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 Cross-Motion for Summary Judgment**

REPLY IN SUPPORT OF INTERVENOR-DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Plaintiff Does Not Have Standing to Challenge the FEC's Dismissal 1

A. Plaintiff Lacks Competitive Standing 2

B. Plaintiff Has Not Suffered an Informational Injury 3

II. The FEC's Exercise of Prosecutorial Discretion in Dismissing Plaintiff's Complaint is Not Reviewable 6

A. Plaintiff Cannot Subdivide the FEC's Dismissal into Reviewable and Nonreviewable Parts 7

B. The FEC Correctly Exercised Its Prosecutorial Discretion 8

C. Plaintiff's Assertion of "Erroneous Legal Reasoning" is Incorrect and Not a Basis for Judicial Review 12

D. Plaintiff Has Offered No Feasible Test for Evaluating "Pretext" in this Context 14

III. The FEC's Dismissal of Plaintiff's Complaint was Lawful 16

A. The Commission Did Not Make Any Legal Errors 16

B. The Commission was Justified in Relying Upon the Hazelwood Affidavit 17

C. The Commission Adequately Explained Its Reasons for Dismissing Plaintiff's Coordinated Communications Claim 18

D. Plaintiff's Remaining Arguments Are Meritless 18

CONCLUSION 19

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

CASES

Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd., 663 F.3d 476 (D.C. Cir. 2011) 15

CREW v. FEC, 892 F.3d 434 (D.C. Cir. 2018) 8

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

Campaign Legal Ctr. v. FEC, No. 21-5081 6

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

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 15

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

Crossroads Grassroots Policy Strategies v. FEC, 788 F.3d 312 (D.C. Cir. 2015) 10

Dept' of Com. v. New York, 139 S. Ct. 2551 (2019) 15, 19

FEC v. Akins, 524 U.S. 11 (1998) 7

FEC v. National Republican Senatorial Comm., 966 F.2d 1471 (D.C. Cir. 1992) 10

Gottlieb v. FEC, 143 F.3d 618 (D.C. Cir. 1998) 1, 2

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

**Heckler v. Chaney*, 470 U.S. 821 (1985) 14, 16, 19

In re Sealed Case, 223 F.3d 775 (D.C. Cir. 2000) 10

La Botz v. FEC, 889 F. Supp. 2d 51 (D.D.C. 2012) 2, 17, 18

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 1

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

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

Campaign Legal Ctr. v. FEC, No. 20-cv-730, 2021 U.S. Dist. LEXIS 248159 (D.D.C. Dec. 30, 2021) 4

Public Citizen v. FEC, 2021 U.S. Dist. LEXIS 49769 (D.D.C. Mar. 17, 2021) 7

Public Citizen v. FERC, 839 F.3d 1165 (D.C. Cir. 2016) 10, 11

Spokeo v. Robbins, 578 U.S. 330 (2016) 1, 3

**Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001) 4, 6

STATUTES

52 U.S.C. § 30106 9

52 U.S.C. § 30107 9

53 U.S.C. § 30109 9

OTHER AUTHORITIES

Fed. Election Comm'n, *Filing FEC-1230048*, (May 9, 2018) 5

Fed. Election Comm'n, *New Republican PAC Filing FEC-1237886*, (June 14, 2018) 5

Fed. Election Comm'n, *Filing FEC-1247735 Schedule E*, (July 15, 2018) 5

INTRODUCTION

Intervenor-Defendant contends, and D.C. Circuit precedent makes clear, that Plaintiff lacks standing to challenge the FEC's dismissal of its administrative complaint. Plaintiff argues, in opposition to a mountain of contrary precedent, that it does. Similarly, Intervenor-Defendant asserts that D.C. Circuit precedent is correct in shielding from judicial review FEC dismissals based upon prosecutorial discretion. At its core, Plaintiff's argument is that the applicable caselaw is wrong and a different standard is needed. This Court should reaffirm its own caselaw on these issues, reject the Plaintiff's arguments as contrary to that precedent, and grant Intervenor-Defendant's Cross-Motion for Summary Judgment.

I. Plaintiff Does Not Have Standing to Challenge the FEC's Dismissal

"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 v. Robbins*, 578 U.S. 330, 339 (2016). While the Federal Election Campaign Act ("FECA") provides Plaintiff with a cause of action, parties bringing complaints under the 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)). Plaintiff has failed to establish Article III standing under either of the theories that it advances.

