeb Bush's 2016 presidential campaign's first FEC report failed to contain retroactive financial disclosures covering a period when he was testing the waters for a presidential run, thereby depriving them of information.[2] *See id.* at 45. The injury in this case is even clearer: Plaintiff has alleged that Scott and the Scott Campaign entirely failed to file required reports (and other forms) after Scott, on Plaintiff's view of the law, became a candidate in 2017, and explained how this failure deprived ECU of information of which FECA requires disclosure. *See, e.g.*, ECF No. 25 at 22-25; ECF No. 23 at 19-20, 23-27; Compl., ECF No. 1, ¶¶ 11, 54.

The *CLC* court's reconsideration of its original ruling does not change this conclusion. As Intervenor acknowledges, the *CLC* court reconsidered its initial standing determination—though not its reasoning—"after the intervenor-defendant demonstrated that the supposedly missing information had in fact been reported by an entity other than Governor Bush's campaign." ECF No. 26-1 at 19-20 (citing *CLC*, 2021 WL 6196985); *see also CLC*, 2021 WL 6196985, at *4 (recounting the evidence offered by the intervenor-defendant to show full reporting). In this case, Intervenor has not taken any similar steps to rebut Plaintiff's allegations that Scott and the Scott Campaign failed to file required disclosures and thereby deprived ECU of information of which

[2] Intervenor's response wrongly suggests that Plaintiff misstated *CLC*'s holding when Plaintiff explained that "Bush's failure to begin reporting on the proper date had deprived" the *CLC* plaintiffs of information. ECF No. 26-1 at 19 (quoting ECF No. 23 at 29). In context, this statement referred to Bush's failure to disclose financial information stretching back as far as FECA required, not to a failure to file separate reports. *See* ECF No. 23 at 29.

FECA requires disclosure. The reconsidered *CLC* opinion thus does nothing to undermine ECU's standing.

2. The Dismissals Deprive ECU of Concrete Information About the Details of New Republican's Contributions to the Scott Campaign Through Coordinated Communications

The dismissals also injure ECU by depriving it of information about in-kind contributions from New Republican to the Scott Campaign in the form of coordinated communications. *See* ECF No. 25 at 25-26; ECF No. 23 at 20-21. Specifically, Plaintiff has alleged that commercials aired by New Republican in May and June of 2018 were coordinated with the Scott Campaign, and therefore qualified as in-kind contributions that, under FECA, must be disclosed by both parties as contributions. *See* 52 U.S.C. § 30104(a); 11 C.F.R. § 109.21. Because New Republican would need to report its spending on these commercials separately from other expenditures, including truly independent expenditures made by the super PAC to benefit the Scott Campaign, proper disclosure would reveal concrete information about the commercials' production that ECU cannot discern from current reporting. For example, FECA-compliant disclosure would inform ECU which of New Republican's expenditures (and in what amounts) paid for the commercials' production, which consultants or contractors were involved, and when each of the foregoing transactions took place. As Plaintiff has further explained, the fact that proper disclosure would reveal this new information to ECU distinguishes this case from *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), where the plaintiffs already knew all conceivable factual information about the allegedly coordinated transactions at issue and sought only a declaration that the expenditures were coordinated. *See id.* at 1074-75; ECF No. 25 at 25-26; ECF No. 23 at 21.

Intervenor's response does not engage with this argument, summarily insisting that ECU seeks only "a legal determination." ECF No. 26-1 at 21. But the amount New Republican spent on

these coordinated communications, as opposed to other expenditures, is not a legal determination. The identities of the consultants that New Republican paid to produce these particular commercials are not legal determinations. The dates of the transactions that went into creating these commercials are not legal determinations. Rather, all these details are archetypal examples of information of which FECA requires disclosure. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 21 (1998). The dismissals therefore deprived ECU not of a mere legal determination, but of concrete information to which the statute entitles ECU.

Instead of responding to Plaintiff's showing that this case is distinguishable from *Wertheimer*, Intervenor resorts to claiming that Plaintiff's motion "acknowledge[d]" that *Wertheimer* "preclude[s]" this argument for informational standing by noting in a footnote "that '*Wertheimer*'s scope is currently before the D.C. Circuit.'" ECF No. 26-1 at 21 (quoting ECF No. 23 at 30 n.4). Not so. Plaintiff's proper indication to the Court that additional interpretation of *Wertheimer* might be forthcoming is in no way a concession that ECU lacks standing under current law. On the contrary: pursuant to the authorities discussed above, the dismissals of Plaintiff's allegations create informational injuries that confer standing on ECU.

