UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

END CITIZENS UNITED PAC, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, and NEW REPUBLICAN PAC, Intervenor-Defendant.	Civil Action No. 1:21-cv-2128-RJL **Reply in Support of Intervenor-Defendant's Renewed Motion to Dismiss Plaintiff's Complaint**

REPLY IN SUPPORT OF INTERVENOR-DEFENDANT'S RENEWED MOTION TO DISMISS PLAINTIFF'S COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. Dismissal is Required Because Plaintiff Lacks Article III Standing 1

A. Plaintiff Lacks Competitive Disadvantage Standing. 2

B. Plaintiff Has Not Suffered a Cognizable Informational Injury 7

II. FEC Complaints Dismissed Due to Prosecutorial Discretion Are Not Subject to Judicial Review. 10

A. The Statement of Reasons Is Not Divisible 11

B. The Controlling Commissioners' Statement Is Controlling 12

C. Plaintiff Cannot Circumvent Prosecutorial Discretion Because Of Alleged "Legal Error." 13

D. Plaintiff Has Presented No Standard For Evaluating Pretext In This Context. 16

CONCLUSION 17

CERTIFICATE 19

TABLE OF AUTHORITIES

CASES

ASPCA v. Feld Ent., Inc., 659 F.3d 13 (D.C. Cir. 2011) 7

Am. Inst. of Certified Pub. Accountants v. IRS, 804 F.3d 1193 (D.C. Cir. 2015) 7

Buchanan v. FEC, 112 F. Supp. 2d 58 (D.D.C. 2000) 3, 5

CREW v. FEC, 380 F. Supp. 3d 30 (D.D.C. 2019) 12, 13

**CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) .... *passim*

Campaign Legal Ctr. v. FEC, 507 F. Supp. 3d 79 (D.D.C. 2020) 7

Campaign Legal Center v. FEC, 520 F. Supp. 3d 38 (D.D.C. 2021) 9

Campaign Legal Ctr. v. FEC, 2021 U.S. Dist. LEXIS 248159 (D.D.C. Dec. 30, 2021) 8

Common Cause v. FEC, 108 F.3d 413 (D.C. Cir. 1997) 1

FEC v. National Republican Senatorial Committee, 966 F.2d 1471 (D.C. Cir. 1992) 12

Fulani v. Brady, 290 U.S. App. D.C. 205, 935 F.2d 1324 (1991) 6

Gottlieb v. FEC, 143 F.3d 618 (D.C. Cir. 1998) 2, 3, 6

Hassan v. FEC, 893 F. Supp. 2d 248 (D.D.C. 2012) 3

**Heckler v. Chaney*, 470 U.S. 821 (1985) 11, 14, 15

Kamen v. IBEW, 505 F. Supp. 2d 66 (D.D.C. 2007) 10

La Botz v. FEC, 889 F. Supp. 2d 51 (D.D.C. 2012) 3, 5

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 2, 6

Nader v. FEC, 725 F.3d 226 (D.C. Cir. 2013) 6, 7

Nat. Law Party of the United States v. FEC, 111 F. Supp. 2d 33 (D.D.C. 2000) 3, 5, 6

Oryszak v. Sullivan, 576 F.3d 522 (D.C. Cir. 2009) 10

Public Citizen, Inc. v. FERC, 839 F.3d 1165 (D.C. Cir. 2016) 13

Public Citizen v. FEC, 2021 U.S. Dist. LEXIS 49769 (D.D.C. Mar. 17, 2021) 11

In re Sealed Case, 223 F.3d 775 (2000) 12

Spokeo v. Robbins, 578 U.S. 330 (2016) 1, 6

**Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001) 8, 10

Williams-Jones v. Lahood, 656 F. Supp. 2d 63 (D.D.C. 2009) 10

STATUTES

52 U.S.C. § 30109(a) 10, 12, 13

INTRODUCTION

In its opposition brief, Plaintiff End Citizens United PAC ("ECU") fails to meet its burden for avoiding dismissal on the pleadings for two distinct reasons. First, because Plaintiff fails to demonstrate Article III standing under either its novel (and unprecedented) "competitive disadvantage" or "informational" standing theories, this Court lacks subject matter jurisdiction over Plaintiff's claims. Second, recent D.C. Circuit precedent is unmistakable in its direction that a decision by the Federal Election Commission ("FEC") "that rests *even in part* on prosecutorial discretion *cannot* be subject to judicial review." *CREW v. FEC*, 993 F.3d 880, 884 (D.C. Cir. 2021) ("*CREW 2021*") (emphasis added). As much as Plaintiff wishes it were otherwise, the FEC's exercise of prosecutorial discretion in this case ends the inquiry, removing it from the realm of judicial review.

