**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| END CITIZENS UNITED PAC,<br><br>Plaintiff,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant,<br><br>and<br><br>NEW REPUBLICAN PAC,<br><br>Defendant-Intervenor. | Case No. 1:21-cv-2128-RJL |

**PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT**

Pursuant to Rules 55(b) and 56 of the Federal Rules of Civil Procedure, Plaintiff End Citizens United PAC respectfully moves this Court for the entry of default judgment or, in the alternative, summary judgment declaring that the Federal Election Commission ("FEC" or "Commission") acted contrary to law in dismissing Plaintiff's administrative complaints alleging that U.S. Senator Rick Scott, Rick Scott for Florida, and New Republican PAC violated the Federal Election Campaign Act.

Plaintiff brought this action on August 9, 2021, challenging the FEC's unlawful dismissals of Plaintiff's administrative complaints. *See* ECF No. 1. Service was effected on August 19, 2021, and the FEC's deadline to file a responsive pleading was October 18, 2021. *See* ECF Nos. 6-8. The Commission has failed to appear, answer, plead, or otherwise defend this action as required by the Federal Rules of Civil Procedure, and the Clerk of Court entered default against the FEC

on November 2, 2021. *See* ECF No. 12. New Republican moved to intervene as a defendant on October 15, 2021, *see* ECF No. 9, and the Court granted the motion on November 2, 2021, *see* Min. Order (Nov. 2, 2021).

As described in the accompanying memorandum of points and authorities, entry of default judgment or, in the alternative, summary judgment is appropriate because the administrative record establishes that the FEC's dismissals of Plaintiff's administrative complaints were contrary to law. Pursuant to 52 U.S.C. § 30109(a)(8)(C), Plaintiff asks this Court to declare that the dismissals were contrary to law and to direct the FEC to conform to that judgment within thirty days. Plaintiff also asks this Court to award Plaintiff its costs of $402 incurred in this action pursuant to 28 U.S.C. § 1920. A proposed order is attached.

Dated: December 27, 2021

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT**

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

## INTRODUCTION

Plaintiff End Citizens United PAC ("ECU") respectfully requests that the Court declare that the Federal Election Commission's ("FEC" or "Commission") dismissals of alleged campaign finance violations by U.S. Senator Rick Scott, Rick Scott for Florida ("Scott Campaign"), and New Republican PAC ("New Republican") were contrary to law.

To limit the risk and appearance of *quid pro quo* corruption, the Federal Election Campaign Act ("FECA" or the "Act") restricts the sources and amounts of contributions to federal candidates. FECA also requires candidates to file periodic financial disclosure reports that inform the electorate of who is spending money to influence their votes. Starting in 2017, Scott's nascent Senate campaign engaged in a blatant scheme to circumvent these important anti-corruption and pro-transparency laws. Scott illegally delayed declaring his candidacy with the FEC to avoid triggering FECA's requirements, while co-opting a super PAC to raise millions of dollars outside the Act's limits that would later be spent supporting his campaign.

Here is how the scheme worked: In May 2017, Scott, then Governor of Florida, became Chair of a moribund super PAC called New Republican. The super PAC, formed in 2013 ostensibly "to advance . . . ideas of what the next generation of Republicans . . . should represent," AR64, had received no contributions in more than a year and had made no independent expenditures—usually the raison d'être of such an entity—since the 2014 election cycle.

After becoming Chair, Scott quickly set about ramping up the operation. Scott brought on new staff borrowed from his previous roles; his former chief of staff and campaign manager, for example, became New Republican's executive director. In addition, the Scott-led super PAC contracted with a number of consultants who had previously worked with his campaigns.

Under Scott, New Republican became a fundraising dynamo. Within weeks of Scott's joining the organization, it raised over $275,000. By the end of 2017, it had brought in nearly $1.2 million in contributions, with a further $1.2 million following in the first quarter of 2018.

Curiously, however, this newfound financial clout did not translate into increased spending. When Scott entered his new role, New Republican purported to take on a new mission—to support then-President Trump's policies while rebranding the Republican Party—yet it did no more to advance this new goal than it did its original one. During Scott's time as Chair, New Republican continued not to make independent expenditures; the committee aired no issue ads and supported no candidates. Scott left the Chair position—although he did not sever all ties with the organization—by February 2018, but still the super PAC kept its financial powder dry.

All that changed when Scott announced his Senate campaign in April 2018. The day of Scott's announcement, New Republican rolled out a new website—prepared and paid for in advance—and a new objective: "the election of Rick Scott." AR26. This time, the super PAC meant it—New Republican spent millions on the 2018 election, almost all either in support of Scott or in opposition to Bill Nelson, his Democratic rival.

