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 **Memorandum of Points and Authorities in Support of (Renewed) Motion to Dismiss**

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

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Intervenor-Defendant New Republican PAC respectfully moves to dismiss the Complaint filed by End Citizens United PAC for lack of standing and lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.[1] In support of its Motion, Intervenor-Defendant submits as follows.

I. INTRODUCTION

Plaintiff seeks judicial review of the Federal Election Commission's ("FEC") dismissal of its administrative complaints alleging that New Republican PAC made prohibited and excessive in-kind contributions to Rick Scott for Florida in the form of coordinated communications, and that now-Senator Rick Scott impermissibly raised non-federal funds for New Republican PAC. Plaintiff's administrative complaints alleged that Senator Scott may have used non-federal funds (*i.e.*, "soft money") to support his candidacy, that New Republican PAC may have raised and spent non-federal funds, and that New Republican PAC may have made coordinated communications resulting in excessive in-kind contributions to Rick Scott for Florida.

Plaintiff's complaint must be dismissed for two separate reasons. *First*, Plaintiff lacks Article III standing to bring suit under 52 U.S.C. § 30109(a)(8). *Second*, even if Plaintiff had standing, which it does not, the Court still lacks subject matter jurisdiction because the FEC's decision to dismiss the underlying administrative complaints rested on the exercise of its prosecutorial discretion, which is not subject to judicial review. Accordingly, New Republican PAC moves this Court to dismiss Plaintiff's Complaint. *See* Fed. R. Civ. P. 12(b)(1).

The Federal Election Campaign Act of 1971, as amended ("FECA"), authorizes "[a]ny party aggrieved by an order of the Commission dismissing a complaint" to seek review in this

[1] As the Intervenor previously filed an Answer to comply with Fed. R. Civ. P. 24(c), (ECF No. 15); *see also* Minute Entry (Nov. 2, 2021), this Court should, if it deems necessary, accept this Motion to Dismiss as a Motion for Judgment on the Pleadings pursuant to Rule 12(c).

Court, 52 U.S.C. § 30109(a)(8)(A), but such party must make a separate showing of Article III standing. FECA does not confer standing. In some circumstances, an "informational injury" suffices to confer Article III standing, but the law of this circuit is clear that a desire for information about whether FECA has been violated, *i.e.*, a legal determination, is insufficient to support standing. Similarly, a desire to obtain information that has already been disclosed does not support standing. Here, Plaintiff seeks either (i) legal determinations that previously disclosed transactions were unlawful, or (ii) information about relationships for which no disclosure is statutorily required. Accordingly, Plaintiff does not allege a legally cognizable injury sufficient to confer Article III standing. This Court therefore lacks subject matter jurisdiction and Plaintiff's complaint should be dismissed.

In addition, "a Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review." *Citizens for Responsibility & Ethics in Washington v. FEC*, 993 F.3d 880, 884 (D.C. Cir. 2021) ("*CREW (2021)*"). In the present matter, the controlling Commissioners expressly invoked and exercised their prosecutorial discretion as a distinct and independent basis for their decision to dismiss the Plaintiff's administrative complaint. Thus, even if Plaintiff did have standing, the underlying administrative matter is not subject to judicial review. Accordingly, the Court lacks subject matter jurisdiction.

The Court should grant this motion to dismiss for lack of standing and/or because the underlying administrative decision is not subject to judicial review.

II. BACKGROUND

A. Statutory and Regulatory Background

The FEC is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. *See generally*

52 U.S.C. §§ 30106, 30107, 30108. The FEC is authorized to undertake investigations of possible violations of FECA, and it may also institute a civil action for relief if it is unable to correct or prevent a violation of FECA pursuant to its administrative enforcement processes. *Id*. §§ 30109(a)(2), 30109(a)(6)(A).

Any person who believes a violation of FECA has occurred may file an administrative complaint with the FEC. *Id*. § 30109(a)(1). After reviewing the complaint and any response(s) filed by the respondent(s), the Commission then considers whether there is "reason to believe" a violation of FECA occurred. *Id*. § 30109(a)(2). If at least four of the agency's Commissioners vote to find that such "reason to believe" exists, the FEC may undertake an investigation into the alleged violation. *Id*. §§ 30106(c), 30109(a)(2). Importantly, if at least four Commissioners do not vote to find "reason to believe," the FEC dismisses the complaint. After at least four Commissioners vote to find "reason to believe" and the agency conducts an investigation, the FEC must determine by a vote of at least four Commissioners whether there is "probable cause to believe" a violation occurred. *Id*. §§ 30109(a)(4)(A)(i), 30106(c). If the FEC votes to find "probable cause," it is required to correct or prevent the violation and to attempt to enter into a conciliation agreement with the respondent(s). *Id*. § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement with the respondent(s), it may institute a civil enforcement action in federal district court. *Id*. § 30109(a)(6)(A).

If at any point in this process the FEC determines that no violation occurred or decides to dismiss the complaint, the Act authorizes limited judicial review of the Commission's dismissal decision. *Id.* § 30109(a)(8)(A). Whether a dismissal results from the votes of four or more Commissioners, or from an evenly divided 3-3 vote, the same limited review applies. *FEC v. National Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). An administrative

complainant must file suit to challenge a dismissal "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B).

The district court's review of a Commission decision to dismiss a complaint is limited in scope. "A court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the Act . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)). The sole remedy available to the district court is to declare "that the dismissal of the complaint . . . is contrary to law" and issue an order "direct[ing] the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). In cases where the FEC's dismissal is the result of a divided vote, judicial review is based on the reasoning of the Commissioners who voted to dismiss the complaint because "those Commissioners constitute a controlling group for purposes of the decision" since their "rationale necessarily states the agency's reasons for acting as it did." *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476; *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW (D.C. Cir. 2018)*") ("[F]or purposes of judicial review, the statement or statements of those naysayers – the so-called 'controlling Commissioners' – will be treated as if they were expressing the Commission's rationale for a dismissal[.]").