For these reasons, and the reasons outlined in Intervenor-Defendant's Memorandum in Support of its Renewed Motion to Dismiss, ECF No. 22-1, this Court should grant Intervenor-Defendant's Renewed Motion to Dismiss.

ARGUMENT

I. Dismissal is Required Because Plaintiff Lacks Article III Standing.

"Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 339 (2016). While the Federal Election Campaign Act ("FECA") provides Plaintiff a cause of action, Parties bringing complaints under FECA must make a separate showing of standing. "Section [30109](a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997). When an "'asserted injury arises from the government's allegedly unlawful regulation (or lack of

regulation) of someone else,' standing will often be difficult to establish." *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

Thus, regardless of whether Plaintiff has the right to bring suit, it has failed to meet its burden of demonstrating injury-in-fact under its theories of standing. For the reasons outlined below, Plaintiff's arguments for competitive disadvantage standing and informational standing both fail. Because Plaintiff lacks standing to bring these claims, dismissal of its complaint is warranted.

A. Plaintiff Lacks Competitive Disadvantage Standing.

For the reasons below, Plaintiff fails to meet its burden of demonstrating that it has suffered a competitive injury sufficient to confer standing in this action. Dismissal is thus appropriate for lack of standing.

1. Plaintiff Does Not Compete With Any of the Administrative Respondents in Any Cognizable Way.

First, Plaintiff's claims of competitive harm from the FEC's administrative dismissal rest on its conclusory allegations that it is a "rival" or competitor of the "Scott Campaign," New Republican PAC, and "then-Florida Governor (now U.S. Senator) Rick Scott" (collectively the "administrative respondents"). *See* ECF No. 25 at 8, 25. As an initial matter, the argument that ECU is a competitor with Senator Scott and the Scott Campaign for purposes of competitive-disadvantage standing is belied by the D.C. Circuit's determination that non-candidates like Plaintiff here do not "compete" with candidates or campaign committees for purposes of competitive disadvantage standing. *Gottlieb*, 143 F.3d at 621. Non-candidates cannot allege competitive injury from the government's bestowal of an allegedly illegal benefit on candidates. "[A] *candidate*—as opposed to individual voters and p*olitical action groups*—would theoretically have standing based upon a 'competitive injury,'" but the plaintiff must "show that he personally

competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit." *Hassan v. FEC*, 893 F. Supp. 2d 248, 255 n.6 (D.D.C. 2012) (emphases added) (quoting *Gottlieb*, 143 F.3d at 621). Here, Plaintiff ECU—"a PAC that was active in the 2018 Florida Senate race," ECF No. 25 at 16—"cannot show that [it] personally competes in the same arena with candidates." *Hassan*, 893 F. Supp. 2d at 255 n.6. "Only another candidate could make such a claim." *Gottlieb*, 143 F.3d at 621. And just as ECU cannot show that it personally competes in the same arena with Rick Scott the candidate, ECU does not compete with the campaign committee Rick Scott for Florida.

Regarding Plaintiff's claim that New Republican and ECU are competitors because they are both PACs that spend money in the same election races, this understanding of competitive standing is an unfounded and extreme extension of this Court's standing doctrine, and has no support in precedent. Generally, competitor standing in D.C. Circuit caselaw has been limited to "already established candidates . . . [who] challenge an 'assertedly illegal benefit' being conferred upon someone with whom those candidates compete." *Hassan*, 893 F. Supp. 2d at 254 n.6. The cases on which Plaintiff relies to support its claims of competitor standing all arose in the context of presidential debates, and are distinguishable because they were confined to addressing harms to candidates and/or political parties with *direct* competitors, namely the candidates or political parties against whom the plaintiffs were competing in defined electoral races. *See, e.g.*, *La Botz v. FEC*, 889 F. Supp. 2d 51, 56 (D.D.C. 2012) ("La Botz was no mere bystander—he was a candidate for office."); *Buchanan v. FEC*, 112 F. Supp. 2d 58, 65 (D.D.C. 2000) ("[T]he loss of an opportunity to participate in the presidential debates which few would doubt can be instrumental to a candidate's success in the general election."); *Nat. Law Party of the United States v. FEC* , 111 F. Supp. 2d 33, 47 (D.D.C. 2000) (finding competitive standing where the political candidates

and their party affiliates "*directly* competed for the alleged benefit of participating in the presidential debates" (emphasis added)).