These facts make clear that, in taking charge of New Republican, Scott aimed to amass funds to support his eventual Senate campaign without having to declare his candidacy or comply with the limits on contribution amounts and sources set by FECA. Plaintiff ECU therefore filed two administrative complaints with the FEC, alleging that Scott; his principal campaign committee, Rick Scott for Florida; and New Republican had violated the Act by failing to timely file documentation of Scott's candidacy and required financial disclosures, by accepting funds that did not comply with FECA's contribution and disclosure restrictions (so-called "soft money"), and

by making or accepting unlawful excessive contributions in the form of coordinated communications.

In response to Plaintiff's administrative complaint, New Republican and Scott argued essentially that the super PAC's support of its erstwhile Chair was a coincidence. They claimed that Scott had not long planned to run for Senate, he did not fill New Republican with allies and use it to amass funds meant to support his eventual candidacy, and he and his campaign did not coordinate any of these developments with the super PAC he resurrected.

Remarkably, three FEC Commissioners (the "controlling Commissioners") purported to credit this argument—or, at least, to believe that the brazen FECA violations alleged were not worth pursuing—and, contrary to the recommendation of the agency's General Counsel, voted to dismiss ECU's claims at the preliminary reason-to-believe stage. Although the FEC's other three Commissioners voted to investigate the matter, the resulting 3-3 deadlock led to the complaints' dismissals.

This action challenges the controlling Commissioners' dismissals of Plaintiff's claims as contrary to law. The reasoning offered by the controlling Commissioners to explain the dismissals is so flawed and filled with distortions that the FEC voted *not* to appear in this action to defend it. Indeed, that reasoning runs counter to the evidence that was before the agency and was based on faulty legal analysis. Moreover, the controlling Commissioners' attempt to shield their decision from judicial review by invoking the FEC's prosecutorial discretion fails because the full agency voted *not* to exercise that discretion, the rationale for employing that discretion relied on faulty interpretations of FECA, and the invocation was pretextual. Plaintiff therefore respectfully requests that this Court grant its motion for default judgment or, in the alternative, summary judgment.

## STATEMENT OF THE CASE

### I. Statutory and Regulatory Background

#### A. FECA's Source and Amount Restrictions

Congress enacted FECA in response to the Watergate scandal and the "deeply disturbing" reports from the 1972 federal elections of contributors giving large amounts of money to candidates "to secure a political quid pro quo." *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam). To "limit the actuality and appearance of corruption resulting from large individual financial contributions," *id.* at 26, FECA restricts the sources and amounts of contributions made "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A)(i). For example, and relevant here, individuals may contribute no more than $2,900 per election to a federal candidate, and $5,000 per year to a political committee ("PAC").[1] *Id.* § 30116(a)(1)(A), (C). PACs generally may contribute no more than $5,000 per election to a candidate. *Id.* § 30116(a)(2)(A). And corporations are prohibited from contributing any amount to federal candidates and most PACs. *Id.* § 30118. Money subject to FECA's limits is colloquially called, "hard money." *See, e.g.*, *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 546 (D.C. Cir. 2019).

#### B. The Prohibition on Super PAC Contributions to Candidates

A "super PAC" is a type of political committee. Unlike other PACs, they are "permitted to fundraise largely uninhibited by FECA's source restrictions and contribution limitations so long as they make exclusively independent expenditures and do not coordinate with any candidate." *Campaign Legal Ctr.* [("CLC")] *v. FEC*, 520 F. Supp. 3d 38, 43 (D.D.C. 2021). Because super PACs can solicit and receive "soft money"—that is, contributions in unlimited amounts and from

[1] A PAC is any group of persons whose major purpose is the nomination or election of a federal candidate and that has contributed or spent at least $1,000 to influence a federal election. 52 U.S.C. § 30101(4)(A).

sources (like corporations) that FECA normally prohibits—they "may not make contributions to candidates . . . , including in-kind contributions such as coordinated communications."[2] FEC Advisory Op. 2017-10 (Citizens Against Plutocracy) at 2. Nor may candidates knowingly accept such excessive or prohibited contributions from super PACs. *See* 52 U.S.C. §§ 30116(f), 30118(a).