A. Plaintiff Lacks Competitive Standing

Plaintiff's claim of standing under a "competitive disadvantage" theory is premised on the incorrect assumption that it is a political competitor of Senator Scott, the Scott Campaign, or

Intervenor-Defendant. It is not. Plaintiff is not a candidate for office or a candidate campaign committee—it is a PAC. ECF No. 31 at 6. To invoke competitive standing, Plaintiff must demonstrate that it "personally competes in the same arena with the same party to whom the government has bestowed the allegedly illegal benefit." *Gottlieb*, 143 F.3d at 621. Spending in the same election in which a particular candidate is running is not enough.

Likewise, Plaintiff's claims of standing misread the applicable precedents. Legitimate competitive standing cases are those in which "already established *candidates*" challenge an "'assertedly illegal benefit' being conferred upon someone with whom those *candidates* compete." *Hassan v. FEC*, 893 F. Supp. 2d 248, 254 n.6 (D.D.C. 2012) (emphasis added); *see also 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."); *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)). Not only are Plaintiff and Intervenor-Defendant not direct competitors, they are different kinds of entities that are subject to different rules. Intervenor-Defendant is a super PAC which is prohibited from coordinating its activities with candidates, but which may raise unlimited funds, whereas Plaintiff is a traditional PAC that can contribute directly to the candidates it supports, but must operate under FECA's contribution limits.[1] The two are not comparable, and they are not competitors.

Under Plaintiff's expansive view of competitive standing, any two committees that happen to spend money in the same election race funding messages supporting rival political candidates

[1] Of course, at all times pertinent to this inquiry End Citizens United PAC had the option of establishing a non-contribution account under the *Carey* decision to raise and spend unlimited dollars as well, but simply chose not to do so.

would be automatically rendered direct competitors themselves, regardless of whether they were otherwise ideologically aligned. Because there is no limiting principle to Plaintiff's proposed sweeping expansion of the competitive standing doctrine and because the principle it espouses is contrary to Circuit precedent, this Court should reject it.

Plaintiff also misinterprets its standing in light of *Nader v. FEC*, 725 F.3d 226 (D.C. Cir. 2013). Plaintiff alleges that it intends to spend in the 2024 Florida U.S. Senate election in which Senator Scott will be competing, and that it therefore "satisf[ies] the causation and redressability requirements" that would entitle it to standing. ECF No. 31 at 9. But Plaintiff here lacks the same necessary element that doomed Nader's own claim: "a favorable decision here will not redress the injuries [it] claims." *Id.* at 228; *see also Spokeo*, 578 U.S. at 339 (redressability is a necessary element of standing). Even if Plaintiff's allegations concerning Defendants' conduct in 2017 and 2018 are correct, and they are not, Plaintiff has not offered any reason to believe that the required FEC reports will not be filed in 2023 and 2024. Plaintiff offers only 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 standing in ongoing or future elections.

B. Plaintiff Has Not Suffered an Informational Injury

Plaintiff continues to rely heavily on *Campaign Legal Ctr. v. FEC*, 520 F. Supp. 3d 38, 45-46 (D.D.C. 2021), to support its claim of informational injury. But the court that decided that case subsequently reconsidered its holding in light of additional relevant information, *see* No. 20-cv-730, 2021 U.S. Dist. LEXIS 248159 (D.D.C. Dec. 30, 2021), and the latter decision is much closer to the facts here.

Plaintiff is adamant that there are additional FEC reports that should have been filed to report Senator Scott's activities in 2017 and early 2018 before he declared his candidacy for the U.S. Senate, yet Plaintiff is conspicuously silent concerning which transactions should have supposedly appeared on those reports. ECF No. 31 at 10. This is because all the funds raised during the relevant timeframe have *already* been reported on Intervenor-Defendant's own FEC reports. In this regard, this case is no different from the reconsidered decision cited by Plaintiff: In both, the relevant spending had already been reported by the super PAC that eventually supported the targeted candidate's candidacy, and "Plaintiff ha[s] not identified any other pre-candidacy events, travel, or speaking engagements from which the Court could infer the existence of still-undisclosed spending." 2021 U.S. Dist. LEXIS 248159, at *13. "Without such allegations, the complaint does not contain more than the 'unsupported inference' that there is more spending to be disclosed." *Id.*