By contrast, the D.C. Circuit has never extended competitor standing to facts like these. The distinction between Plaintiff's claims and those made in the above-cited cases is readily apparent. New Republican (a super PAC) and ECU (a traditional PAC) are independent committees that both spend money to promote political messages and candidates running for election; importantly, they are two committees among countless other committees that can lawfully spend funds to promote a limitless array of political or ideological messages. New Republican and ECU do not fall within the same category of PAC; they operate under different legal standards and serve very different functions.[1] The fact that these two committees both happened to spend money in one election promoting different political candidates does not automatically create a cognizable competitive injury for purposes of Article III standing.

Indeed, this is a far cry from candidates running against each other on the same ballot, or from a political party operating in a two-party system that inherently creates a clearly defined opposing party competitor. When it comes to political committees, defining which PACs are "rivals" and which are aligned is not so clear-cut. PACs frequently put out messages that do not fit neatly into a box of support or opposition to a particular candidate or political party, and even occasionally put out messages that cut both ways. While PACs may spend money supporting or opposing candidates who themselves are rivals, and may sponsor advertisements offering conflicting ideological perspectives, such expenditures do not automatically render such committees "competitors" or "rivals" in the same way as two candidates competing for a single

[1] For example, New Republican made independent expenditures in the Florida election, while ECU endorsed and contributed to one of the candidates. ECF No. 25 at 16.

elected office. Yet under Plaintiff's expansive view of competitive standing, any two committees that happen to spend money in an election race with messages supporting rival political candidates would be automatically rendered direct competitors themselves, even if they were otherwise ideologically aligned.

Because there is no limiting principle to this proposed sweeping expansion of the competitive standing doctrine, this Court should reject Plaintiff's unsupported theory of competitive standing for political committees.

2. *Regardless, Plaintiff Fails to Demonstrate Injury-in-Fact, Causation, and Redressability.*

Even assuming Plaintiff and New Republican were direct competitors (which they are not), this case is still unlike *La Botz*, *Buchanan*, and *Natural Law Party*, where the loss of an opportunity to participate in a presidential debate was deemed sufficient to show injury-in-fact. *See La Botz*, 889 F. Supp. 2d at 56; *Buchanan*, 112 F. Supp. 2d at 65; *Natural Law Party*, 111 F. Supp. 2d at 47. Here, by contrast, ECU has experienced no similar "injury to their interest in effectively voicing [its] political message," *Nat. Law Party*, 111 F. Supp. 2d at 47, because it is still able to engage in all activities permitted for PACs under FECA. *Cf. Buchanan*, 112 F. Supp. 2d at 65 ("[I]t is relatively self-evident that the people who have the most to gain and lose from the criteria governing the debate participation are the candidates themselves."). Plaintiff has suffered no lost opportunity, nor has it been excluded from the political process in any way, that would qualify as a cognizable injury for purposes of Article III.

Plaintiff also alleges that it has suffered injury to its "concrete interest in the electoral success of the candidates it financially supports" because of the FEC's administrative dismissal, *see* ECF No. 25 at 25, but such speculation is insufficient to state a claim for relief. "Even if agency action authorizes the conduct at issue . . . causation will not exist where . . . multiple, tenuous links

connect the challenged conduct to the asserted injury." *Nat. Law Party*, 111 F. Supp. 2d at 47 (internal quotation marks omitted). "[A]n injury will not be 'fairly traceable' to the defendant's challenged conduct nor 'redressable' where the injury depends not only on that conduct, but on independent intervening or additional causal factors." *Fulani v. Brady*, 935 F.2d 1324, 1329 (1991). The D.C. Circuit has rejected claims by private parties analogous to Plaintiff's that assert a "supposed injury to their 'ability to influence the political process,'" because such an injury "rests on gross speculation and is far too fanciful to merit treatment as an 'injury in fact.'" *Gottlieb*, 143 F.3d at 621 (citation omitted). Even if Plaintiff had pleaded that the FEC's administrative dismissal had somehow harmed the electoral success of its preferred candidates that it financially supports, this "conclusion rests on a series of hypothetical occurrences, none of which [Plaintiff] can demonstrate came to pass." *Id.* This attenuated chain of causation requires speculation that New Republican somehow gained an advantage over influencing voters in Senator Scott's race, which then ultimately had a negative impact on the "electoral success" of ECU's preferred candidate; certainly, this sequence of events would "'depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* at 621 (quoting *Lujan*, 504 U.S. at 562).