### C. Candidacy

FECA imposes various fundraising limits and disclosure requirements after an individual becomes a "candidate" under the Act. A candidate must file a Statement of Candidacy that designates her principal campaign committee within fifteen days. 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a). That committee, in turn, has ten days from its designation to file a Statement of Organization, 52 U.S.C. § 30103(a), and must thereafter file regular disclosure reports with the FEC, 52 U.S.C. § 30104(a); 11 C.F.R. § 104.1(a). These disclosure reports are important because they inform the electorate about sources of political speech. *See, e.g.*, *Stop This Insanity Inc. Employee Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) (emphasizing the "First Amendment rights of the public to know the identity of those who seek to influence their vote").

Under FECA, a "candidate" is "an individual who seeks nomination for election, or election to Federal office," and that status is triggered when an individual (or their agent) accepts or spends more than $5,000 for the purpose of influencing a federal election. 52 U.S.C. § 30101(2). While the Commission's "testing the waters" exemptions allow an individual to raise and spend more than $5,000 without becoming a candidate if that money is used solely to assess whether to

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[2] Under FECA, a contribution is "any gift . . . or deposit of money or anything of value made by any person for the purposes of influencing any [federal] election." 52 U.S.C. § 30101(8)(A). "Coordinated expenditures"—which are expenditures "made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents"—qualify as contributions. *Id.* § 30116(a)(7)(B). One type of coordinated expenditure—and therefore one type of contribution—is a "coordinated communication." 11 C.F.R. § 109.21(b).

commit to a possible run, those exemptions are unavailable to an individual who has already decided to become a candidate. *See* 11 C.F.R. §§ 100.72(b), .131(b).

FEC rules establish an objective inquiry to determine whether an individual has become a candidate. *See id.* §§ 100.72(b), .131(b); FEC Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) at 6; Factual and Legal Analysis at 7-8, MUR 5363 (Sharpton *et al.*) (Nov. 13, 2003). As part of that inquiry, the FEC considers a nonexhaustive list of "activities that indicate that an individual has decided to become a candidate." 11 C.F.R. §§ 100.72(b), .131(b). Among these activities is "rais[ing] funds in excess of what could reasonably be expected to be used for exploratory activities or undertak[ing] activities designed to amass campaign funds that would be spent after he or she becomes a candidate." *Id.* §§ 100.72(b)(2), .131(b)(2).

**D. The Soft-Money Ban**

FECA prohibits candidates from using "soft money" for their election campaigns; that is, candidates may not "solicit, receive, direct, transfer, or spend funds in connection with [a federal] election . . . unless the funds are subject to the [Act's] limitations, prohibitions, and reporting requirements." 52 U.S.C. § 30125(e)(1). The soft-money ban also applies to a candidate's agents and any entity (including any PAC) "directly or indirectly established, financed, maintained, or controlled by or acting on behalf of" a candidate. *Id.* "To determine whether a [candidate] directly or indirectly established, finances, maintains, or controls an entity" under § 30125(e)(1), the Commission considers ten nonexhaustive factors "in the context of the overall relationship between the [candidate] and the entity." 11 C.F.R. § 300.2(c)(2).

**E. The Statutory Framework for FEC Administrative Complaints**

Any person may file a complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). Based on the complaint and the FEC General Counsel's recommendations,

the Commission then votes whether to find "reason to believe" that the subject of the complaint committed a violation. *Id.* § 30109(a)(2). A decision to find reason to believe, which requires four affirmative votes, does not trigger any penalties; rather, it initiates further investigation by the FEC. *See id.*; Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007) (reason to believe requires that "the available evidence . . . is at least sufficient to warrant conducting an investigation").

Following a reason-to-believe investigation, and after considering input from the agency's General Counsel and the complaint's respondent, the FEC determines whether there is "probable cause to believe that [the respondent] has committed . . . a [FECA] violation." *Id.* § 30109(a)(3)-(4). If four Commissioners vote to find probable cause, the agency may seek civil penalties either through a conciliation agreement with the respondent or in federal court. *Id.* § 30109(a)(4)-(6).

If, at any stage, fewer than four Commissioners vote to proceed, the agency may vote to dismiss the complaint. *See, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). "Any party aggrieved" by dismissal of its complaint may seek review in this Court. 52 U.S.C. § 30109(a)(8). For the FEC to defend such a lawsuit, at least four Commissioners must vote to authorize the defense. *See* 52 U.S.C. §§ 30106(c), 30107(a)(6). The court "may declare that the dismissal . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8). Should the agency fail to comply with such an order, "the complainant may bring . . . a civil action to remedy the violation." *Id.* § 30109(a)(8)(C).