B. Factual Background

New Republican PAC is an independent-expenditure-only political committee, more commonly known as a "Super PAC," that is registered with the FEC and reports its activity to the FEC in regular financial activity reports. Rick Scott for Florida is the principal campaign committee of Senator Rick Scott of Florida.

On or about April 10, 2018, End Citizens United PAC filed an administrative complaint with the FEC against New Republican PAC, Rick Scott for Florida, and now-Senator Rick Scott. Admin. Compl., MUR 7370, (ECF No. 1-1 at 1) (AR 001-026).[2] End Citizens United PAC filed a supplemental administrative complaint with the FEC against the same administrative respondents on or about April 17, 2018. Admin. Compl., MUR 7370, (ECF No. 1-2 at 1) (AR 027-034). The FEC designated this complaint and its supplement as Matter Under Review ("MUR") 7370. This administrative complaint alleged that the named respondents had violated various provisions of FECA.

On or about June 18, 2018, New Republican PAC filed a response with the FEC in MUR 7370. New Republican PAC Response to MUR 7370 (Ex. 1, ECF No. 9-2) (AR 063-075).[3] Rick Scott for Florida filed a response with the FEC in MUR 7370 on or about June 14, 2018. Rick Scott for Florida Response to MUR 7370 (Ex. 2, ECF No. 9-3) (AR 053-062). New Republican PAC and Rick Scott for Florida filed separate responses, each of which argued that the administrative complaint was incorrect and that the respondents had not violated any provision of FECA.

On or about September 5, 2018, End Citizens United PAC filed a second administrative complaint raising related allegations against the same administrative respondents. Second Admin. Compl. (Ex. 3, ECF No. 9-4) (AR 076-083). This second administrative complaint was designated MUR 7496. The second administrative complaint made further allegations of violations of FECA.

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[2] In the interest of clarity and the Court's convenience, all citations to the exhibits referenced herein will be to the Administrative Record—joint appendix pursuant to D.D.C. Local Rule 7(n) forthcoming—as well as to the exhibits already filed in this matter, including to Intervenor's Memorandum of Points and Authorities in Support of its Motion to Intervene.

[3] To prevent confusion, Intervenor-Defendant used numbers in identifying its exhibits as Plaintiff used letters in its Complaint.

On or about October 23, 2018, New Republican PAC filed a response with the FEC in MUR 7496. New Republican Response to MUR 7496 (Ex. 4, ECF No. 9-5) (AR 095-114). On or about November 9, 2018, Rick Scott for Florida filed a response with the FEC in MUR 7496. Rick Scott for Florida Response to MUR 7496 (Ex. 5, ECF No. 9-6) (AR 115-119). Again, New Republican PAC and Rick Scott for Florida filed separate responses, each of which argued that the administrative complaints were incorrect and that the respondents had not violated any provision of FECA.

The FEC consolidated MUR 7370 and MUR 7496 for consideration, and OGC presented its report and recommendations in the matter to the FEC approximately two years later, in OGC's First General Counsel's Report, on or about December 2, 2020. OGC First General Counsel's Report (Ex. 6, ECF No. 9-7) (AR 124-185). OGC recommended that the FEC:

> (1) find reason to believe that Rick Scott violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file his Statement of Candidacy;
>
> (2) find reason to believe that Rick Scott for Florida violated 52 U.S.C. §§ 30103(a) and 30104 by failing to timely file a Statement of Organization;
>
> (3) find reason to believe that New Republican PAC violated 52 U.S.C. § 30125(e) by soliciting, receiving, directing, transferring, or spending non-federal funds;
>
> (4) take no action at this time as to the allegation that Rick Scott violated 52 U.S.C. §§ 30116(f), 30118(a), and 30125(e) by accepting impermissible and excessive in-kind contributions in the form of coordinated communications;
>
> (5) take no action at this time as to the allegation that Rick Scott for Florida violated 52 U.S.C. §§ 30104(b), 30116(f), 30118(a), and 30125(e) by accepting and failing to report

impermissible and excessive in-kind contributions in the form of coordinated communications; and

(6) take no action at this time as to the allegation that New Republican PAC violated 52 U.S.C. §§ 30104(b), 30116(f), 30118(a), and 30125(e) by making and failing to report impermissible and excessive in-kind contributions in the form of coordinated communications.

(Ex. 6, ECF No. 9-7 at 27-28) (AR 149-150).

Under the FECA, "[i]f 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." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015). Accordingly, "[t]he FEC . . . must dismiss the administrative complaint when the members deadlock three-to-three because 'under FECA, the FEC may pursue enforcement only upon an affirmative vote of 4 of its members.'" *Citizens for Responsibilities & Ethics in Washington v. FEC*, 316 F. Supp. 3d 349, 416-17 (D.D.C. 2018) (quoting *Citizens for Responsibilities & Ethics in Washington v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018)). This so-called "deadlock dismissal" is a feature of the statute that has been explicitly recognized by the D.C. Circuit. *See*, *e.g.*, *CREW (2021)*, 993 F.3d at 891 (noting the D.C. Circuit's "previous cases, which have recognized the possibility of 'deadlock dismissals,' namely dismissals resulting from the failure to get four votes to proceed with an enforcement action").

On May 20, 2021, the FEC divided 3-3 on a motion to approve the recommendations made in the OGC's First General Counsel's Report (and set forth above). Fed. Election Comm'n, *Certification*, MURs 7370 and 7496 (signed May 28, 2021) (Ex. 7, ECF No. 9-8) (AR 186-187).

Commissioners Broussard, Walther, and Weintraub voted in favor of the motion. Commissioners Cooksey, Dickerson, and Trainor voted against the motion.