II. The Dismissals of Plaintiff's Claims Are Reviewable

Plaintiff's motion and its response to Intervenor's motion to dismiss explained that the FEC's dismissals of ECU's allegations are reviewable notwithstanding the controlling Commissioners' purported invocation of the Commission's prosecutorial discretion. *See* ECF No. 23 at 36-45; ECF No. 25 at 27-34. None of Intervenor's counterarguments rebut that conclusion.

A. If the Commission Dismisses One Claim on the Basis of Prosecutorial Discretion, the Court Can Still Review the Dismissals of Other Claims

As Intervenor's response acknowledges, an FEC "nonenforcement decision is reviewable . . . if the decision rests solely on legal interpretation," as opposed to prosecutorial

discretion. ECF No. 26-1 (quoting *CREW 2021*, 993 F.3d at 884). And, as Plaintiff's motion explained, *see* ECF No. 23 at 37, and as Intervenor's response does not dispute, *see* ECF No. 26-1 at 26-27, the controlling Commissioners attempted to invoke the FEC's prosecutorial discretion only as a reason to dismiss the Candidacy Filing claims and not as a justification for dismissing ECU's other allegations. As a result, the dismissals of the other allegations, which were based solely on legal interpretation, remain reviewable even if the purported exercise of prosecutorial discretion bars review of the Candidacy Filing claims—although, as discussed below, it does not. This conclusion follows from both common sense and the fact—recognized in *CREW 2018*—that the Supreme Court in *Akins* allowed judicial review of one claim in an FEC administrative complaint to proceed even after the FEC dismissed another claim in the same complaint as an exercise of prosecutorial discretion. *See Akins*, 524 U.S. at 25; *CREW 2018*, 892 F.3d at 438 n.6

Notwithstanding *Akins* and *CREW 2018*, Intervenor argues that, because the controlling Commissioners claimed to exercise the FEC's prosecutorial discretion to dismiss one of ECU's allegations, this Court cannot review the dismissals of ECU's other claims, either. *See* ECF No. 26-1 at 26-27. This view is incorrect.

Intervenor's argument fails because it conflates two different scenarios: In the first, the Commission dismisses a single administrative claim both on the basis of legal analysis and as an exercise of prosecutorial discretion. This situation is the one addressed by *CREW 2018* and *CREW 2021*. *See CREW 2021*, 993 F.3d at 883; *CREW 2018*, 892 F.3d at 438. In the second scenario, the Commission dismisses two distinct claims, one on the basis of legal analysis and the second by purporting to invoke its prosecutorial discretion. These are the facts of *Akins*—and this case. *See Akins*, 524 U.S. at 25; *CREW 2018*, 892 F.3d at 438 n.6; ECF No. 23 at 37. *CREW 2021*, which involved the first scenario, found that review was unavailable in that case because reviewing the

dismissal at issue would require the court to judge the FEC's exercise of discretion, and examining only the agency's legal reasoning would constitute an impermissible advisory opinion because prosecutorial discretion provides an alternative basis for the dismissal. *See* 993 F.3d at 885, 889.

These concerns do not apply, however, in the second scenario. Reviewing the dismissal of the claim dismissed *solely* on legal grounds does not require evaluating the Commission's exercise of prosecutorial discretion to dismiss the distinct second claim. And review of the dismissal does not risk an advisory opinion, since the FEC has not given alternative, discretionary grounds for its decision. In other words, review in a case like this one does not require a court to "carve out" reviewable agency action from the Commission's exercise of discretion, *id.* at 886, because the agency's own explanation has already distinguished the reasons for each dismissal. As a result, where, as here, the Commission offers prosecutorial discretion as a reason to dismiss only some claims in an administrative complaint, a court can—and, under FECA, must—review the dismissals of other claims.

Because, as Plaintiff's motion explained, *see* ECF No. 23 at 37, the controlling Commissioners purported to exercise the Commission's prosecutorial discretion to dismiss only the Candidacy Filing claims, the dismissals of ECU's other allegations remain reviewable.