## II. Statement of Facts

### A. Scott Chairs New Republican, Which then Supports His Senate Candidacy

New Republican is a super PAC that registered with the FEC on May 8, 2013. AR64, 128. The organization's stated purpose at its founding was "to advance . . . ideas of what the next

generation of Republicans . . . should represent" and support candidates who fit the "New Republican" model. AR64. The committee was active during the 2013-2014 election cycle, but it made no independent expenditures during the 2015-2016 cycle, and by May 2017 it had not received any contributions in over a year. AR128-29.

In May 2017, Scott, then Governor of Florida, became Chair of New Republican. AR7. Upon joining the super PAC, Scott hired a number of political allies to key roles. AR7. His former chief of staff and campaign manager, Melissa Stone, for example, became New Republican's executive director. AR7. New Republican also contracted with Stone's consulting firm, brought on a Scott administration appointee as finance director, and retained Scott's longtime fundraiser, along with other consultants who had previously worked on Scott's campaigns. AR2, 7, 9, 13, 129. The super PAC also revised its mission to include "rebrand[ing] the way the Republican Party approaches the challenges of the future" and supporting President Trump. AR7, 129.

Although Scott himself had not publicly declared his candidacy in Florida's 2018 Senate election when he joined New Republican, media reports at the time indicated that "political strategists in both parties viewed New Republican 'as a vehicle to raise money ahead of Scott's anticipated bid to unseat Democratic U.S. Sen. Bill Nelson in 2018.'" AR21, 129-30. A former Scott spokesman explained that "[h]e is running for Senate. That's all this is about." AR21.

New Republican greatly expanded its fundraising after Scott's hiring. The committee took in more than $275,000 during Scott's first three weeks, nearly $1.2 million in 2017, and a further $1.2 million in the first quarter of 2018. AR1, 8, 130. These contributions included both corporate and unlimited contributions. AR130. However, New Republican did not increase its spending: under Scott, the organization continued to make no independent expenditures in support of candidates, and it aired no issue ads. AR130.

Scott claimed to have stepped down from his role with the super PAC in December 2017. AR54, 66. However, New Republican's website continued to identify him as Chair until at least January 18, 2018. AR131, 143. In addition, in April 2018, a spokesman for the Scott Campaign indicated that Scott had remained with the super PAC until February 2018, AR131-32, 143, and media reports identified him as Chair as late as March 3, 2018, AR77, 131-32. Scott also remained involved in the organization's fundraising well into 2018. On March 3, he was a "featured guest" at a New Republican fundraiser in his own home, AR19, 54, 132, and he participated in a conference call with the super PAC's donors on August 29, AR116, 133. Scott allies also remained with the organization after his ostensible departure. *See* AR68, 131.

After Scott stepped down as Chair, but before he publicly declared his Senate candidacy, New Republican commissioned and paid for a poll testing Scott's competitiveness against Nelson, the Democratic incumbent. AR29-30, 69, 73 ¶ 6, 133. The poll was commissioned on March 1 or 2, conducted between March 10 and 13, and paid for on March 14. AR29-30, 69, 73 ¶ 6, 133.

Scott publicly declared his candidacy in Florida's 2018 Senate election on April 9. AR54. He filed his Statement of Candidacy with the FEC on April 8, 2018, and his campaign submitted a Statement of Organization on April 10 and began filing disclosure reports later that year. AR54. The Scott Campaign's first disclosure report listed testing-the-waters expenses of over $166,500 beginning in January 2018 but did not reveal any earlier contributions or expenditures. AR126-27.

On April 9—the same day as Scott's announcement—New Republican updated its website and mission statement to support his candidacy. AR3, 133, 139. In a press release, the super PAC announced that it was "focused on the election of Rick Scott," AR26, 133, while the revamped website—designed in February and paid for in March, before Scott publicly declared—included such features as an "About Rick" page and details on Scott's political positions, AR3, 30, 69, 139.

Less than a month later, on May 3, New Republican released a television advertisement attacking Nelson, thereby expressly supporting Scott's candidacy. AR78, 97. The super PAC launched another advertisement for television and social media on June 11, calling on voters to "Term Limit Career Politician Bill Nelson." AR78, 97. Ultimately, between May and November 2018, New Republican made over $30.5 million in independent expenditures, over $29.5 million of which were in support of Scott or opposition to Nelson. AR134.

**B. ECU Files Two Administrative Complaints**

Like New Republican, Plaintiff ECU is a PAC that was active in the 2018 Florida Senate race. Decl. of Tiffany Muller ("Muller Decl."), ¶¶ 2, 7-10. ECU's mission is to get big money out of politics and protect the right to vote by working to elect reform-oriented politicians, pass meaningful legislative reforms, and elevate electoral issues in the national conversation. *Id.* ¶ 3. In furtherance of that mission, and as part of its broader efforts to secure a Democratic Senate majority, ECU actively participated in the 2018 Florida Senate race in which Scott was a candidate: ECU endorsed and contributed to his Democratic opponent, Nelson. *Id.* ¶¶ 7-9. This spending was in direct political opposition to Scott, his campaign, and New Republican. *Id.* ¶ 10.