On June 10, 2021, the FEC voted on the matters again. A motion was made to:

(1) dismiss the allegation under *Heckler v. Chaney* [470 U.S. 821 (1985)] that Rick Scott violated the FECA by failing to timely file his Statement of Candidacy;

(2) dismiss the allegation under *Heckler v. Chaney* that Rick Scott for Florida violated 52 U.S.C. §§ 30103(a) and 30104 by failing to timely file a Statement of Organization;

(3) find no reason to believe that New Republican PAC violated 52 U.S.C. § 30125(e) by soliciting, receiving, directing, transferring, or spending non-federal funds;

(4) dismiss the allegation that Rick Scott violated 52 U.S.C. § 30125(e) by soliciting, receiving, directing, transferring, or spending non-federal funds;

(5) dismiss the allegation that Rick Scott violated 52 U.S.C. §§ 30116(f), 30118(a), and 30125(e) by accepting impermissible and excessive in-kind contributions in the form of coordinated communications;

(6) dismiss the allegation that Rick Scott for Florida violated 52 U.S.C. §§ 30104(b), 30116(f), 30118(a), and 30125(e) by accepting and failing to report impermissible and excessive in-kind contributions in the form of coordinated communications;

(7) dismiss the allegation that New Republican PAC violated 52 U.S.C. §§ 30104(b), 30116(a), 30118(a), and 30125(e) by making and failing to report impermissible and excessive in-kind contributions in the form of coordinated communications; and

(8) close the file.

Fed. Election Comm'n, *Certification*, MURs 7370 and 7496 (signed June 14, 2021) (Ex. 8, ECF No. 9-9) (AR 188-189).

This motion failed by a vote of 3-3. (AR at 188). Commissioners Cooksey, Dickerson, and Trainor voted in favor of the motion. Commissioners Broussard, Walther, and Weintraub voted against the motion. In light of their deadlock, the Commissioners then voted 5-1 to "close the file." (AR at 189). Commissioner Weintraub dissented in this latter vote. This 5-1 vote to close the file formally ended the FEC's consideration of the matter with no action taken against the administrative respondents.

After the Commission voted to close the file, the three Commissioners who voted *against* adopting OGC's recommendations, and *against* pursuing the matter further, explained their votes in a written Statements of Reasons dated July 21, 2021. Fed. Election Comm'n, MUR 7370 and 7496, *Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor III* (Ex. 9, ECF No. 9-10) (AR 203-213). This explanation from Commissioners Cooksey, Dickerson, and Trainor serves as the "Controlling Statement of Reasons" in this matter for purposes of judicial review. *See Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) ("[W]hen … the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why."); *Citizens for Responsibility & Ethics in Washington v. FEC*, 316 F. Supp. 3d at 417 ("*CREW (D.D.C. 2018)*") ("[T]he controlling Commissioners must provide a statement of their reasons for their vote in cases of deadlock[.]").

In their Controlling Statement of Reasons, Commissioners Cooksey, Dickerson, and Trainor explained that they voted to dismiss the Plaintiff's administrative complaints because "neither the wise use of Commission resources nor the available evidence supported such a sweeping approach [as recommended by the FEC's Office of General Counsel]. Accordingly, we 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*." (Ex. 9, ECF No. 9-10 at 3) (AR at 204). The controlling Commissioners further explained that "we determined that this Matter merited the invocation of our prosecutorial discretion," and:

> Moreover, we would have been authorizing an expensive and resource-consuming investigation while the Commission is still working through a substantial backlog of cases that accumulated while it lacked a quorum. As a result, 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. In the instant case, we were unable to justify the commitment of the Commission's scarce enforcement resources to such a lengthy and cumbersome investigation on the basis of such a thin evidentiary reed. Accordingly, as regards Rick Scott's alleged failure to timely file his candidacy and committee paperwork, we invoked our prosecutorial discretion pursuant to *Heckler v. Chaney*.

(AR at 212).

The Commissioners also explained that their decision to find no "reason to believe that New Republican violated the soft money ban" reflected their conclusion that "the evidence marshaled by OGC [did] not rise to the level of the [reason to believe] standard," and followed from, and was intertwined with, their decision to exercise prosecutorial discretion with respect to alleged violations by Senator Scott because "whether or not a soft money violation occurred depends on whether an individual is a 'candidate' within the meaning of [FECA]." (AR at 207-208); *see also* (AR at 209) ("Under the Act, New Republican can commit a soft money violation only if Scott is a candidate. But if Scott was not a candidate, then there can be no soft money violation."). With respect to when Senator Scott's candidacy began, the Commissioners found insufficient evidence that it began earlier than was declared and concluded, "we were unable to justify the commitment of the Commission's scarce enforcement resources to such a lengthy and cumbersome investigation on the basis of such a thin evidentiary reed." (AR at 212).

End Citizens United PAC filed their complaint in this Court on August 9, 2021, pursuant to 52 U.S.C. § 30109(a)(8). New Republican PAC moved to intervene on October 8, 2021, and simultaneously filed a proposed Answer and Motion to Dismiss. (ECF No. 9). Plaintiff then filed an Affidavit of Default, (ECF No. 11), which the clerk entered on November 2, 2021, (ECF No. 12). Also on November 2, 2021, the Court granted New Republican's Motion to Intervene, and ordered that both the Motion to Dismiss and the Proposed Answer be filed by the clerk. (Minute Order, Nov. 2, 2021); *see also* (ECF No. 14); (ECF No. 15). Subsequently, Plaintiff and Intervenor-Defendant met and conferred regarding case scheduling and other matters and filed a notice with the Court of the same. (ECF No. 18). In the Joint Meet and Confer Statement, Plaintiff and Intervenor-Defendants agreed that, *inter alia*, Intervenor's Motion to Dismiss should be held in abeyance pending the FEC serving the administrative record on the parties and filing a certified list of contents of the administrative record with the Court within 30 day of the Court's order. *Id.* at ¶¶ 2-3. The Court granted the motion the same day. (Minute Order, November 12, 2021). Thirty days thereafter, on December 13, 2021, the FEC filed a certified list of the administrative record with the Court and served the record upon the parties. *See* (ECF No. 19). Having reviewed the administrative record, Intervenor now files this Renewed Motion to Dismiss Plaintiff's Complaint.