B. The Dismissals Are Reviewable Because the FEC Declined to Exercise Its Prosecutorial Discretion

Although the three controlling Commissioners purported to exercise the FEC's prosecutorial discretion to dismiss the Candidacy Filing claims, that purported invocation was ineffective, as Plaintiff's motion explained, because the full Commission had already declined to exercise such prosecutorial discretion when a vote to dismiss pursuant to *Heckler v. Chaney* failed 3-3. *See* ECF No. 23 at 37-41; *see* AR188. In response, Intervenor does not dispute, as Plaintiff explained, *see* ECF No. 23 at 38, that one of the Commission's "powers" is its ability to exercise

its prosecutorial discretion, and that, under FECA, the Commission may exercise its powers only by a majority vote. Yet Intervenor puts forth a labyrinthine effort that attempts, but fails, to avoid the straightforward result that a non-majority of the Commission's members cannot exercise a power that requires approval by a majority of the Commissioners.

Contrary to Intervenor's claims, *see* ECF No. 26-1 at 1-2, 28, the rule that a majority of the Commission must approve the agency's use of its power of prosecutorial discretion does not violate FECA's requirement that four affirmative votes are necessary only to proceed with an enforcement action. As Plaintiff's motion explained, the legal effect of the FEC's decision not to exercise its power of prosecutorial discretion follows directly from FECA's ordinary majority-vote requirement. *See* 52 U.S.C. § 30106(c); ECF No. 23 at 37-41; *see also CREW 2021*, 993 F.3d at 891 (observing that "dismissals are not on [the] list" of "matters for which [FECA requires] an affirmative vote of four [Commissioners]" and contrasting that four-vote requirement with "FECA's general rule that the Commission must make decisions by majority vote"). For instance, had one of the Commissioners who voted against the motion to dismiss under *Heckler* abstained from the vote instead, the motion would have been approved with majority support, 3-2, without needing four votes. Acknowledging that the FEC declined, by a vote of 3-3, under its ordinary majority-vote rule, to exercise its prosecutorial discretion in this case is therefore not, as Intervenor suggests, an attempt to circumvent *CREW 2021* or FECA's text. Rather, the rule that the controlling Commissioners cannot invoke the agency's power to dismiss allegations as a matter of prosecutorial discretion when the agency voted against doing so follows directly from *CREW*

2021's emphasis on FECA's distinction between a four-vote requirement and a majority-vote requirement.[3]

Again ignoring the majority-vote rule, New Republican takes the contradictory position that the agency's failed 3-3 vote to dismiss under *Heckler* did not prevent three Commissioners from later claiming to dismiss the matter under *Heckler*, because the *failed* vote to dismiss was actually *a dismissal*. *See, e.g.*, ECF No. 29 at 29 (claiming that "a 3-3 vote to dismiss an enforcement matter has the legal effect of dismissing that matter"). Intervenor extends the "heads I win, tails you lose" logic of its novel claim even further and asserts that "*any time* three or more Commissioners vote against proceeding in an enforcement matter," no matter the vote, it dismisses the matter, regardless of whether the three Commissioners were in the majority. ECF No. 26-1 at 28-29; *see also id.* at 3-4. But Intervenor's untenable argument fails because it is not supported by FECA and is contrary both to Commission regulations and practice and to case law.

First, there is no basis in either FECA or Commission regulations for New Republican's position that failed motions to dismiss under *Heckler* actually dismiss a matter. New Republican repeatedly asserts that an enforcement matter is automatically dismissed if there is a failed reason-to-believe or dismissal vote without citing any statutory or regulatory authority. *E.g.*, ECF No. 26-1 at 2, 28-29. The only provision Intervenor cites as allegedly supporting its argument is 52 U.S.C. § 30109(a)(2), *see, e.g.*, ECF No. 26-1 at 28, which requires four affirmative votes for the Commission to find reason to believe a violation has occurred—but which does not say that a

[3] A Commission vote not to exercise its prosecutorial discretion would not prevent controlling Commissioners from explaining their legal reasons for not proceeding with a matter in their Statement of Reasons. Intervenor's claimed concern about the ability of controlling Commissioners to produce the required Statement of Reasons, *see* ECF No. 26-1 at 29, is therefore baseless—as this matter illustrates, given that the "Controlling Statement of Reasons includes legal analysis of the merits of Plaintiff's administrative complaint," ECF No. 26-1 at 27.

matter is dismissed when a dismissal or reason-to-believe vote fails. *See* 52 U.S.C. § 30109(a)(2). Instead, FECA specifically references the possibility of a "vote to dismiss" an administrative complaint in a *separate* portion of the statute that gives no indication that such a vote is in any way related to the reason-to-believe vote. *Compare id.* § 30109(a)(1) (discussing "a vote to dismiss"), *with id.* § 30109(a)(2) (separately discussing reason-to-believe votes).