ECU had several reasons to seek proper enforcement of FECA's requirements against New Republican and the Scott Campaign. First, ECU is a political competitor of those entities and expects to maintain that status in future years: Plaintiff intends to actively engage in the 2024 Senate race, *id.* ¶¶ 4, 11, 14; Scott has filed his Statement of Candidacy for that election, *id.* ¶ 12; *id.* Ex. A; and New Republican's website continues to accept donations, *id.* ¶ 13; *id.* Ex. B-C. The FEC's failure to enforce FECA requirements against ECU's rivals places Plaintiff, which always seeks to comply with federal law, at a competitive disadvantage. *Id.* ¶¶ 15-16.

Second, ECU depends heavily on accurate FEC disclosure reports in order to fulfill its mission. *Id.* ¶¶ 17-22. Plaintiff uses the information contained in these reports (1) to track outside and corporate spending in elections in order to highlight issues critical to ECU, such as dark-money spending in elections and the corrosive influence of single-candidate super PACs and corporate PACs, and to create reports, craft candidate messaging, and provide statements to the press, *id.* ¶¶ 18-19; (2) to determine how to allocate its resources in supporting or opposing candidates, making independent expenditures, and organizing to elect its favored candidates, *id.* ¶ 20; and (3) to determine whether to file FEC complaints against candidates and PACs that violate campaign finance laws, *id.* ¶ 21. ECU cannot complete this work without accurate disclosures. *Id.* ¶¶ 18-22.

Thus motivated, and drawing on publicly available information about Scott's relationship with New Republican, ECU filed two administrative complaints alleging several distinct violations of the Act by Scott, his campaign, and New Republican. In its first complaint, filed on April 10, 2018, and supplemented on April 17, Plaintiff asked the Commission to find reason to believe that Scott had failed to timely file a Statement of Candidacy under 52 U.S.C. § 30102(e)(1); that the Scott Campaign had failed to timely file a Statement of Organization and to submit required financial disclosures under 52 U.S.C. §§ 30103(a) and 30104; and that Scott and New Republican had violated the soft-money ban of 52 U.S.C. § 30125(e). AR3-5, 28. The FEC designated the matter initiated by this complaint as Matter Under Review ("MUR") 7370. AR1.

ECU's second complaint, filed on September 5, 2018, asked the Commission to find reason to believe that the advertisements run by New Republican in May and June of 2018 had been made in coordination with Scott and his campaign, such that New Republican had made, and Scott and his campaign had accepted, unlawful in-kind contributions. AR79-83. The FEC designated the matter initiated by this second complaint as MUR 7496. AR76.

### C. The FEC's Office of General Counsel Recommends Finding Reason to Believe and Investigating the Complaints

Based on ECU's administrative complaints; written responses by Scott, his campaign, and New Republican; and all other available evidence, the FEC's General Counsel recommended that the Commission find reason to believe that (1) "Scott violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy and designate a principal campaign committee," (2 & 3) the Scott Campaign "violated 52 U.S.C. §§ 30103(a) and 30104 by failing to timely file a Statement of Organization and disclosure reports," and (4) "New Republican violated 52 U.S.C. § 30125(e) by soliciting, receiving, or spending soft money." AR126. Because investigating these claims could reveal information material to ECU's remaining claims, the General Counsel further recommended that the Commission take no immediate action on the allegations that Scott himself violated the soft-money ban or that New Republican made impermissible in-kind contributions to Scott and the Scott Campaign in the form of coordinated communications. AR126.

The General Counsel based her recommendation on two primary conclusions. First, "the available information indicate[d] that Scott became a federal candidate as early as 2017 because, as Chair of New Republican, he undertook activities designed to amass funds that were to be spent on supporting his Senate candidacy after he declared such candidacy in April 2018." AR137. Second, in light of this determination, "the available information supports a reasonable inference that Scott controlled New Republican and that New Republican and Scott were thus subject to the Act's soft money prohibitions from the time that Scott became a federal candidate." AR142.

### D. The Commission Deadlocks 3-3 and Dismisses ECU's Claims

On May 20, 2021, the FEC voted 3-3 on a motion to approve the General Counsel's recommendations. AR186-87. The motion failed because approving a reason-to-believe finding requires four affirmative votes. *See* 52 U.S.C. § 30109(a)(2).