III. ARGUMENT

A. Plaintiff Lacks Article III Standing.

Plaintiff lacks standing to challenge the FEC's dismissal of the administrative complaints. Plaintiff alleges that the FEC's dismissal of its administrative complaints was arbitrary, capricious, and contrary to law. While FECA provides that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party … may file a petition with the United States District Court for the District of Columbia," 52 U.S.C. § 30109(a)(8)(A), this provision does

not confer Article III standing on any such party. "Injury in fact is a constitutional requirement, and '[i]t is settled that 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. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)). Accordingly, the "party aggrieved" must make a separate showing of Article III standing. *See Common Cause*, 108 F.3d at 419 ("Section [30109(a)(8)(A)] does not confer standing; it confers a right to sue upon parties who otherwise already have standing.").

As the Supreme Court explained, "to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Additionally, "[i]n those cases where 'a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*' it is substantially more difficult to establish injury in fact." *Common Cause*, 108 F.3d at 417 (quoting *Lujan*, 504 U.S. at 562).

Plaintiff advances two theories of standing in its Complaint, "competitive disadvantage standing" and "informational standing," but neither applies here.

1. Plaintiff's "Competitive Disadvantage" Claims Are Insufficient to Confer Article III Standing.

Plaintiff attempts to argue that it has standing based on a "competitive disadvantage" theory that has no applicability to the facts of this case. According to the Plaintiff, the FEC's "refusal to enforce the law . . . allows [Plaintiff's] political opponents, Rick Scott, the Scott Campaign, and

New Republican PAC, to raise money for a super PAC in violation of federal law, placing Plaintiff (which [according to Plaintiff] always seeks to comply with federal law) at a competitive disadvantage and forcing Plaintiff to spend its resources countering its opponents' illegally raised funds." Compl. (ECF No. 1 ¶ 10). This allegation of harm appears to be an attempt to invoke the "competitive" standing theory recognized by the D.C. Circuit in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). However, as explained below, the "competitive" standing theory recognized in *Shays* has no applicability here. Furthermore, the D.C. Circuit has already held that a Plaintiff who challenges a FEC dismissal cannot base standing on a claim "that he was 'forced to compete' in an 'illegally structured campaign environment' because his opponents were flouting election laws without suffering any consequences from the FEC." *Nader v. FEC*, 725 F.3d 226, 228 (D.C. Cir. 2013).

In *Shays*, Congressmen Shays and Meehan argued that certain regulations adopted by the FEC to implement provisions of the Bipartisan Campaign Finance Act of 2002 ("BCRA") "infringe[d] their BCRA-protected interest in BCRA-compliant elections." *Shays*, 414 F.3d at 84. More specifically, both Members of Congress asserted that "if any of the campaign finance reforms embodied in BCRA is subverted, eroded, or circumvented *by the Commission's implementing regulations*, I will be forced once again to raise money, campaign, and attempt to discharge my important public responsibilities in a system that is widely perceived to be, and I believe in many respects will be, significantly corrupted by the influence of special-interest money." *Id*. (quoting Shays and Meehan Declarations). In short, the two plaintiffs alleged "that under FEC regulations permitting what BCRA prohibits, they suffer injury to their interest, protected by that statute, in seeking reelection through contests untainted by BCRA-banned practices." *Id*. The current litigation bears no resemblance to *Shays*.

First, there is no FEC regulation being challenged as incompatible with FECA. What Plaintiff challenges in this case is the FEC's dismissal of an enforcement matter on the basis of the agency's prosecutorial discretion. The *Shays* Court analogized the injury claimed by Representatives Shays and Meehan as having been previously recognized "when agencies adopt procedures inconsistent with statutory guarantees." *Id.* at 85. The dismissal of an enforcement action on the grounds of prosecutorial discretion, however, does not "set the rules of the game" as may regulations or administrative procedures. *Id*. In the present matter, the "rules of the game" are exactly the same as they were before the FEC dismissed Plaintiff's complaint. No administrative regulation or procedure has been adopted or amended, and the FEC has not acted to create or authorize "additional competitors and additional tactics." *Id*. at 86. Here, the FEC simply declined to pursue an enforcement matter, in part, on the basis of prosecutorial discretion. Accordingly, there is no agency action at issue that can be alleged to have "illegally structured the competitive environment" at the Plaintiff's expense.

Second, the Plaintiff is not a "competitor" for reelection and has no "competitive interest" protected by FECA. While Plaintiff views itself as a "political opponent" of the administrative respondents, it is simply another independent political committee. Plaintiff does not "compete" with any of the administrative respondents in any cognizable way.

The *Shays* Court explained that competitor standing in "politics" rarely exists: "[A]t least two lines of precedent (procedural rights and competitor standing cases) embody a principle that supports Shays's and Meehan's standing: that when regulations illegally structure a competitive environment – whether an agency proceeding, a market, or a reelection race – parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III." *Id.* at 87; *see also Hassan v. FEC*, 893 F. Supp. 2d 248, 254 n.6 (D.D.C. 2012)

(describing "so-called 'competitor standing' cases, in which already established candidates have been found to have standing to challenge an 'assertedly illegal benefit' being conferred upon someone with whom those candidates compete").

"Competitor" standing has only a narrow application to "political arena" cases, and Plaintiff cannot establish competitor standing in a case challenging the FEC's dismissal of an enforcement action on the basis of prosecutorial discretion.

2. Plaintiff's "Informational" Claims Are Insufficient to Confer Article III Standing

A plaintiff suffers an informational injury only when it "fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also Nader*, 725 F.3d at 230 ("*Akins* … establish[es] that litigants who claim a right to information allege the type of concrete injury needed for standing to bring a FECA claim if the disclosure they seek is related to their informed participation in the political process."). As the D.C. Circuit recently explained, "[t]he 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. & Democracy 21 v. FEC* ("*CLC & Democracy 21 (2020)*"), 952 F.3d 352, 356 (D.C. Cir. 2020) (*per curiam*) (quoting *EDF v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019)).