Second, and in contrast, FEC regulations and practice make clear that a failed reason-to-believe or dismissal-under-*Heckler* vote does not automatically dismiss a complaint. For example, 11 C.F.R. § 5.4(a)(4), provides for public disclosure of investigatory materials from an enforcement case within thirty days after the parties are notified "that the Commission has voted to close [the] enforcement file." Moreover, 11 C.F.R. § 111.20(a) describes a Commission "*finding* of no reason to believe," not a lack of four votes, as method by which the FEC "terminates its proceedings." *Id.* (emphasis added); *see also* 11 C.F.R. § 111.9(b) (same). Commission practice similarly demonstrates that a failed reason-to-believe or dismissal-under-*Heckler* vote does not constitute a dismissal. Indeed, in the enforcement matter at issue here, the Commissioners deadlocked in a series of 3-3 reason-to-believe, no-reason-to-believe, and *Heckler* votes, *see* AR186-89, each of which would nonsensically qualify as an independent dismissal of the matter under New Republican's theory. Yet, as New Republican acknowledges, *see* ECF No. 26-1 at 4, the matter was not dismissed until after a majority of the Commission subsequently voted 5-1 to "[c]lose the file," *see* AR189. As New Republican further admits, the D.C. Circuit has recognized that it is the Commission's "'typical practice,'" after the Commissioners deadlock 3-3, to then hold a separate vote "to dismiss the administrative complaint." ECF No. 26-1 at 4 (quoting *CREW v. FEC*, 971 F.3d 340, 346 (D.C. Cir. 2020)). Intervenor also concedes that, "historically," the

Commission's vote to close the file "signal[s] the end of the FEC's consideration of an administrative complaint." ECF No. 26-1 at 4.

Despite these concessions, New Republican protests that the vote to close the file in this matter was "not required" and "without legal effect." ECF No. 26-1 at 4. But those claims are legally unsupported and impossible to reconcile with decades of practice by the Commission, which surely would be surprised to learn that its votes to close the file in thousands of enforcement matters were all meaningless. To take one example, in Matters Under Review ("MURs") 7350, 7351, 7357, and 7382, the Commission initially failed to find reason to believe that a number of respondents had violated FECA and Commission regulations,[4] then later reversed course and found reason to believe that many of those respondents *had* violated those same laws in the same matters.[5] If New Republican's view of the law were correct, those later reason-to-believe findings would not have been possible.

Third, case law undermines Intervenor's argument. In *Giffords v. FEC*, No. 19-cv-1192 (D.D.C. Oct. 14, 2021), a court in this District held that the FEC's three-year delay in adjudicating the plaintiff's administrative complaints was contrary to law even though the record showed that the Commission had failed *four times* to find reason to believe a violation occurred. *See* Unredacted Mem. Op. at 9-10, 31, *Giffords*, No. 19-cv-1192, ECF No. 88. Yet those votes did not dismiss the matter; instead, the Commission had also "rejected a motion to close the enforcement matters, and thereby dismiss Plaintiff's administrative complaints." *Id.* at 10. The court concluded that the

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[4] *See* Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (Apr. 12, 2019), https://www.fec.gov/files/legal/murs/7350/7350_27.pdf.

[5] *See* Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (July 30, 2019), https://www.fec.gov/files/legal/murs/7350/7350_29.pdf; Certification, MURs 7350, 7351, 7357 & 7382 (Cambridge Analytica LLC, *et al.*) (Aug. 22, 2019), https://www.fec.gov/files/legal/murs/7350/7350_37.pdf.

FEC's failure to act on the complaint after those failed votes was contrary to law, retained jurisdiction until the FEC "t[ook] final agency action with respect to [the underlying] administrative complaints," and ordered the agency to conform to the judgment within thirty days. *See id.* at 30-31. If each of the four failed reason-to-believe votes had automatically dismissed the complaint, the court's decision and order would be nonsensical—the FEC would have already taken final action on the underlying complaints four times over.