Plaintiff further attempts to distinguish its case from *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), but it is not clear on what conceivable basis they are differentiable. *Wertheimer* involved an allegation by plaintiffs that "the two major political parties were funding campaign advertisements furthering the election of their respective [] nominees in close coordination with those candidates[,]" and sought "*a declaration* that expenditures by political parties that further the election of their respective [] candidates, and that are coordinated with those [] candidates, constitute contributions to and expenditures by such [] candidates[.]" *Id.* at 1071. The court ruled against plaintiffs because it determined that they did "not really seek additional facts but only the legal determination that certain transactions constitute coordinated expenditures." *Id.* at 1075. Plaintiff seeks the exact same determination as the plaintiffs in *Wertheimer*, and the result should be the same.

In Plaintiff's own words, it seeks "information about in-kind contributions from New Republican to the Scott Campaign in the form of coordinated communications." ECF No. 31 at 12. But Plaintiff never identifies any *unreported* information that it alleges should have been reported—instead, it alleges that certain commercials, produced and reported by Intervenor-Defendant, "qualified as in-kind contributions" and therefore "must be disclosed by both parties as contributions." *Id.* A review of Intervenor-Defendant's public FEC reports reveals ample information about the commercials in question; the reports identify the media consultants paid to produce Intervenor-Defendant's advertising and the specific dates on which the relevant transactions were made.[2] The relevant details were even reported twice, once on Intervenor-Defendant's 24- and 48- hour reports and then again on its Schedule E filings that accompanied its regular FEC reports.[3] Specifically, Plaintiff claims that "FECA-compliant FEC 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." ECF No. 31 at 12. This *exact* information appears in New Republican's FEC reports. A review of New Republican's publicly available FEC reports reveals that all New Republican's expenditures for "media production" were paid to "SRCP Media" and all expenditures for "media placement" were paid to "Matson Media LLC." *See supra* note 3. The itemized disclosure of each such transaction includes, among other things, the date of the

[2] *See, e.g.*, Fed. Election Comm'n, *Filing FEC-1230048*, (May 9, 2018), https://docquery.fec.gov/cgi-bin/forms/C00544544/1230048/se (disclosing expenditures for "media placement" and "media production"); Fed. Election Comm'n, *New Republican PAC Filing FEC-1237886*, (June 14, 2018), https://docquery.fec.gov/cgi-bin/forms/C00544544/1237886/se (same).

[3] Fed. Election Comm'n, *Filing FEC-1247735 Schedule E*, (July 15, 2018), https://docquery.fec.gov/cgi-bin/forms/C00544544/1247735/se (collecting all independent expenditures during the second quarter of 2018).

disbursement or obligation, the date the commercial was publicly distributed or disseminated, and which candidate was supported or opposed. *Id.* Thus, Plaintiff already knows "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." ECF No. 31 at 12. All information that Plaintiff claims is missing is already public and has been for years.

Of course, Plaintiff never alleges that Intervenor-Defendant failed to report its own expenditures on the commercials in question, only that it believes the expenditures should have been "disclosed by both parties as contributions." *Id.* But there is no separate reporting category for expenditures that the payor maintains were independent, as Intervenor-Defendant does, but which third-party groups allege were coordinated. In other words, Plaintiff seeks only a "legal determination that certain transactions"—*i.e.*, expenditures for Intervenor-Defendant's commercials—"constitute coordinated expenditures." *Wertheimer*, 268 F.3d at 1075. This is precisely the kind of "legal determination" that *Wertheimer* precludes.[4]

II. The FEC's Exercise of Prosecutorial Discretion in Dismissing Plaintiff's Complaint is Not Reviewable

D.C. Circuit precedent is clear: FEC decisions to dismiss administrative complaints that are predicated on an exercise of the agency's prosecutorial discretion, whether in whole or in part, are not subject to judicial review. *CREW v. FEC*, 993 F.3d 880, 882 (D.C. Cir. 2021) ("*CREW 2021*"). Here, the controlling Commissioners clearly explained in their Statement of Reasons that they voted against proceeding with an investigation of Plaintiff's complaint in an exercise of

[4] Although appellants in separate litigation have recently raised the question of *Wertheimer*'s scope before the D.C. Circuit, *see Campaign Legal Ctr. v. FEC*, No. 21-5081, *Wertheimer* remains the law of this Circuit and should be applied in this instance.