On June 10, the Commission declined, also by a 3-3 vote, to dismiss under *Heckler v. Chaney* the allegations that Scott failed to timely file a Statement of Candidacy and his campaign failed to timely file a Statement of Organization and required finance reports. AR188. By the same margin, the FEC rejected a motion to find no reason to believe that New Republican violated the soft-money ban and to dismiss the remainder of the allegations. AR188-89. In light of these deadlocks, the FEC then voted 5-1 to "[c]lose the file" on Plaintiff's administrative complaints, effectively dismissing them. AR189.

Two of the three Commissioners who had voted to approve the General Counsel's recommendations issued a July 15 Statement of Reasons explaining their decision and criticizing the FEC's failure to pursue ECU's "well-supported allegations." AR196-202.

Subsequently, on July 21, the three controlling Commissioners who had voted to reject the General Counsel's recommendations issued a Statement of Reasons purporting to explain the basis for their decisions. AR203-13. The Statement indicated that the controlling Commissioners had concluded there was no reason to believe that New Republican had violated the soft-money ban, and further claimed that they had "dismissed the allegations that Scott untimely filed his candidacy and organization paperwork under *Heckler v. Chaney*." AR204. The Statement acknowledged that the two allegations were related. AR209.

## III. Procedural History

Plaintiff filed this action on August 9, 2021, challenging the dismissals of the claims in its complaints as contrary to law. Compl., ECF No. 1. The Commission, the sole defendant named in Plaintiff's complaint, failed to appear, plead, or otherwise defend the action, and the Clerk of Court entered default against the agency on November 2, 2021. *See* ECF No. 12. Prior to that default, on October 15, 2021, New Republican moved to intervene as a defendant in this case, filing a

proposed answer and motion to dismiss. *See* ECF Nos. 9, 14-15. The Court granted New Republican's motion to intervene. *See* Minute Order (Nov. 2, 2021).

## LEGAL STANDARDS

### I. Default by the Government Under Rule 55

A plaintiff is entitled to seek default judgment against a defendant who fails "to plead or otherwise defend" itself against the plaintiff's claims. Fed. R. Civ. P. 55(a)-(b). But "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). "In determining whether default judgment against the government is proper, a court may accept as true the plaintiff's uncontroverted evidence," *Payne v. Barnhart*, 725 F. Supp. 2d 113, 116 (D.D.C. 2010), including public record evidence, *Doe v. DPRK Ministry of Foreign Affs. Jungsong-Dong*, 414 F. Supp. 3d 109, 120 (D.D.C. 2019); *see also, e.g.*, Order, *Citizens for Resp. & Ethics in Wash.* [("CREW")] *v. FEC*, No. 1:19-cv-2753 (D.D.C. Apr. 9, 2020) (granting motion for default judgment where plaintiff demonstrated, "by evidence that satisfies the Court, that the FEC's failure to act on the administrative complaints . . . is contrary to law"). Although the plaintiff is required to establish its entitlement to relief against the defaulting government defendant, "the quantum and quality of evidence that might satisfy a court can be less than that normally required." *Alameda v. Sec'y of Health, Educ. & Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980).

### II. Summary Judgment

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). FEC dismissals of administrative complaints are reviewed on the administrative record under the

contrary-to-law standard. 52 U.S.C. § 30109(a)(8)(C); *see, e.g.*, *CLC v. FEC*, 952 F.3d 352, 357 (D.C. Cir. 2020).

## III. The Contrary-to-Law Standard

The Commission's decision to dismiss an administrative complaint will be set aside if it is "contrary to law," 52 U.S.C. § 30109(a)(8)(C), meaning the dismissal (1) rests on an impermissible interpretation of law or (2) is "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). The test for whether the FEC's dismissal of a complaint was arbitrary, capricious, or an abuse of discretion is similar to the "arbitrary [or] capricious" standard applied under the Administrative Procedure Act ("APA"). *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51 (D.C. Cir. 1980) (Wald, J., concurring in the decision to affirm); *see also CLC v. FEC*, 466 F. Supp. 3d 141, 155 (D.D.C.) (noting that the second *Orloski* prong uses APA's arbitrary and capricious standard), *reconsidered in part on other grounds*, 507 F. Supp. 3d 79 (D.D.C. 2020). Under that analysis, a court must set aside agency action "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

FEC dismissals are subject to judicial review under the contrary-to-law standard regardless of whether they spring from a majority vote or a deadlock. *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*"). When a complaint is dismissed due to a deadlock vote among the Commissioners, the Commissioners who voted to dismiss "constitute a controlling group for purposes of the decision, [and] their rationale necessarily states

the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"). When the FEC declines to proceed with an administrative complaint "contrary to [its] General Counsel's recommendation to proceed," the "declining-to-go-ahead Commissioners" must issue a Statement of Reasons explaining their decision. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988).