Against this weight of authority, New Republican can point only to dicta conflating a deadlocked reason-to-believe vote with a vote to dismiss a complaint by closing the file in contexts where the distinction made no difference. *See* ECF No. 26-1 at 3-4. *CREW v. American Action Network*, 410 F. Supp. 3d 1 (D.D.C. 2019), is typical: That case stemmed from a MUR that resulted in two deadlocked reason-to-believe votes; after each failed vote, the Commission summarily voted to "[c]lose the file"—that is, dismiss the complaint. *See id.* at 9-11.[6] *American Action Network*'s suggestion, quoted in Intervenor's response, that "[i]f fewer than four Commissioners find 'reason to believe[,]' . . . the complaint is dismissed," 410 F. Supp. 3d at 8; ECF No. 26-1 at 3-4, thus reflects the fact that, in that case, the distinction between a failed reason-to-believe vote and a vote to close the file made no difference—one simply followed the other. Indeed, it is little wonder that past decisions have not discussed the difference between a failed reason-to-believe vote and a vote to dismiss a complaint; as Intervenor acknowledges, a successful vote to dismiss has "historically been a customary, routine," and "*pro forma*" practice after a failed reason-to-believe vote. ECF No. 26-1 at 4.

[6] Certification, MUR 6589 (American Action Network, *et al.*) (Oct. 19, 2016), https://eqs.fec.gov/eqsdocsMUR/16044401006.pdf; Certification, MUR 6589 (American Action Network, *et al.*) (June 26, 2014), https://eqs.fec.gov/eqsdocsMUR/14044361924.pdf.

In sum, the controlling Commissioners' purported invocation of prosecutorial discretion to dismiss the Candidacy Filing claims was ineffective, given that a majority of the Commissioners had already declined to support a motion to exercise that very discretion, and the motion necessarily failed without majority support.

C. The Purported Exercise of Prosecutorial Discretion Relied on Erroneous Legal Reasoning

Intervenor's response does not dispute that FEC dismissals premised on erroneous legal conclusions are reviewable. *See* ECF No. 26-1 at 31. Plaintiff's motion and response to Intervenor's motion to dismiss explained the legal errors underlying the controlling Commissioners' reasoning. *See* ECF No.25 at 30-33; ECF No. 23 at 41-43. Intervenor's counterarguments are unavailing.

First, the controlling Commissioners erred in concluding that whether an individual has moved beyond testing the waters and become a candidate depends on that individual's subjective intent, and Intervenor's arguments in defense of this reasoning are without merit. The language of the relevant regulations makes the objectivity of the candidacy inquiry clear: those rules examine whether the individual has engaged in "activities that indicate that [that] individual has decided to become a candidate." 11 C.F.R. §§ 100.72(b), 100.131(b). In other words, while the activities listed in the testing-the-waters regulations may serve as *proxies* for an individual's subjective intent, the ultimate inquiry turns on whether the potential candidate has engaged in those activities—an objective fact—and not the individual's subjective state of mind.

Commission precedent unambiguously adopts this interpretation. In resolving a MUR involving allegations that Al Sharpton had become a candidate earlier than his FEC filings indicated, the Commission explained that "[e]ven if Sharpton subjectively did not irrevocably decide to run for President until [a later date], the Commission's regulations look objectively to

candidate activities, not to the stage of an individual's subjective decisionmaking process, in determining whether the 'testing the waters' exemption applies." Factual and Legal Analysis at 7-8, MUR 5363 (Sharpton et al.) (Nov. 13, 2003). The language from this MUR quoted in Intervenor's response is consistent with this view, explaining that "when an individual raises or spends more than $5,000 and engages in activities indicating that he or she has decided to run for a particular office, or in activities relevant to conducting a campaign, the individual is deemed to [have become a candidate]." *Id.* at 2. In other words, the prerequisite to candidacy status is not having subjectively decided to run, but "engag[ing] in activities indicating that he or she has decided to run." *Id.* Again, the inquiry is objective, not subjective.[7]

The enforcement matter cited by Intervenor in its response further evidences the objective nature of the inquiry. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn, and Ellen L. Weintraub, MUR 5934 (Thompson) (Mar. 10, 2009). That matter involved allegations that Fred Thompson had moved beyond the testing-the-waters exemptions and became a candidate in the 2008 presidential election earlier than he had indicated in his FEC filings. *See id.* at 1. In analyzing the allegations, the controlling Statement of Reasons did not probe Thompson's state of mind or analyze his subjective intent. *See id.* at 1-3. Rather, it assessed whether, from an objective standpoint, Thompson had engaged in activities indicating that he had decided to become a candidate. *See id.* In analyzing statements by Thompson about his potential candidacy, for example, the Commissioners did not try to deduce what Thompson had meant by those statements or whether he subjectively believed