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 novel theories to the contrary are each unavailing and should be rejected.

A. Plaintiff Cannot Subdivide the FEC's Dismissal into Reviewable and Nonreviewable Parts

Plaintiff cites *FEC v. Akins*, 524 U.S. 11 (1998), for the proposition that this Court can "allow[] 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." ECF No. 31 at 14. This overstates the holding in *Akins*, which can be easily summarized: Parties have "Article III standing to challenge a Commission nonenforcement decision when that decision was based upon an 'agency misinterpret[ation of] the law.'" *CREW 2021*, 993 F.3d at 893 (quoting *Akins*, 524 U.S. at 25). That's it. Furthermore, unlike in this case, "in *Akins* . . . the Commission did not invoke enforcement discretion as a basis for dismissal, and so the court had no reason to consider whether such an invocation would bar judicial review." *Id.* When prosecutorial discretion *is* exercised, the outcome is necessarily different as it was in *CREW 2021*. *Id.* (noting that "prosecutorial discretion did not shield the Commission's decision from judicial review in *Akins* because the Commission had not relied on it[,]" while holding that the court could not exercise judicial review in a scenario where it had).

The scenario presented here is no different than that in *CREW 2021*. There, the FEC declined to pursue an enforcement action for two reasons: "because the non-profit organization was not a 'political committee' under the Act and because, exercising 'prosecutorial discretion,' the Commission did not find proceeding with enforcement to be an appropriate use of its

resources." *Id.* at 882. Indeed, the controlling Commissioners in *CREW 2021* "dedicated most of the[ir] statement to legal analysis of the alleged violations," only mentioning prosecutorial discretion "[i]n the final paragraph." *Id.* at 883. Nevertheless, the D.C. Circuit declined to review the decision because it "lack[ed] the authority to second guess a dismissal based *even in part* on prosecutorial discretion." *Id.* at 882 (emphasis added). Plaintiff errs in asserting that the Commission's legal reasoning in this case is in any way separable from its decision to exercise prosecutorial discretion. It is not.

"[E]ven if some statutory interpretation could be teased out of the Commissioners' statement of reasons," it is still a mistake to "subject[] the dismissal of [Plaintiff's] complaint to judicial review. The law of 'this circuit rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'" *CREW v. FEC*, 892 F.3d 434, 442 (D.C. Cir. 2018) ("*CREW 2018*") (internal citation omitted). As demonstrated in *CREW 2018* and *CREW 2021*, Commissioners frequently discuss legal interpretations to explain their rationale for invoking prosecutorial discretion, and there is no way for a reviewing court to discern where legal analysis ends and prudential concerns begin.

B. The FEC Correctly Exercised Its Prosecutorial Discretion

Plaintiff ignores the plain language of FECA when it suggests that "the Commission may exercise its powers only by a majority vote," ECF No. 31 at 16, and ignores D.C. Circuit precedent when it claims that the FEC may exercise prosecutorial discretion only when four Commissioners vote to do so.

To the contrary, the FECA specifically distinguishes between the powers of the Commission which may be exercised by "a majority vote of the members of the Commission" and those which require "the affirmative vote of 4 members of the Commission." 52 U.S.C. §

30106(c). These are separate thresholds which should not be conflated simply because they sometimes coincide; sometimes, when the Commission is not at its full capacity of six members, three members will constitute a majority, but three members can never exercise power which is expressly entrusted only to four commissioners. Nine powers of the Commission are enumerated in 52 U.S.C. § 30107(a). Read in conjunction with Section 30106(c), the first five enumerated powers (subsections (1) – (5)) may be exercised by a majority, and the last four (subsections (6) – (9)) require the vote of four Commissioners. One of the latter powers requiring the vote of four Commissioners is the power "to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities." 52 U.S.C. § 30107(a)(9). The power "to conduct investigations" refers to the Commission's complaint-based enforcement authority, which Section 30109(a)(1) further specifies requires "an affirmative vote of 4 of its members" to find "reason to believe that a person has committed, or is about to commit, a violation of this Act" to "make an investigation of such alleged violation."