Although the controlling Commissioners' Statement of Reasons provides the agency's reasons for acting in a deadlock dismissal, the Statement of Reasons does not receive *Chevron* or *Auer* deference because it does not reflect an exercise of delegated authority to make "rules carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). To qualify for either form of deference, an FEC interpretation of FECA or Commission regulations "must be one actually made by the agency," meaning "it must be the agency's 'authoritative' or 'official position.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (quoting *Mead*, 533 U.S. at 257-59 & n.6 (Scalia, J., dissenting)). A legal interpretation announced by fewer than four FEC Commissioners is neither. *Common Cause*, 842 F.2d at 449 n.32, 453 (recognizing that three-vote Statement of Reasons is "not law" and does not create "binding legal precedent or authority for future cases").[3]

A Statement of Reasons is particularly undeserving of deference where, as here, the agency decided not to defend it in court. Under FECA, at least four Commissioners must vote to authorize a defense of a lawsuit, such as this one, brought under § 30109(a)(8). 52 U.S.C. §§ 30106(c), 30107(a)(6). That vote failed here; three Commissioners voted against defending this action due to deep-seated substantive disagreements regarding the law and facts of this case, "as

[3] Although the D.C. Circuit has previously deferred to legal interpretation in a Statement of Reasons by fewer than four Commissioners, *see In re Sealed Case*, 223 F.3d 775, 779-81 (D.C. Cir. 2000); *NRSC*, 966 F.2d at 1476; *DCCC*, 831 F.2d at 1134-35, those rulings preceded the Supreme Court's clarification of the requirements for agency deference in *Mead* and *Kisor*.

well as the distortions in [the controlling Commissioners'] Statement of Reasons regarding the disposition of this matter." Statement of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub on *End Citizens United PAC v. FEC* (Oct. 15, 2021) ("Broussard Statement"), https://www.fec.gov/resources/cms-content/documents/statement_on_ECU_v_FEC_litigation_vote_broussard_walther_weintraub.pdf; *see also* AR196-202.

**ARGUMENT**

Plaintiff ECU is entitled to default judgment or, in the alternative, summary judgment. First, ECU has standing to challenge the controlling Commissioners' dismissals of the claims in its administrative complaints. Second, the dismissals were contrary to law: the record establishes that Scott, the Scott Campaign, and New Republican violated the Act, and the explanation for the dismissals given by the controlling Commissioners' Statement of Reasons runs counter to the evidence and is based on both pretext and erroneous legal reasoning. Finally, the controlling Commissioners have failed in their effort to insulate their contrary-to-law decision from review by attempting to invoke the FEC's prosecutorial discretion.

## I. Plaintiff Has Standing to Challenge the Dismissals of Its Claims

A plaintiff challenging FEC action must establish the three basic requirements of standing: injury in fact, causation, and redressability. *See, e.g.*, *Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005). Plaintiff ECU satisfies all three of these requirements.

### A. Plaintiff Has Suffered Competitive Injuries

The dismissals injure ECU as a political competitor of the administrative respondents, forcing Plaintiff to compete on an illegally structured political playing field by allowing its political competitors to fundraise outside the limits set by FECA. *See id.* at 84-91. When the Commission acts contrary to law in failing to enforce campaign finance laws, FEC-regulated

competitors of the entities that benefit from that non-enforcement suffer an injury in fact. *See Shays*, 414 F.3d at 84-91; *see also Nader v. FEC*, 725 F.3d 226, 228-29 (D.C. Cir. 2013) (recognizing that FEC dismissal of administrative complaint could produce competitive injury when plaintiff will compete against involved entities in future). In *Shays*, two Members of Congress challenged several FEC regulations interpreting the Bipartisan Campaign Reform Act ("BCRA"), contending that those regulations would erode the statute's reforms and allow the plaintiffs' political competitors to engage in conduct that Congress had prohibited. *See* 414 F.3d at 82-84. The court recognized that the plaintiffs had alleged a sufficient injury in fact, holding that if the FEC failed to enforce BCRA in the way the statute required, the two Congressmembers, who regularly faced reelection campaigns, would suffer injury to their right to a legally structured competitive political environment in those campaigns, as their competitors would be able to operate outside BCRA's limits. *Id.* at 84-87.