Finally, Plaintiff asserts that *Nader* is distinguishable here because New Republican "continues to solicit contributions," and Plaintiff will "continue to compete politically with the respondents from its administrative complaints in the future." ECF No. 25 at 24. However, this fails to explain how a "favorable decision here will [] redress the injuries [Plaintiff] claims." *Nader*, 725 F.3d at 228; *see Spokeo*, 578 U.S. at 339 (redressability is a necessary element of standing). The D.C. Circuit has only found competitive disadvantage standing in cases where Plaintiff alleges injury in *ongoing* or *future* elections, which Plaintiff fails to do here. *Cf. Nader*,

725 F.3d at 228 ("In *Shays*, we held that candidates had competitor standing to challenge an FEC regulation they claimed would harm their chances in the next election. In *LaRoque*, we held that a candidate had competitor standing to seek to enjoin the Attorney General from enforcing the Voting Rights Act in a way that would diminish the candidate's chances of victory in an upcoming election." (citations omitted)). All Plaintiff offers here is unadorned speculation regarding the impact its allegations will have on the 2024 election cycle; yet, when its claims are boiled down, what it really alleges is a prior violation of the law. This is insufficient for purposes of redressability in ongoing or future elections.

Because Plaintiff does not "compete" with any of the administrative respondents in any cognizable way, and only offers conclusory or speculative allegations that fail "to show an actual or imminent increase in competition," *Am. Inst. of Certified Pub. Accountants v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015), it fails to meet its burden of demonstrating competitor standing; dismissal of the complaint is thus appropriate.

B. Plaintiff Has Not Suffered a Cognizable Informational Injury.

Plaintiff persists in its misreading of the informational standing caselaw. Although informational injury *can* sometimes confer standing, *see ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011), "a plaintiff's inability to procure from the [FEC] a 'legal determination' or 'legal conclusion that carries certain law enforcement consequences' does not amount to informational injury." *Campaign Legal Ctr. v. FEC*, 507 F. Supp. 3d 79, 83-84 (D.D.C. 2020) (quotation omitted). Likewise, "a plaintiff lacks a cognizable informational injury where the information [it] seeks 'is already required to be disclosed' elsewhere and, pursuant to that obligation, 'reported in some form.'" *Id.* (quotation omitted). Here, all of the transactions in which Plaintiff claims to be interested have already been reported by Intervenor-Defendant, and any

question raised by Plaintiff concerning the time at which Senator Scott became a "candidate" within the meaning of the FECA is fundamentally a desire for a certain legal determination that the Commission has already declined to make.

1. *Every Transaction in Which Plaintiff Is Interested Has Been Reported.*

Plaintiff argues that Scott and the Scott Campaign should have begun filing quarterly disclosure reports a year earlier than they did, and that Plaintiff was therefore "deprived of information that FECA required Scott and the Scott Campaign to report in 2017 and early 2018[.]" ECF No. 25 at 29-30. To the extent Plaintiff suggests that there are certain funds raised or spent that remain unreported to the FEC, that is not the case. *All* of the fundraising activity in which Plaintiff is allegedly interested was timely reported either by Intervenor-Defendant New Republican PAC or by the Scott Campaign itself. *See, e.g.*, *Campaign Legal Ctr. v. FEC*, 2021 U.S. Dist. LEXIS 248159, at *13 (D.D.C. Dec. 30, 2021) (holding that expenditures for specific pre-candidacy events identified by plaintiff had already "been disclosed" and therefore the complaint presented only an "'unsupported inference' that there is more spending to be disclosed"). Hence, Plaintiff does not seek any information that has not yet been disclosed to the FEC; it simply alleges that the wrong entity reported that information. In other words, Plaintiff wants a "legal conclusion that carries certain law enforcement consequences," and that kind of claim has never conferred an injury sufficient for Article III standing. *Wertheimer v. FEC*, 268 F.3d 1070, 1074-75 (D.C. Cir. 2001).