[7] FEC Advisory Opinion 2015-09 (Senate Maj. Pac, *et al.*) similarly calls for an objective inquiry. While that opinion indicates that a subjective intent to run would suffice to make an individual a candidate, *see id.* at 5, it also explains that the Commission will look ultimately at "objective indication[s]" of candidates' intent to run, even when the candidate asserts a subjective intent not to do so, *id.* at 6.

them to be true, but instead looked at the meaning those statements conveyed to third parties. *See id.* at 2-3. The Statement of Reasons contrasted Thompson's statements with more definitive declarations from earlier enforcement matters not to somehow deduce Thompson's subjective intent, as Intervenor's response suggests, but rather to demonstrate that his statement was, viewed objectively, ambiguous. *See id.* The Thompson matter thus further demonstrates the controlling Commissioners' misunderstanding of controlling law.

This misunderstanding renders the controlling Commissioners' decision to dismiss ECU's allegations reviewable because, as Plaintiff's motion explained, that mistake underlay all the reasons those Commissioners gave for purporting to exercise the FEC's prosecutorial discretion. *See* ECF No. 23 at 42-43. Intervenor emphasizes the various considerations cited by the Statement of Reasons in favor of dismissal, such as the invasiveness of an investigation into Scott's subjective intent, *see* ECF No. 26-1 at 31, yet those considerations were ostensibly relevant only because the controlling Commissioners believed an inquiry into Scott's subjective intent would be necessary. *See* AR212. The dismissals thus rested entirely on the controlling Commissioners' legal error and are therefore reviewable.

That error alone would suffice to render the dismissals reviewable. However, the controlling Commissioners compounded their mistake by relying on their misunderstanding of the testing-the-waters exemptions to conclude that the evidence in the record did not support pursuing the matter. *See* AR212. That assessment of the legal merits of ECU's allegations rested on the controlling Commissioners' erroneous interpretation of the law governing candidacy and testing the waters, and thus provides an additional legal mistake that this Court can review.

In sum, because all of the controlling Commissioners' reasons for attempting to invoke the FEC's prosecutorial discretion relied on erroneous legal reasoning, the dismissals are reviewable.

D. Pretextual Invocations of Prosecutorial Discretion Are Reviewable

Plaintiff's motion explained why the controlling Commissioners' purported invocation of prosecutorial discretion was pretextual, *see* ECF No. 23 at 44-45, and Intervenor offers no meaningful rebuttal to that argument, *see* ECF No. 26-1 at 35-36. Instead, New Republican argues that the "controlling Commissioners' use of prosecutorial discretion can[not] be reviewed for 'pretext.'" ECF No. 26-1 at 35. This argument is meritless and, if accepted, would nullify FECA's judicial review provision.

FEC dismissals of administrative complaints are reviewable for pretext under *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). In that case, the Supreme Court explained that, if a statute provides for judicial review of agency action, actions based on pretextual rationales are arbitrary and capricious—or, in FECA terms, contrary to law. *See id.* at 2573-76; *see also Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). While *Department of Commerce* did at one point distinguish the reviewability of some agency "decision[s] not to institute enforcement actions," it did so not in the context of pretext review, but rather in discussing the Administrative Procedure Act's no-law-to-apply exception to reviewability. 139 S. Ct. at 2568. The Supreme Court explained in *Akins* that that exception does not apply to judicial review under FECA, such that Commission dismissals of administrative complaints are reviewable. *See* 524 U.S. at 26. As a result, this Court can review the underlying dismissals for pretext.

Nor did *CREW 2021* hold that an invocation of prosecutorial discretion by the controlling Commissioners is immune to pretext review. There was no claim in that case that the Commission's invocation of prosecutorial discretion was pretextual; the court thus had no need or opportunity to address the issue. *See* 993 F.3d 880. Moreover, the decision's reasoning does not support a prohibition on pretext review: *CREW 2021* concluded that judicial review is unavailable

where an FEC dismissal is genuinely based on prosecutorial discretion because a court has no standard by which to assess the exercise of that discretion. *See, e.g.*, *id.* at 885. But where the invocation of prosecutorial discretion is pretextual, pretext review under *Department of Commerce* provides precisely such a standard. *CREW 2021* thus does not bar that review here.