The D.C. Circuit has also specified that "the nature of the information allegedly withheld is critical to the standing analysis." *Common Cause*, 108 F.3d at 417. This principle applies to this case in two key ways. First, "a plaintiff does not suffer an injury in fact if it seeks only information that the applicable statute does not require to be disclosed." *Campaign Legal Ctr. v. FEC* ("*CLC (2017)*"), 245 F. Supp. 3d 119, 125 (D.D.C. 2017). *Second*, "where 'plaintiffs have all of the information they are entitled to pursuant to FECA,' their coming to court anyway makes

it 'apparent that what they really want is a legal determination' they have no standing to seek.'" *Campaign Legal Ctr. v. FEC*, 507 F. Supp. 3d 79, 84 (D.D.C. 2020) (quoting *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138, 148 (D.D.C. 2005)). A plaintiff does not suffer an informational injury where the plaintiff seeks only information that is *not* required to be disclosed or information that has already been disclosed.

a. Plaintiff Does Not Seek New Information to Be Disclosed

To establish an informational injury, "a plaintiff must espouse a view of the law under which the defendant (or an entity it regulates) is obligated to disclose certain information that the plaintiff has a right to obtain." *ASPCA v. Feld Entm't, Inc*., 659 F.3d 13, 23 (D.C. Cir. 2011). In cases following *Akins*, courts have recognized that the plaintiff in a Section 30109(a)(8)(A) lawsuit may have standing if the underlying matter is one in which FEC action may lead to new public disclosures that FECA requires the administrative respondent to make. *See, e.g.*, *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001) (plaintiffs "have failed to show that either they are directly deprived of any information or that the legal ruling they seek might lead to additional factual information"); *CREW (2017)*, 267 F. Supp. 3d at 54 (describing the standing requirement of "*Akins*, where the complainants had a cognizable injury because they sought to enforce a provision of the FECA that would make the target of the enforcement action subject to additional reporting requirements"). Thus, to establish standing under *Akins*, a Plaintiff must show that the information it seeks and has not received (1) is actually required to be disclosed under the relevant statutory provision, and (2) that the information has not already been disclosed in some other manner. The information identified in Plaintiff's complaint does not satisfy the requirements of *Akins*.

As noted above, "a plaintiff does not suffer an injury in fact if it seeks only information that the applicable statute does not require to be disclosed." *CLC (2017)*, 245 F. Supp. 3d at 125. For example, a plaintiff is not injured where it seeks only information such as an exact valuation of a mailing list because FECA does not require such disclosure. *See Citizens for Responsibility & Ethics in Washington v. FEC*, 401 F. Supp. 2d 115, 121 n.2 (D.D.C. 2005) ("*CREW (2005)*"); *Alliance for Democracy*, 362 F. Supp. 2d at 145; *see also CREW (2017)*, 267 F. Supp. 3d at 54 (holding that an advocacy group lacked standing to challenge FEC dismissal of alleged violation of FECA's "prohibition on pass-through contributions" because "nothing in the statute or regulatory regime" would have required the alleged violator to disclose such information).

While deprivation of information that is required to be disclosed pursuant to a statute may constitute an injury-in-fact, "a plaintiff lacks a cognizable informational injury where the information she seeks 'is already required to be disclosed' elsewhere and, pursuant to that obligation, 'reported in some form.'" *CLC (2020)*, 507 F. Supp. 3d at 84 (quoting *Wertheimer*, 268 F.3d at 1074-75). If "the plaintiffs already have access to everything they are entitled to under the FECA, their alleged 'informational injury' is not cognizable injury under the FECA, sufficient to satisfy the standing requirement." *Alliance for Democracy*, 362 F. Supp. 2d at 148-149 (internal citations omitted); *see also Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39, 48 (D.D.C. 2004) (finding no Article III standing where "plaintiffs already possess the information they claim to lack").

b. Plaintiff Has No Cognizable Legal Interest in Agency Legal Determinations

As has been repeatedly held, if the information a plaintiff seeks "is simply the fact that a violation of FECA has occurred," the plaintiff does not suffer an injury in fact under *Akins*. *Common Cause*, 108 F.3d at 417; *see also Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 47

(D.D.C. 2003) (Plaintiff "does not have a justiciable interest in the enforcement of the law"); *Wertheimer*, 268 F.3d at 1074 ("[T]he government's alleged failure to 'disclose' that certain conduct is illegal by itself does not give rise to a constitutionally cognizable injury."); *CLC & Democracy 21 (2021)*, 2021 U.S. Dist. LEXIS 31169, at *19 (quoting *Wertheimer*, 268 F.3d at 1075) ("[A] plaintiff has no legally cognizable interest in a 'legal conclusion that carries certain law enforcement consequences.'"); *CLC (2020)*, 507 F. Supp. 3d at 83 (quoting *Vroom v. FEC*, 951 F. Supp. 2d 175, 179 (D.D.C. 2013)) ("[A] plaintiff's mere 'desire for information concerning a violation of FECA' does not give rise to an Article III injury-in-fact."); *CREW (2017)*, 267 F. Supp. 3d at 55 ("[A]n interest in knowing or publicizing that the law was violated is akin to claiming injury to the interest in seeing the law obeyed, which simply does not present an Article III case or controversy").

Where a plaintiff seeks only a legal determination that a violation of the law has occurred, then what plaintiff really "desires is for the Commission to 'get the bad guys,'" and no standing exists. *Common Cause*, 108 F.3d at 418. As this Court previously explained: "Ask[ing] the FEC to compel information … in the hope of showing that [defendants] violated" the law "amounts to seeking disclosure to promote law enforcement," and an injury to such law-enforcement interest is merely a generalized grievance insufficient to confer standing." *CLC (2020)*, 507 F. Supp. 3d at 83 (quoting *Nader*, 725 F.3d at 230). Accordingly, "a plaintiff's inability to procure from the agency a 'legal determination' or 'legal conclusion that carries certain law enforcement consequences' does not amount to informational injury." *Id*. at 83-84.