To the extent that the FECA does not specify exactly what happens when the Commission lacks four votes to proceed with an enforcement matter, the courts have logically filled in the blanks. As the D.C. Circuit recognized in *CREW 2021*, "[t]he statute specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list, which suggests that they are not included under the standard construction that *expressio unius est exclusio alterius*. A decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners." 993 F.3d at 891. The D.C. Circuit has also referred to "FECA's legal requirement to dismiss complaints in deadlock situations[.]" *Public Citizen v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016).

These observations accord with decades of D.C. Circuit precedent recognizing that a deadlocked enforcement vote constitutes a final agency action to dismiss a matter. *See CREW 2021*, 993 F.3d at 898 ("[T]he members who voted against proceeding further … established the official position of the Commission on the [administrative respondent's] matter and *definitively foreclosed further action* against [administrative respondent] on [administrative complainant's] complaint.") (emphasis added); *Public Citizen*, 839 F.3d at 1170 ("[T]he statute compels FEC to dismiss complaints in deadlock situations" and "the treatment of probable cause deadlocks as agency action is baked into the very text of the statute"); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015) ("If four of the six Commissioners conclude there is reason to believe a violation was committed, a full FEC investigation commences. Conversely, if there are fewer than four votes, the FEC dismisses the administrative complaint.") (internal citation omitted; *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (referring to "a no-action decision by three commissioners"); *FEC v. National Republican Senatorial Comm*., 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint").

This treatment of deadlocked enforcement votes also reflects Congress's unique, but intentional, structuring of the FEC:

> Congress uniquely structured the FEC toward maintaining the status quo, increasing the appropriateness of recognizing deadlocks as agency action in that specific context. As an initial matter, FEC always includes six Commissioners, distinguishing it from the vast majority of agencies with an odd number of members. No more than three FEC Commissioners may be affiliated with the same political party. 52 U.S.C. § 30106(a)(1). The voting and membership requirements mean that, unlike other agencies—where deadlocks are rather atypical—FEC will regularly deadlock as part of its *modus operandi*. Taken together, FEC's structural design and FECA's legal requirement to dismiss complaints in deadlock situations mark FECA as an exception to the rule.

Public Citizen, Inc., 839 F.3d at 1171. Plaintiff clearly disagrees with Congress's policy judgment in this regard, but that does not make their claim cognizable.

Contrary to Plaintiff's assertions, under FECA and D.C. Circuit precedent, a lack of four votes to proceed with enforcement, *i.e.*, any vote to dismiss, whether based on substantive legal reasons, prosecutorial discretion, or a combination of the two, results in dismissal. Thus, it is necessarily the case that fewer than four Commissioners, *e.g.*, the three Commissioners who voted to dismiss in the present matter, have the power to dismiss an enforcement matter. To the extent that FEC practice fails to conform with statutory requirements, those practices are invalid and beyond the Commission's authority to implement. For many years, the FEC's "close the file" vote following a deadlock was simply an automatic step taken as a routine matter and its legal significance, or lack thereof, never presented an issue. Recently, however, certain Commissioners have effectively "weaponized" what was once an automatic and ministerial step by refusing to vote to "close the file" after a Commission deadlock, which presents the issue of whether it is the deadlock vote or the vote to close the file which has the legal effect of dismissing an enforcement matter. Under both the statute and applicable precedent, it is the deadlocked vote which "foreclose[s] further action" and which must necessarily end the Commission's consideration of a matter through dismissal. To the extent that certain Commissioners contend that a failed vote to "close the file" means the matter has not been lawfully dismissed, that position is without support and contrary to FECA.

Plaintiff contends that *Giffords v. FEC* supports its position, but the question of the legal effect of a "deadlock" vote, and whether a vote to "close the file" has any legal effect, was specifically noted by Judge Sullivan as a matter to be litigated in a separate proceeding. Tr. of Video Status Conf. 9-10, No. 1:19-1192, (Nov. 1, 2021) ("[I]f the Court hypothetically today were to say to the plaintiff, Proceed with your private action, then that would be a legitimate issue to be raised by defense counsel, that it was premature at that point."). In the present matter, Plaintiff's

claim that "a majority of the Commission must approve the agency's use of its power of prosecutorial discretion" is contrary to FECA's plain language and structure, and inconsistent with well-established D.C. Circuit precedent. ECF No. 31 at 16. This claim should therefore be rejected.