The answer is no different even if one assumes *arguendo* that Plaintiff is correct and Scott became a candidate in May 2017. ECF No. 25 at 24-25. Even if that were true, and it is not, it would *not* require the disclosure of any additional information because Intervenor-Defendant properly reported its own fundraising activity to the FEC and Scott *did* file a Statement of

Candidacy in April 2018. *Id.* at 15. While "[d]eprivation of the disclosures that FECA requires for [a] disputed period" can constitute an informational injury, *Campaign Legal Center v. FEC*, 520 F. Supp. 3d 38, 45 (D.D.C. 2021), Plaintiff has not alleged that it was deprived of any information required to be disclosed, only that it believes a different filer should have reported the information in question. Again, unsatisfied with the legal determination it received, Plaintiff seeks a different legal determination as to when Scott became a candidate rather than access to any information that has not already been disclosed, and therefore this is not the kind of informational injury that supports standing.

2. *Plaintiff's Claims of Alleged Coordinated Spending Are Also a Request for a Legal Determination.*

Similarly, Plaintiff is not entitled to any additional information concerning its allegation that Intervenor-Defendant made coordinated communications. ECF No. 25 at 32-33. Plaintiff argues that it does not merely seek a legal determination, but "more detailed, disaggregated disclosure of expenditures related to the coordinated communications at issue." *Id.* But this only means that Plaintiff is once again taking issue with the way in which expenditures were reported by Intervenor-Defendant, without actually alleging that any information that was subject to disclosure went unreported. Moreover, the information that Plaintiff claims to seek is simply amended reporting that would be filed as a consequence if Plaintiff received its desired legal determination that the already-reported spending at issue constituted coordinated communications and in-kind contributions. Stated differently, Plaintiff seeks a legal determination that would require information that was already reported to be reported differently.

Plaintiff attempts to obfuscate this issue by claiming that the expenditures challenged in *Wertheimer* were "label[ed] . . . as a discrete category," but the Court in that case noted that the plaintiffs "did not dispute that all political parties *currently report all disbursements* or that each

transaction [plaintiffs] allege is illegal *is reported in some form*." *Wertheimer*, 268 F.3d at 1074 (emphasis added). Plaintiff alleges that some of the expenditures already reported by Intervenor-Defendant should have been differently reported in a discrete "coordinated communications" category; Intervenor-Defendant contends that no coordinated communications were made, and so all of its expenditures were properly reported. There is no "discrete category" on FEC reports for communications that the reporting party maintains were non-coordinated but that might be challenged by another party that believes differently. Reading between the lines of Plaintiff's argument, it does not dispute that Intervenor-Defendant "report[ed] all disbursements or that each transaction [it] allege[s] is illegal is reported in some form." *Id.* Hence, Plaintiff's nonsensical argument is yet another thinly veiled attempt to elicit a legal determination from this Court as to whether Intervenor-Defendant's expenditures constituted coordinated communications.

II. FEC Complaints Dismissed Due to Prosecutorial Discretion Are Not Subject to Judicial Review.[2]

D.C. Circuit precedent is clear: FEC decisions to dismiss administrative complaints that are predicated on an exercise of prosecutorial discretion, whether in whole or in part, are not subject to judicial review.[3] Here, the controlling Commissioners clearly explained in their

[2] Intervenor-Defendant notes that it has separately cross-moved for summary judgment in this case on the grounds that, *inter alia*, the FEC's exercise of prosecutorial discretion is not reviewable. ECF No. 27-1 at 26–41.

[3] Intervenor maintains that because FECA is a jurisdictional statute unlike the APA, a request for a dismissal on the grounds of prosecutorial discretion is proper under Rule 12(b)(1). *Compare Oryszak v. Sullivan*, 576 F.3d 522, 524 (D.C. Cir. 2009) (holding that the APA "is not a jurisdiction-conferring statute") *with* 52 U.S.C. § 30109(a)(8)(A) (expressly conferring jurisdiction on this Court for cases in which a party is "aggrieved by an order of the [FEC] dismissing a complaint filed by such party"). Nonetheless, this court may, in its discretion, construe the request for a 12(b)(1) dismissal as a request to dismiss for failure to state a claim under Rule 12(b)(6). *See Kamen v. IBEW*, 505 F. Supp. 2d 66, 71, 71 n.1 (D.D.C. 2007); *see also Williams-Jones v. Lahood*, 656 F. Supp. 2d 63, 68 (D.D.C. 2009).