Courts have held that a plaintiff seeks only a legal determination where the object of the plaintiff's lawsuit is to force the FEC to apply a certain legal characterization to an already-reported transaction. For example, in *Wertheimer*, the D.C. Circuit found no standing existed

where the plaintiff sought a determination that publicly disclosed expenditures were "coordinated." *Wertheimer*, 268 F.3d at 1074-75. Similarly, a plaintiff has no standing to seek a legal determination that previously reported expenditures exceeded applicable limits, *see Vroom*, 951 F. Supp. 2d at 178-79, should be treated as in-kind contributions, *see Citizens for Responsibility & Ethics in Wash. v. FEC*, 799 F. Supp. 2d 78, 88-89 (D.D.C. 2011), or that a contribution should be attributed to a different donor, *CREW (2017)*, 267 F. Supp. 3d at 54.

c. Plaintiff Here Seeks Only Legal Determinations or Information Not Required to be Disclosed Under FECA

In the present matter, "under the *Akins* test, [Plaintiff has] failed to show either that they are directly being deprived of any information or that the legal ruling they seek might lead to additional factual information." *Wertheimer*, 268 F.3d at 1074; *see also Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 345 (D.D.C. 2020) ("Plaintiff does not seek any presently unknown information that is otherwise subject to disclosure under FECA" and "therefore lacks standing to sue"). Rather, while Plaintiff alleges an "informational injury" from being "deprived of full disclosure" of various matters, what Plaintiff actually seeks is a legal determination that the administrative respondents violated FECA. The law of this circuit is clear that no standing exists for Plaintiffs who merely seek a different legal determination from the FEC.

According to Plaintiff, it has suffered "harm" from being "deprived of full disclosure" of five types of information: (1) when Scott in fact became a candidate; (2) the activities undertaken by Scott and his agents to control New Republican PAC; (3) the amounts raised and spent by Scott and New Republican PAC to further Scott's campaign before Scott declared his candidacy; (4) the nature of the ongoing relationship between New Republican PAC and the Scott campaign; and (5) whether New Republican PAC's expenditures should be deemed "coordinated" with the Scott

Campaign. See Compl., ECF No. 1 ¶ 11. As discussed in more detail below, none of Plaintiff's information-based allegations support Article III standing.

(1) "When now-Senator Scott became a candidate" is a legal determination

The question of when an individual "in fact became a candidate" is simply a legal determination, and, by itself, it is not a question that can lead to the disclosure of additional information. Senator Scott filed his Statement of Candidacy on or about April 9, 2018, while Plaintiff alleges he should have filed it earlier. Whether Plaintiff is correct is a legal determination that the FEC declined to make. Even if the FEC were to make that determination, no additional disclosures would result.

This Court previously determined that a "[p]laintiff[] cannot claim informational injury based solely on the absence of information as to when [a candidate] moved from testing the waters to mounting an undeclared campaign." *Campaign Legal Ctr. & Democracy 21*, 2021 U.S. Dist. LEXIS 31169 at *17. According to Plaintiff, Senator Scott qualified as a "candidate" before he declared his candidacy, meaning he should have filed a Statement of Candidacy earlier than he did. Plaintiff does not allege that this delay deprived them of any information, nor could they. Even if Plaintiff's theory were correct, which it is not, "FECA requires that 'all funds received or payments made in connection with' the testing-the-water exceptions 'be considered contributions or expenditures' under FECA and 'be reported in accordance with 11 C.F.R. [§] 104.3 in the first report filed by such candidate's principal campaign committee.' 11 C.F.R. § 101.3." *Id.* Plaintiff does not allege that either New Republican or Rick Scott for Florida failed to report any receipts or spending. Thus, a different legal determination regarding "when Scott in fact became a candidate" would carry with it no additional information required to be reported under FECA.

Accordingly, an alleged deprivation of information regarding when an individual "in fact became a candidate" is not an injury that confers Article III standing.

(2) FECA does not require disclosure of "activities undertaken by Scott and his agents to control New Republican PAC"

Plaintiff next alleges that it has been deprived of information regarding the "activities undertaken by Scott and his agents to control New Republican PAC." Compl., ECF No 1 ¶ 11. Plaintiff does not specify what "activities undertaken by Scott and his agents to control New Republican PAC" it believes would be disclosed were it to prevail—which is itself outcome determinative as to its standing—but regardless, FECA requires the disclosure of certain *campaign finance* information, not underlying conduct. Whatever "activities" the Plaintiff believes occurred, those activities are not themselves subject to any disclosure requirement under FECA. None of the statutory provisions of FECA referenced by Plaintiff would require the disclosure of this information were Plaintiff to prevail. As this Court has held, "a plaintiff does not suffer an injury in fact if it seeks only information that the applicable statute does not require to be disclosed." *CLC (2017)*, 245 F. Supp. 3d at 125.

At best, any alleged "activities undertaken by Scott and his agents to control New Republican PAC" would be evidence used by the FEC in reaching a legal conclusion regarding the legal consequences of such "control," which in turn could impact the legal classification of certain already-reported financial transactions. For example, *if* "Scott and his agents" "controlled" New Republican PAC, *then* certain New Republican PAC spending *might be* treated as "coordinated." *If* such "coordination" occurred, *then* a previously reported independent expenditure *might* be reclassified as an in-kind contribution. The possible reclassification of already-reported expenditures does not support standing.

In *Free Speech for People*, the plaintiff filed an administrative complaint with the FEC alleging violations of FECA in connection with payments made to Karen McDougal through a third party that were allegedly orchestrated by the Trump campaign. As the Court explained:

> [W]hat Plaintiff wants to know is whether the Trump Campaign, acting through Michael Cohen and possibly the President himself, coordinated with AMI to pay Karen McDougal. But in seeking such information, Plaintiff desires for the Commission to do no more than "get the bad guys;" that is, Plaintiff seeks a legal determination that the respondents engaged in a coordinated scheme to violate FECA.

Free Speech for People, 442 F. Supp. 3d at 343. In other words, the plaintiff lacked standing to seek information regarding the underlying relationships between the administrative respondents, including whether one or more respondent "controlled" another.

In this matter, the spending at issue has already been disclosed; Plaintiff simply wants the FEC to declare it "coordinated" and therefore determine that the administrative respondents violated the law. In other words, Plaintiff seeks only to "get" those whom it considers to be "the bad guys." In that way, Plaintiff's claim is just another way of alleging that it has been deprived of its preferred legal determination, and, as this Court recently made clear, "such claimed informational injury is insufficient to confer standing." *Free Speech for People*, 442 F. Supp. 3d at 343.