C. Plaintiff's Assertion of "Erroneous Legal Reasoning" is Incorrect and Not a Basis for Judicial Review

Plaintiff further alleges that this Court has the power to peer behind the controlling Commissioners' invocation of prosecutorial discretion because they made a "legal error" in assuming that the inquiry into when an individual becomes a candidate within the meaning of FECA "depends on that individual's subjective intent," and note that Intervenor "does not dispute that FEC dismissals premised on erroneous legal conclusions are reviewable." *Id.* at 21. Plaintiff is correct that Intervenor does not dispute the applicable law, but it *does* object to Plaintiff's assertion that the controlling Commissioners made a mistake.

Put simply, the question of when an individual decides to run for a particular office is an inherently subjective determination which is normally exhibited by objectively discernible factors. Classifying this as an "objective" or "subjective" test fails to capture its nuances, because the inquiry properly involves elements of both. The FEC has repeatedly explained that under its testing the waters regulation, the question of when an individual finally becomes a candidate 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. Because none of the Commissioners are mind-readers, this evaluation necessarily requires that they "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." MUR 6928, Controlling Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 9. Plaintiff goes astray when it assumes that research into objective indicia of candidacy is easy, when it remains "a highly fact-intensive inquiry." *Id.*

Plaintiff mischaracterizes the controlling Commissioners' reasoning in MUR 5934. Plaintiff claims that "[i]n analyzing statements by Thompson about his potential candidacy, . . . the Commissioners did not try to deduce what Thompson meant by those statements or whether he subjectively believed them to be true, but instead looked at the meaning those statements conveyed to third parties." ECF No. 31 at 22-23. Not only does Plaintiff once again try to cleanly divide the inseparable "objective" and "subjective" elements of the testing-the-waters inquiry, but it also incorrectly describes the Statement of Reasons it purports to explain. In that case, the controlling Commissioners determined that Thompson's statement that he would "tell people that I am thinking about [running for President] and see what kind of reaction I get" was commensurate with an effort to "gauge the level of support that might be achieved and determine the viability of the candidacy"—*i.e.*, to use the objective response of potential supporters to come to a subjective determination about candidacy viability. Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn, and Ellen L. Weintraub at 2, MUR 5934 (Thompson) (Mar. 10, 2009). Similarly, Thompson is quoted as telling an audience that he was "testing the waters" and "the waters feel pretty warm to me." *Id.* Again, this is clearly an example of an individual evaluating the objective response of voters to come to a subjective determination about whether he should become a candidate.

Plaintiff claims that the controlling Commissioners' alleged mistake "underlay all the reasons those Commissioners gave for purporting to exercise the FEC's prosecutorial discretion." ECF No. 31 at 23. Not so—not only was the Statement of Reasons an accurate characterization of FEC precedents in this area, but it was also far from the only rationale offered for the Commission's decision. The controlling Commissioners observed that an inquiry into Scott's "subjective intent" in this matter would require investigating "core constitutionally protected

activity," *i.e.* Scott's advocacy concerning political issues, which is "not an action [they] could take lightly." AR at 212. They further explained 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.* The Commission correctly understood that any investigation in this matter would be time-consuming and resource-intensive and made its decision to invoke prosecutorial discretion on that basis.

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). Taking all these factors into account is difficult, which is why it is a task consigned to agency discretion. Here, the Commission evaluated the law correctly and applied it prudently.

D. Plaintiff Has Offered No Feasible Test for Evaluating "Pretext" in this Context

Plaintiff argues that agency enforcement dismissals based upon prosecutorial discretion must be reviewable for "pretext," or else "Commissioners can always pretextually invoke prosecutorial discretion, and every such invocation renders a decision completely unreviewable," thereby making "judicial review . . . a nullity" in the context of FECA. ECF No. 31 at 25. This contention, if taken seriously, reflects a rather dim view of the FEC's Commissioners, but also disregards traditional separation of powers considerations. In *Department of Commerce v. New York*, the Supreme Court specifically noted that "in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record. That principle reflects the recognition that further judicial inquiry into

'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." 139 S. Ct. 2551, 2573 (2019) (internal citation omitted). Plaintiff has presented no evidence suggesting that a "judicial inquiry into 'executive motivation'" is warranted here. *Id.* Moreover, *Department of Commerce* involved a challenge to agency rulemaking, rather than an agency's dismissal of an enforcement action on the grounds of prosecutorial discretion. The two situations are not analogous.