Statement of Reasons that they voted against proceeding with an investigation of Plaintiff's complaint in an exercise of prosecutorial discretion. Given the applicable precedent and the fact that they "exercised their prosecutorial discretion to dismiss this matter, the Controlling Commissioners' analysis is not subject to judicial review." *Public Citizen v. FEC*, 2021 U.S. Dist. LEXIS 49769, at *15 (D.D.C. Mar. 17, 2021). Plaintiff's attempts to subdivide the Statement of Reasons into reviewable subsections or otherwise peer behind the controlling Commissioners' plain explanation of their decision should therefore fail.

A. The Statement of Reasons Is Not Divisible

Plaintiff attempts to slice and dice the Statement of Reasons into reviewable and nonreviewable parts, arguing that the fact that the Statement of Reasons issued by the controlling Commissioners mentioned prosecutorial discretion with respect to some claims and not others indicates that the Commission "reached a substantive conclusion" (and hence a reviewable one) about some claims. ECF No. 25 at 35-36. Plaintiff's close reading of the text is irrelevant because "a Commission decision that rests *even in part* on prosecutorial discretion cannot be subject to judicial review" without running afoul of the U.S. Supreme Court's decision in *Heckler v. Chaney*. *CREW 2021*, 993 F.3d at 884 (emphasis added). Unlike Plaintiff, this Court cannot simply ignore the discretionary nature of the Commission's decision.

"[E]ven if some statutory interpretation could be teased out of the . . . statement of reasons," "[t]he law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions." *Id.* at 883, 886 (quotation omitted). But that is precisely what Plaintiff asks this Court to do, alleging that only its allegations concerning candidacy filing are off-limits. ECF No. 25 at 35. The Commission took *one* reason-to-believe vote on Plaintiff's administrative complaints and *one* vote to dismiss, both of which deadlocked 3-3. *Id.* at 19. The controlling

Commissioners then issued *one* Statement of Reasons explaining their vote, saying they "found no reason to believe that New Republican violated the soft money rules and dismissed the allegations that Scott untimely filed his candidacy and organization paperwork under Heckler v. Chaney." AR at 204. Nothing in that Statement or in the applicable caselaw suggest that Plaintiff's claims are in any way separately reviewable. *See CREW v. FEC*, 380 F. Supp. 3d 30, 41 (D.D.C. 2019) ("*CREW 2019*") ("[T]his Court cannot evaluate the 'reviewable legal rulings' contained in the Controlling Commissioners' statement of reasons."). To suggest otherwise is to "artificially carv[e] out [an] antecedent legal issue from [a] basic request for enforcement," *CREW 2021*, 993 F.3d at 886 (quotation omitted), a request that the Commission has already declined to pursue.

B. The Controlling Commissioners' Statement Is Controlling

Plaintiff also attempts to argue that the expressed reasons of the controlling Commissioners in this instance are not actually controlling because they "were on the losing end" of the Commission's vote to dismiss. ECF No. 25 at 36-37.[4] Plaintiff misstates the voting requirements set forth in FECA, which provides that the FEC may only pursue an enforcement matter "by an affirmative vote of 4 of its members." 52 U.S.C. § 30109(a)(2). Accordingly, a complaint is dismissed if four commissioners vote in favor of dismissal, or by the simple fact that there are fewer than four votes in favor of pursuing an enforcement action. 52 U.S.C. § 30109(a)(2). When the FEC lacks four votes to find reason to believe a violation occurred, the enforcement matter is

---

[4] Plaintiff's argument that "the controlling Commissioners' Statement of Reasons does not receive *Chevron* or *Auer* deference," ECF No. 25 at 14 n.2, is directly contradicted by D.C. Circuit precedent. *See, e.g.*, *In re Sealed Case*, 223 F.3d 775, 779, 781 (2000) (affirming that the Court "owe[s] deference to a legal interpretation supporting a negative probable cause determination that prevails on a 3-3 deadlock," and citing the Statement of Reasons as the "prevailing" interpretation meriting *Chevron* deference in that case (citing *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471, 1476 (D.C. Cir. 1992)).

dismissed, and the D.C. Circuit requires the issuance of a single, legally controlling Statement of Reasons from "the Commissioners who voted not to proceed with the matter." *See CREW 2019*, 380 F. Supp. 3d at 35.