(3) Plaintiff seeks additional legal determinations that do not support standing.

Plaintiff seeks information regarding "the amounts raised and spent by Scott and New Republican PAC to further Scott's campaign before Scott declared his candidacy." Compl., ECF No. 1 ¶ 11. The amounts raised and spent by Senator Scott, his campaign committee, and New Republican PAC have already been disclosed. Plaintiff does not allege that any of the administrative respondents failed to file a required financial activity report, or that any respondent

filed an incomplete financial activity report. Rather, Plaintiff seeks a legal determination from the Commission that the administrative respondents violated the law and that certain already-reported expenditures should be classified differently.

Plaintiff does *not* allege that any spending by any of the administrative respondents that it believes was related to Senator Scott's campaign for U.S. Senate went unreported. Rather, Plaintiff alleges that certain already-reported New Republican PAC spending constituted an in-kind contribution to Senator Scott's campaign, and as a result, should be reported differently by New Republican PAC (and therefore declared illegal), with corresponding entries included on FEC reports filed by Rick Scott for Florida (which would also be declared illegal). All of the financial information pertinent to Plaintiff's claim has already been reported; Plaintiff seeks no *new* information required to be disclosed by statute and thus it lacks standing here.

This Court has addressed dismissals of administrative complaints alleging similar pre-candidacy spending violations. In *CREW (2011)*, this Court observed that the amounts spent were already known and that "what Plaintiffs want is a reclassification of [the PAC's] disbursements as 'in-kind contributions' under FECA." *CREW (2011)*, 799 F. Supp. 2d at 89. "As Plaintiffs' Amended Complaint demands only amended FEC filings to reclassify disbursements of which they are already aware, and which are already part of the public record, this Court cannot find that Plaintiffs have standing to bring their claim for wrongful dismissal" of the administrative complaint. *Id*. The present matter presents exactly the same issues, and the Plaintiff here lacks standing for exactly the same reasons.

(4) FECA does not require disclosure of "the nature of the ongoing relationship between New Republican PAC and the Scott campaign"

Plaintiff next claims it has been deprived of information regarding "the nature of the ongoing relationship between New Republican PAC and the Scott campaign." Compl., ECF No. 1 ¶ 11. Like the issue of "control" above, Plaintiff does not specify what information pertaining to "the nature of the ongoing relationship between New Republican PAC and the Scott campaign" it believes would be disclosed were it to prevail. Again, however, FECA requires the disclosure of certain *campaign finance* information, not underlying conduct. Whatever Plaintiff believes with respect to "the nature of the relationship" between the administrative respondents, the nature of the relationship is not itself subject to any disclosure requirement under FECA. Once again, "a plaintiff does not suffer an injury in fact if it seeks only information that the applicable statute does not require to be disclosed." *CLC (2017)*, 245 F. Supp. 3d at 125.

As is the case with information regarding "control," information regarding the nature of any relationship would be evidence used by the FEC in reaching a legal conclusion regarding how to classify certain spending, which in turn could have legal consequences with respect to already-reported financial transactions. However, that spending has already been disclosed; Plaintiff simply wants the FEC to declare it "coordinated" or otherwise in violation of applicable laws. *See Free Speech for People*, 442 F. Supp. 3d at 343 ("Plaintiff seeks a legal determination that the respondents engaged in a coordinated scheme to violate FECA."). The alleged injury Plaintiff claims to have suffered is simply another way of Plaintiff alleging that it has been deprived of its preferred legal determination on the question of coordination.

(5) "Whether New Republican PAC's expenditures should be deemed 'coordinated' with the Scott Campaign" is a legal determination

Finally, Plaintiff alleges it has been deprived of information regarding "whether New Republican PAC's expenditures should be deemed 'coordinated' with the Scott Campaign." Compl., ECF No. 1 ¶ 11. It has been settled law in this Circuit for 20 years that this kind of alleged informational injury does not confer standing. A plaintiff who seeks a determination from the FEC that certain expenditures are "coordinated" seeks only "a legal conclusion that carries certain law enforcement consequences." *Wertheimer*, 268 F.3d at 1075; *CLC & Democracy 21 (2021)*, 2021 U.S. Dist. LEXIS 31169, at *20 ("*Wertheimer* held that plaintiffs have no legally cognizable interest in labeling spending 'coordinated' if that spending has already been disclosed in some format."); *see also CLC (2020)*, 507 F. Supp. 3d 79 (following *Wertheimer*); *Free Speech for People*, 442 F. Supp. 3d 335 (following *Wertheimer*).

Plaintiff does not allege that any of the administrative respondents have failed to report any information required to be disclosed under FECA. Instead, Plaintiff seeks only a legal determination that expenditures *already reported* by New Republican PAC were "coordinated." Plaintiff has "no legally cognizable interest" in such a legal determination, and on the specific issue raised, this Court recently held that "plaintiffs lack standing to determine which of [Super PAC's] disbursements were coordinated with the [candidate's] campaign." *CLC & Democracy 21 (2021)*, 2021 U.S. Dist. LEXIS 31169, at *21.

B. Even If Plaintiff Has Standing, FEC Dismissals Based on Exercise of Prosecutorial Discretion Are Not Reviewable

Under D.C. Circuit precedent, Commission decisions to dismiss an administrative complaint on the basis of prosecutorial discretion, whether in whole or in part, are not subject to judicial review. "[A] commission decision that rests even in part on prosecutorial discretion cannot

be subject to judicial review." *CREW 2021*, 993 F.3d at 884. The Controlling Statement of Reasons, which provides the FEC's rationale for its dismissal of the administrative complaint, makes clear that the controlling bloc of Commissioners who voted to dismiss the underlying administrative complaint based their votes on the exercise of prosecutorial discretion. As such, this Court lacks jurisdiction to review the FEC's dismissal. See *CREW 2021*, 993 F.3d at 884; *see also CREW 2018*, 892 F.3d at 440 n.8 ("[E]ven if the APA is out of the picture, an agency's prosecutorial discretion is still presumptively immune from judicial review.").