While dressed up in the legal language of "pretext" and "reviewability," what Plaintiff really asks the Court to do is accept its contention that the controlling Commissioners have lied and that their stated reasons for invoking prosecutorial discretion were disingenuous. This would be an extraordinary leap. As the Supreme Court explained, "we have recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers.' On a 'strong showing of bad faith or improper behavior,' such an inquiry may be warranted and may justify extra-record discovery." *Dep't of Com.*, 139 S. Ct. at 2573-74; *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("[S]uch inquiry into the mental processes of administrative decisionmakers is usually to be avoided" and "there must be a strong showing of bad faith or improper behavior before such inquiry may be made").

Plaintiff cannot seriously believe that extra-record discovery in this matter would yield any evidence that the controlling Commissioners acted in bad faith or behaved improperly. It has certainly presented no "significant showing … that [Plaintiff] will find material in the agency's possession indicative of bad faith or an incomplete record." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd*. 663 F.3d 476, 479 (D.C. Cir. 2011). The full administrative record has been produced and the controlling Statement of Reasons speaks for itself—the Commissioners' decision to rely on prosecutorial discretion was explained in reasonable terms in reliance upon the longstanding precedent of *Heckler v. Chaney*. Plaintiff claims that *CREW 2021* differentiated between FEC dismissals that are "genuinely based on prosecutorial discretion" and those that are

ostensibly not, ECF No. 31 at 24-25, but no such distinction appears on the face of the opinion. The rule the *CREW 2021* court laid out is black-and-white: "When a Commission decision rests even in part on prosecutorial discretion . . . we cannot review it under the 'contrary to law' standard." 993 F.3d at 884-85. That clear standard leaves no wiggle room.

But no matter whether agency prosecutorial discretion dismissals are reviewable for "pretext" as a purely legal matter, there is absolutely nothing in the present record that suggests the controlling Commissioners acted in bad faith in dismissing Plaintiff's administrative complaint. Once again, Plaintiff confuses a policy disagreement with a cognizable claim—it simply disagrees with the Commission's decision to dismiss its complaint.

III. The FEC's Dismissal of Plaintiff's Complaint was Lawful

Plaintiff concludes by identifying several alleged legal errors in the Commission's consideration and dismissal of its administrative complaint, none of which are correctly characterized as errors.

A. The Commission Did Not Make Any Legal Errors

Plaintiff incorrectly claims that its "coordinated-communications allegations presented an independent legal issue from [its] other claims[,]" and therefore could have still been investigated even if its other claims "failed on the merits." ECF No. 31 at 25-26. But the controlling Commissioners explained that an investigation in this matter "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. Even if implicating different legal questions, the various claims in Plaintiff's administrative complaint were not separable because substantial agency resources would have to have been expended to assess their veracity, thereby justifying the Commission's exercise of prosecutorial discretion.

Plaintiff characterizes the dismissal as an "attempt" to invoke prosecutorial discretion, ECF No. 31 at 26, but it was a successful one. As explained *supra*, it is not necessary for the full

Commission—or even a majority of four Commissioners—to choose to exercise prosecutorial discretion for that decision to be legally effective. "[T]he members who voted against proceeding further . . . established the official position of the Commission on the [administrative respondent's] matter and *definitively foreclosed further action* against [administrative respondent] on [administrative complainant's] complaint." *CREW 2021*, 993 F.3d at 898. The Statement of the three controlling Commissioners is sufficient.

B. The Commission was Justified in Relying Upon the Hazelwood Affidavit

Plaintiff objects to the Commission's reliance on an affidavit submitted by Blaise Hazelwood, executive director of New Republican PAC, as unreliable. ECF No. 31 at 26-27. In support of this argument Plaintiff cites *La Botz v. FEC*, 889 F. Supp. 2d 51, claiming that case stands for the proposition that affidavits should be discounted when "'written in summary fashion,' [] produced after the FEC's inquiry had commenced, and [] contradicted by some contemporaneous evidence." ECF No. 31 at 26-27 (quoting 889 F. Supp. 2d at 61-62). But the court in *La Botz* identified "two serious flaws" with the affidavit it was reviewing: It was "unclear from the face of the affidavit why the declarant has first-hand knowledge of the assertions or is otherwise competent to testify to such[,]" and it "was only submitted after the FEC inquiry had commenced." 889 F. Supp. 2d at 61-62.