Finally, it is worth considering the implications of New Republican's argument. If Commissioners can always pretextually invoke prosecutorial discretion, and every such invocation renders a decision completely unreviewable, Congress's "explicit[]" decision in FECA to subject dismissals to judicial review becomes a nullity. *Akins*, 524 U.S. at 26; *see also Dep't of Com.*, 139 S. Ct. at 2576 ("Accepting contrived reasons would defeat the purpose of [judicial review]."). *Akins* and *Department of Commerce* foreclose that result.

III. The Dismissals of Plaintiff's Claims Were Contrary to Law

Plaintiff's motion thoroughly documented the ways in which the controlling Commissioners' decision to dismiss ECU's allegations at the preliminary reason-to-believe stage was contrary to law. *See* ECF No. 23 at 23-36. Intervenor makes only a cursory attempt to defend the dismissals on the merits. *See* ECF No. 26-1 at 37-41. That attempt does not address most of the arguments raised in Plaintiff's motion, and fails to rebut those it does acknowledge.

A. Plaintiff's Motion Identified Several Legal Errors Committed by the Controlling Commissioners

Intervenor's response errs in suggesting that Plaintiff's motion "object[ed] only to the controlling Commissioners' 'evaluation of the record'" and not to the Commissioners' legal reasoning. ECF No. 26-1 at 41 (quoting ECF No. 23 at 29). Although Plaintiff's motion identified a number of faults in the Commissioners' evaluation of the record sufficient to render the dismissals contrary to law, it *also* highlighted multiple legal errors in the Commissioners' analysis. First, the motion explained that the controlling Statement of Reasons erred in suggesting that the

merits of the coordinated-communications claims depended on the merits of the Candidacy Filing or soft-money allegations. *See* ECF No. 23 at 35-36. In fact, the coordinated-communications allegations presented an independent legal issue from the other claims: New Republican could have unlawfully coordinated with Scott and the Scott Campaign even if the Candidacy Filing and soft-money allegations failed on the merits. Second, the motion identified a number of legal flaws in the controlling Commissioners' attempt to invoke the agency's prosecutorial discretion. In particular, that attempt was foreclosed by the full Commission's decision not to exercise that discretion, relied on erroneous legal conclusions about the nature of the candidacy inquiry and the strength of ECU's claims, and unlawfully rested on a pretextual rationale. *See* ECF No. 23 at 37-45. Intervenor's response does nothing to address these legal errors, which render the dismissals contrary to law.

B. The Affidavit Relied Upon by the Controlling Commissioners Does Not Justify the Dismissals

Intervenor, like the controlling Commissioners, repeatedly seeks to justify the dismissals by referencing an affidavit submitted by Blaise Hazelwood, who became executive director of New Republican in 2018.[8] However, case law from this district indicates that the affidavit offers little evidentiary value, and, even if the affidavit were reliable, it fails to address the issues key to ECU's allegations and cannot justify the dismissals.

First, precedent shows that the affidavit deserves little weight during judicial review. *La Botz v. FEC*, 889 F. Supp. 2d 51 (D.D.C. 2012), concluded that a similar affidavit could not justify an FEC dismissal. *See id.* at 61-62. The court explained that the affidavit in that case was "written

[8] Although Hazelwood submitted two affidavits, one in response to each of ECU's complaints, *see* AR 73-74, 100-101, the controlling Commissioners cited and discussed only the first affidavit in their Statement of Reasons, *see* AR199-200, 205-11.

in summary fashion," was produced after the FEC's inquiry had commenced, and was contradicted by some contemporaneous evidence.[9] *Id.* Hazelwood's affidavit shares these flaws. It summarily asserted that Hazelwood had made "all decisions regarding New Republican PAC's operations" since February 2018, AR73 ¶ 3, and was submitted as part of New Republican's response to ECU's allegations and dated after the beginning of the FEC's inquiry, AR74. And in addition to being in tension with the substantial record evidence of interrelations between the Scott Campaign and New Republican, the affidavit contradicted *itself* by first asserting that Hazelwood had made "all decisions regarding New Republican PAC's operations and activities" during her tenure, then immediately reversing course and declaring that Hazelwood "was not involved in planning or organizing" a fundraiser at Scott's home in March 2018. AR73 ¶¶ 3, 9. The *post hoc*, inconsistent affidavit cannot bear the substantial weight the controlling Commissioners purported—and Intervenor now seeks—to place on it.