As the D.C. Circuit has explained, "[f]ollowing [*Heckler v.*] *Chaney*, this court has held that if an action is committed to the agency's discretion under APA § 701(a)(2) – as agency enforcement decisions are – there can be no judicial review for abuse of discretion, or otherwise." *CREW (D.C. Cir. 2018)*, 892 F.3d at 441; *see also CREW (2021)*, 993 F.3d at 882 ("We cannot review the Commission's decision because it rests on prosecutorial discretion."); *Public Citizen v. FEC*, 2021 U.S. Dist. LEXIS 49769 at *15 (D.D.C. Mar. 17, 2021) ("[H]aving exercised their prosecutorial discretion to dismiss this matter, the Controlling Commissioners' analysis is not subject to judicial review.").

The D.C. Circuit's holding regarding the reviewability of FEC dismissals of enforcement matters on the basis of prosecutorial discretion applies regardless of the extent to which the agency's determination rests on prosecutorial discretion. "The Supreme Court has recognized that federal administrative agencies in general . . . and the Federal Election Commission in particular . . . have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." *CREW (D.C. Cir. 2018)*, 892 F.3d at 438. Thus, "even if some statutory interpretation could be teased out of the Commissioner's 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 441-442 (quoting *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994)); *see also CREW (2021)*, 993 F.3d at 882 ("Here, the Commissioners who voted against enforcement invoked prosecutorial discretion to dismiss CREW's complaint, and we lack the authority to second guess a dismissal based even in part on enforcement discretion."); *CREW (2019)*, 380 F. Supp. 3d at 41 ("Thus, because the Controlling Commissioners here invoked prosecutorial discretion in dismissing Plaintiffs' administrative complaint—a 'non-reviewable' action under *CREW/CHGO* —this Court cannot evaluate the 'reviewable legal rulings' contained in the Controlling Commissioners' statement of reasons.").

The three Commissioners who voted to dismiss the Plaintiff's administrative complaint did so on the basis of the agency's broad prosecutorial discretion to pursue or not pursue enforcement matters. The Controlling Statement of Reasons discusses the three Commissioners' reasons for invoking prosecutorial discretion. After describing OGC's recommended approach, the Commissioners explained: "[N]either the wise use of Commission resources nor the available evidence supported such a sweeping approach. Accordingly, we 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).

Following a thorough review of the allegations, evidence presented, and OGC's conclusions, the Commissioners explained:

> Ultimately, we determined that this Matter merited the invocation of our prosecutorial discretion. The only significant evidence of Scott's potential earlier candidacy was predicated on the fundraising and operational activities that occurred during his seven-month term as Chair. To probe his subjective intent during this period would have necessitated a wide-ranging, costly, and invasive investigation into both Scott and New Republican's activities during that period of time, and possibly after. As the Commission is the only agency whose enforcement docket "has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak[,] and associate for political purposes'"—this was not an action we could take lightly.

> Moreover, we would have been authorizing an expensive and resource- consuming investigation while the Commission is still working through a substantial backlog of cases that accumulated while it lacked a quorum. As a result, 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. In the instant case, we were unable to justify the commitment of the Commission's scarce enforcement resources to such a lengthy and cumbersome investigation on the basis of such a thin evidentiary reed. Accordingly, as regards Rick Scott's alleged failure to timely file his candidacy and committee paperwork, we invoked our prosecutorial discretion pursuant to *Heckler v. Chaney*.

(AR at 212) (footnotes omitted). As explained elsewhere in the Controlling Statement of Reasons, any conclusions regarding New Republican PAC's activities necessarily stem from the question of when Senator Scott's candidacy began. (AR at 209) (noting the "circularity" of OGC's recommendations because "[u]nder the Act, New Republican can commit a soft money violation only if Scott is a candidate. But if Scott was not a candidate, then there can be no soft money violation.").

That the Controlling Statement of Reasons also includes legal analysis of the merits of Plaintiff's administrative complaint and OGC's recommendations does not change the outcome; a FEC "decision [to dismiss] based *even in part* on prosecutorial discretion is unreviewable." *CREW (2021)*, 993 F.3d at 882 (emphasis added). In *CREW (2021)*, the D.C. Circuit held that the FEC's decision to dismiss for reasons of prosecutorial discretion was unreviewable even though the statement of reasons "featured only a brief mention of prosecutorial discretion alongside a robust statutory analysis." *Id*. at 883. "[A] Commission nonenforcement decision is reviewable only if the decision rests *solely* on legal interpretation." *Id*. at 884. If prosecutorial discretion serves as even one basis among many for dismissing a complaint, that decision is not reviewable. In the present matter, the Controlling Statement of Reasons includes far more than a mere "brief mention

of prosecutorial discretion," and it is readily apparent that prosecutorial discretion was a distinct and independent basis for the Commissioners' vote to dismiss.

As was the case in *CREW (2021)*, "[t]he statement of reasons issued by the controlling Commissioners explicitly relies on prosecutorial discretion" and "expresses discretionary considerations at the heart of *Chaney*'s holding." *Id*. at 885. For example, the Controlling Statement of Reasons expresses concerns regarding "the wise use of Commission resources," (AR at 204), the likely necessity of "a wide-ranging, costly, and invasive investigation" to pursue the evidence needed to proceed, (AR at 212), the wisdom of "authorizing an expensive and resource-consuming investigation while the Commission is still working through a substantial backlog of cases," *id.*, and the approaching expiration of the statute of limitations, *id*. These expressed concerns are consistent with the reasons identified for invoking prosecutorial discretion that were examined in *CREW (2021)*. The Commissioners' justification for exercising prosecutorial discretion far exceeds what is required to sustain that decision as unreviewable.

Accordingly, even if the Plaintiff did have standing to bring this suit, it would not be "entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *CREW (D.C. Cir. 2018)*, 892 F.3d at 441. Where judicial review is precluded, the Court must dismiss the Complaint.

IV. Conclusion

Plaintiff has not alleged an injury that confers Article III standing and the underlying FEC decision is not subject to judicial review. For either or both reasons, the Court should grant New Republican PAC's motion to dismiss.

Dated: December 27, 2021

Respectfully submitted,

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