Hence, Plaintiff's assertion is premised upon the legally unsupported view that a complaint lingers in FEC purgatory until such time as four Commissioners vote either in favor or against enforcement. Under the statute, however, the three Commissioners who voted to dismiss did so with legal effect and no further action was required. Thus, when the Commission deadlocks 3-3 as it did here, "the statute compels [the] FEC to dismiss" the underlying complaint. *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016). That there were not four votes to dismiss is legally irrelevant. Final agency action occurs when the Commissioners deadlock. Whether four Commissioners cast a ministerial vote to "close the file" is similarly irrelevant; the complaint has already been legally dismissed.

This case does not present a novel situation, and this Court has regularly found Statements of Reasons controlling when issued to explain a vote against proceeding with an investigation. *See, e.g.*, *CREW 2019*, 380 F. Supp. 3d at 45 (holding that, where "the Controlling Commissioners declined to move forward with Plaintiffs' administrative complaint, at least in part, on the basis of prosecutorial discretion," the Statement of Reasons issued to explain their vote against finding "reason to believe" was controlling). There is no reason the outcome should be different here.

C. Plaintiff Cannot Circumvent Prosecutorial Discretion Because Of Alleged "Legal Error"

Plaintiff contends that the FEC's dismissal of its complaint is reviewable because it is based upon "two legal errors": an allegedly erroneous assumption that determining the date Scott became a candidate required an inquiry into his "subjective intent," and the agency's determination that the facts in the record constituted too "thin [an] evidentiary reed" to justify the allocation of agency

resources to pursue the matter. *See* ECF No. 25 at 37-38. Plaintiff argues that since the candidacy inquiry is an "objective" one, the controlling Commissioners' legal reasoning was flawed and hence reviewable. *Id.* Plaintiff advances this argument with a novel interpretation of the D.C. Circuit's recent opinion in *CREW 2021*, arguing that the decision holds "that an FEC dismissal is unreviewable if it rests even partly on an invocation of prosecutorial discretion *that is independent of the agency's legal reasoning*." ECF No. 25 at 39-40. Plaintiff, however, appends the above-italicized caveat to the Court's actual holding, which appears nowhere on the face of the opinion and significantly changes its meaning and scope.

Just like in this case, the controlling Commissioners in *CREW 2021* "explicitly relie[d] on prosecutorial discretion" and expressed "concerns about resource allocation" in explaining why they voted against proceeding with an investigation. *CREW 2021*, 993 F.3d at 885. Even though the *CREW 2021* plaintiff, like Plaintiff here, also challenged the controlling Commissioners' interpretation of FECA—and, therefore, the legal interpretation upon which their decision to invoke prosecutorial discretion was based—the court did not find that a sufficient reason to second-guess the Commission's decision to dismiss the complaint. *Id.* When "the Commissioners who voted against enforcement invoked prosecutorial discretion to dismiss [Plaintiff's] complaint," the Court "lack[s] the authority to second guess a dismissal based *even in part* on enforcement discretion." *Id.* at 882 (emphasis added). Agency decisions concerning whether to proceed with an enforcement action inevitably involve the weighing of multiple considerations, including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, . . . and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). This decision is always inherently bound-up with the agency's interpretation of the controlling law and the strength of the

case, so these considerations are not "independent of the agency's legal reasoning" as Plaintiff erroneously contends. ECF No. 25 at 39-40. To the contrary, the *CREW 2021* Court held that "the Commission's legal analysis is not reviewable *because it is joined with an explicit exercise of prosecutorial discretion*." 993 F.3d at 886 (emphasis added). That Court did not think the Commission's legal reasoning was separable from its exercise of prosecutorial discretion, and *CREW 2021* does not suggest any factors which might point towards a different outcome.

With respect to Plaintiff's assertion that the controlling Commissioners committed legal error, as explained in Intervenor's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Default Judgment and Summary Judgment, ECF No. 27-1 at 36-38, it is Plaintiff who misstates the applicable law. The FEC has repeatedly explained that under its testing the waters regulation, the question of whether an individual is no longer testing the waters rests on "when he or she *makes a private determination* that he or she will run for federal office." Advisory Op. 2015-09 at 5.

Evaluating someone's "private determination" obviously involves evaluating that person's subjective intent, which is no easy task. *See* MUR 6928, Controlling Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 9 ("The Commission will look for objective evidence to show a subjective intent by the individual that an activity occurred for the purpose of determining the viability of a candidacy. Like its determinations as to whether an individual has become a candidate under the Act, an analysis of whether particular expenses are rightly considered testing-the-waters expenses will usually be a highly fact-intensive inquiry."). The controlling Commissioners in this case observed in another matter that "[b]y shifting the weight of the candidacy analysis onto an untenably vague 'private decision' determination, complainants in this Matter and other matters are empowered to cherry-pick

quotations, news reports, and hearsay to support their position that an eventual candidate necessarily reached the private conclusion to run for federal office before making that determination public." MUR 7354, Controlling Statement of Reasons at 7.