The Hazelwood affidavit is easily distinguishable on these metrics. Beginning in February 2018, two months before Scott's declaration of candidacy, Ms. Hazelwood "made all decisions regarding New Republican PAC's operations," giving her ample first-hand knowledge from which to testify concerning PAC operations. AR at 73 ¶ 3. And although the Hazelwood affidavit was dated after the start of the FEC inquiry in this matter, AR at 74, unlike in *La Botz* there is no "contemporaneous document in the record [that] contradicts the FEC's conclusion." 889 F. Supp. 2d at 62. Furthermore, although the *La Botz* court held that the FEC dismissal there was not based on substantial evidence and remanded the matter to the agency, it specifically noted that "a denial

of La Botz's complaint based on prosecutorial discretion might be a wise use of the FEC's limited resources." *Id.* at 63, n.6. Hence, unlike in *La Botz*, here the Commission here relied upon a substantially more reliable affidavit and properly exercised its prosecutorial discretion to dismiss an administrative complaint.

C. The Commission Adequately Explained Its Reasons for Dismissing Plaintiff's Coordinated Communications Claim

Plaintiff claims that "the controlling Commissions' Statement of Reasons offered no valid justification for the dismissal of ECU's coordinated-communications allegations." ECF No. 31 at 28. In fact, the Statement of Reasons offers at least two explanations specifically referencing that claim. First, the First General Counsel's Report in this matter "recommended taking no action at this time regarding . . . [the allegation that] communications disseminated by New Republican PAC constituted illegal coordination with Scott's allegedly untimely-filed campaign." AR at 203 n.1. Additionally, the sworn affidavit submitted by the PAC's executive director stated that "she had 'not spoken with, or otherwise communicated with, Governor Rick Scott about any matters pertaining to the plans, activities, or strategies of New Republican PAC[.]'" *Id.* at 207. These were sufficient reasons for rejecting the coordinated communications claim. Just because Plaintiff disagrees with the explanation offered does not mean the Commission failed to offer one.

D. Plaintiff's Remaining Arguments Are Meritless

Plaintiff concludes by arguing once again that "the controlling Commissioners' attempt to invoke the FEC's prosecutorial discretion cannot justify the dismissals[,]" and that the dismissal violates the "contrary-to-law standard." ECF No. 31 at 29. The controlling Commissioners' decision to invoke prosecutorial discretion, as explained in their Statement of Reasons, was premised on a variety of factors applicable to *each* of Plaintiff's claims. For example, the controlling Commissioners noted that "the Commission is obligated to make difficult decisions about whether or not to enforce against Respondents in Matters nearing the expiration of the statute

of limitations." AR at 212. This is a prudential consideration based upon determinations of "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" which is properly within the agency's discretion per *Heckler v. Chaney*. 470 U.S. at 831-32.

Finally, in invoking the contrary-to-law standard Plaintiff once again confuses agency rulemaking with enforcement actions. The two contexts are different, and therefore warrant differing levels of judicial deference. As the D.C. Circuit has consistently and unambiguously explained, "[w]hen a Commission decision rests even in part on prosecutorial discretion . . . we cannot review it under the 'contrary to law' standard." *CREW 2021*, 993 F.3d at 884-85. "[F]urther judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." *Dept' of Com.*, 139 S. Ct. at 2573. Plaintiff clearly believes that this legal standard is flawed and needs to be reevaluated, but that does not change the applicable law.

CONCLUSION

For the foregoing reasons, Intervenor-Defendant's Cross-Motion for Summary Judgment should be granted.

Dated: February 1, 2022

Respectfully submitted,

/s/*Jason Torchinsky*
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CERTIFICATE OF SERVICE

I certify that on February 1, 2022, I served the foregoing on all counsel of record through this Court's CM/ECF system. I further certify that on February 2, 2022, I served the foregoing on the FEC by USPS First Class mail.

/s/ Jason Torchinsky