Moreover, as the FEC General Counsel noted and Plaintiff's motion explained, Hazelwood's affidavit, even if it were reliable, failed to address many central issues and therefore cannot justify the dismissals. *See* ECF No. 23 at 26, 28-29. Perhaps most notably, it discussed only the time period after Hazelwood joined New Republican in February 2018. *See* AR73 ¶¶ 1, 3. The affidavit therefore does nothing to rebut ECU's allegations about events before that time, including the period in 2017 when ECU alleged that Scott had become a candidate while chairing and controlling New Republican. In addition, Hazelwood did not address whether other individuals associated with New Republican and involved in its decisionmaking may have coordinated with

[9] *La Botz* also noted that it was unclear whether the affiant in that case had personal knowledge of some elements of his affidavit. *See* 889 F. Supp. 2d at 61-62. Hazelwood's affidavit purports to discuss only her own personal activities but, as a result, fails to address many relevant facts, as discussed below.

Scott or the Scott Campaign, or whether the super PAC's actions were influenced by materials developed by Scott during his tenure. Thus, even if the Commissioners could reasonably have relied on Hazelwood's affidavit—which they could not—it would not justify their decision.

C. The Controlling Commissioners Offered No Valid Explanation for Their Decision to Dismiss Plaintiff's Coordinated-Communications Allegations

As Plaintiff's motion explained, the controlling Commissioners' Statement of Reasons offered no valid justification for the dismissal of ECU's coordinated-communications allegations. *See* ECF No. 23 at 35-36. New Republican's response cannot fill this gap.

Intervenor suggests that the controlling Commissioners could have relied on Hazelwood's affidavit to dismiss the coordinated-communications allegations, but that suggestion is both erroneous and irrelevant. "It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). Here, even if the controlling Commissioners could have relied on Hazelwood's affidavit to justify dismissing the coordinated-communications allegations—which, as discussed above, they could not—they did not do so. Their Statement of Reasons referenced the affidavit only in its summary of the factual record and its discussion of the Candidacy Filing claims. *See* AR206, 211. It at no point connected the affidavit to the coordinated-communications allegations; indeed, the only direct reference to those allegations in the Statement was in a footnoted summary of the FEC General Counsel's recommendations. *See* AR203 n.1. Intervenor's suggestion in its response that the controlling Commissioners *could* have relied on the affidavit to dismiss the coordinated-communications allegations does not change the fact that the Commissioners *did not do so*. As a result, the Statement of Reasons offers no valid explanation for the dismissal of Plaintiff's claims.

D. Intervenor's Other Defenses of the Controlling Commissioners' Decision Fail

New Republican also attempts to defend the dismissals by falling back on prosecutorial discretion and by calling for an extreme level of deference to the controlling Commissioners' reasoning. Neither argument can save the dismissals.

First, Plaintiff's motion explained why the controlling Commissioners' attempt to invoke the FEC's prosecutorial discretion cannot justify the dismissals. *See* ECF No. 23 at 29, 36-45. That purported exercise of discretion extended only to the Candidacy Filing claims and was contrary to law because the FEC expressly declined to exercise its discretion and the controlling Commissioners' argument for employing that discretion relied on erroneous legal conclusions and pretextual reasoning. Just as it cannot insulate the dismissals from review, the controlling Commissioners' ineffective invocation of prosecutorial discretion cannot justify their decision on the merits.

Second, Intervenor concludes by implying that virtually *any* explanation by the controlling Commissioners suffices to survive judicial review. However, the contrary-to-law standard is not a rubber stamp: an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Orloski*, 795 F.2d at 161 (arbitrary or capricious FEC action is "contrary to law" under FECA). Plaintiff's motion documented the numerous ways in which the controlling Commissioners' decision fell short of that standard. Accordingly, the dismissals of ECU's allegations were contrary to law.

CONCLUSION

For these reasons, as well as those given in Plaintiff's motion and its response to Intervenor's motion to dismiss, Plaintiff respectfully requests that the Court grant its motion for default judgment or, in the alternative, summary judgment and deny Intervenor's cross-motion for summary judgment.

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Respectfully submitted,

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