Plaintiff contends that "the controlling Commissioners' erroneous conclusion that resolving the Candidacy Filing allegations would require a subjective inquiry was the basis for all of the justifications their Statement of Reasons offered for exercising the FEC's discretion." ECF No. 25 at 38. Plaintiff is wrong on both counts. The controlling Commissioners' characterization of the testing the waters inquiry as requiring "prob[ing] his subjective intent" is not a legal error, nor was this the sole basis "offered for exercising the FEC's discretion." The controlling Commissioners also explained that "[t]o probe his subjective intent" in this matter would involve investigating "core constitutionally protected activity," which is "not an action we could take lightly." AR at 212. The controlling Commissioners then observed that this "wide-ranging, costly, and invasive investigation" would be "expensive and resource-consuming" at a time when "the Commission is still working through a substantial backlog of cases that accumulated while it lacked a quorum." *Id.* Accordingly, the controlling Commissioners assessed the nature of the investigation that would be required in this matter, took into account the agency's enforcement backlog and limited resources, and concluded that dismissal on the basis of prosecutorial discretion was warranted. This conclusion evidences no legal errors.

D. Plaintiff Has Presented No Standard for Evaluating Pretext In This Context.

Finally, Plaintiff claims that the controlling Commissioners' invocation of prosecutorial discretion was a pretextual guise for their substantive legal analysis. ECF No. 25 at 40. The caselaw Plaintiff relies on to advance this argument is inapposite; as the Supreme Court clearly explained in *Department of Commerce v. New York*, there is a meaningful distinction between the judicial

review it exercised over an agency's technical decision-making in the census context and the non-reviewability of an agency "decision not to institute enforcement proceedings" recognized in *Heckler*. 139 S. Ct. 2551, 2568 (2019). Similarly, the D.C. Circuit in *CREW 2021* rejected another plaintiff's attempt to "expand the 'abuse of discretion' standard . . . to include judicial review of decisions that rest on enforcement discretion," just as Plaintiff asks this Court to do here. 993 F.3d at 894-95. As explained above, the only relevant inquiry is whether the agency "relied on enforcement discretion." *Id.* Here, the controlling Commissioners could not have been clearer about their reliance on prosecutorial discretion, explaining that they "determined that this Matter merited the invocation of our prosecutorial discretion" because an investigation "would have necessitated a wide-ranging, costly, and invasive investigation into both Scott and New Republican's activities during [the disputed] period of time, and possibly after." AR at 212. In the absence of any applicable legal standard for evaluating pretext in the enforcement context, this Court has no better interpretive tools than Plaintiff to determine whether the Commission really meant what it said.

Plaintiff does not point to any additional caselaw that might tend to support its pretext argument, instead relying solely on its exegesis of the controlling Commissioners' Statement of Reasons. Therefore, this argument should also be rejected.

CONCLUSION

For the aforementioned reasons, Intervenor-Defendant's Motion to Dismiss should be granted.

Dated: January 25, 2022 Respectfully submitted,

/s/*Jason Torchinsky*

Jason Torchinsky (DC Bar No. 976033)
Jessica F. Johnson (DC Bar No. 976688)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
2300 N Street NW, Suite 643A
Washington D.C. 20037
Phone: (202) 737-8808
Fax: (540) 341-8809
Email: jtorchinsky@holztmanvogel.com
Jessica@holtzmanvogel.com

J. Michael Bayes (DC Bar No. 501845)
Phillip M. Gordon (DC Bar No. 1531277)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Highway
Haymarket, VA 20169
Washington D.C. 20037
Phone: (202) 737-8808
Fax: (540) 341-8809
Email: mbayes@holtzmanvogel.com
pgordon@holtzmanvogel.com

Attorneys for Intervenor-Defendant

CERTIFICATE OF SERVICE

I certify that on January 25, 2022, I served the foregoing on all counsel of record through this Court's CM/ECF system. I further certify that on January 26, 2022, I served the foregoing on the FEC by USPS First Class mail.

/s/ Jason Torchinsky