The competitive injury in this case is even clearer than that in *Shays*. While that decision recognized an injury based merely on potential future BCRA violations, Plaintiff ECU's administrative complaints documented—and the FEC's General Counsel acknowledged—actual, concrete FECA violations by Plaintiff's political competitors, the Scott Campaign and New Republican. AR3-5, 28, 79-83, 126. Moreover, unlike the Congressmembers in *Shays*, who, if their challenge had failed, could at least have benefitted from engaging in the allegedly illegal activity on the same terms as their rivals under the challenged regulations, *see* 414 F.3d at 86, ECU cannot violate FECA as its competitors did without risking FEC enforcement, and has no way of obtaining benefits like those received by the Scott Campaign or New Republican. *See also* Muller Decl. ¶ 16 (explaining that "ECU always seeks to comply with federal law"); *id.* ¶ 2 (explaining that ECU, unlike New Republican, abides by FECA's amount and source limitations). ECU, as a PAC,

competes politically with the Scott Campaign and New Republican both to raise funds and to elect candidates, *see id.* ¶¶ 2, 4, 14, and will continue to do so in the future, *see id.* ¶¶ 11-14. The FEC's unlawful action thus forces ECU to compete on an uneven, illegally structured political playing field, creating an injury in fact.

**B. Plaintiff Has Suffered Informational Injuries**

Although ECU's competitive injuries are sufficient to support Plaintiff's standing, the dismissals have also caused Plaintiff informational injuries, as the Commission's action deprives Plaintiff of information to which it is entitled under FECA and on which ECU relies to perform its work and achieve its mission. *See FEC v. Akins*, 524 U.S. 11, 20-21 (1998). "The law is settled that a denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (quoting *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019)). In this case, the FEC's unlawful dismissals of Plaintiff's administrative complaints deprives ECU of two different categories of information, both of which it is entitled to under FECA.

*First*, ECU has been deprived of information about the Scott Campaign's fundraising and spending as a result of the Scott Campaign's failure to begin filing the financial disclosures required by the Act when Scott became a candidate in 2017. A plaintiff suffers an informational injury when a campaign fails to file financial disclosures covering the period when the candidate entered the race or began testing the waters. *CLC v. FEC*, 520 F. Supp. 3d 38, 45-46 (D.D.C. 2021). *CLC* recognized such an injury where the plaintiffs alleged that presidential candidate Jeb Bush had failed to file retroactive financial disclosures covering a period when he was, in the plaintiffs' view, testing the waters for a potential run. *See id.* at 45. While the defendant disputed

when Bush had in fact begun testing the waters, the court recognized that this argument went to the merits, not to standing: on plaintiffs' view of the law, Bush's failure to begin reporting on the proper date had deprived them of information to which FECA entitled them, which sufficed to establish informational injury. *See id.* at 45-46. Similarly, as discussed below, on ECU's view of the law—with which the Commission's General Counsel agreed, *see* AR134-41—Scott became a candidate under the Act in 2017, and FECA required disclosure of the campaign's donors and finances from that point on, *see* 52 U.S.C. § 30104(a); 11 C.F.R. § 104.1(a). However, the Scott Campaign's disclosures stretch back only to January 1, 2018. AR126-27. As in *CLC*, Scott's and his campaign's failure to timely file required documents thus deprived Plaintiff of information about their financial dealings, inflicting an informational injury.

*Second*, the dismissals deny ECU information about the precise amounts that New Republican contributed to the Scott Campaign in the form of coordinated communications. This injury derives from the failure of the Scott Campaign and New Republican to report coordinated communications as in-kind contributions as required by FECA.

Failure to file "accurate disclosure[s] of contributor information" can produce informational injury under the Act. *CLC*, 952 F.3d at 356. In this case, on Plaintiff's view of the law, as alleged in its second administrative complaint, the advertisements run by New Republican in May and June of 2018 were coordinated with the Scott Campaign, and therefore constituted in-kind contributions of which FECA requires disclosure by both participants. *See* AR79-83; *see also* 52 U.S.C. § 30104(a); 11 C.F.R. § 109.21. However, neither New Republican nor the Scott Campaign reported any such contributions. AR97-99, 116-19. This nonreporting of in-kind contributions in the form of coordinated communications deprives ECU of "accurate disclosure of contributor information" and leaves it in the dark as to the magnitude of the contributions at issue,

as ECU cannot assess exactly how much New Republican spent producing and distributing these particular communications. As a concrete example, ECU cannot know from current reporting which fees that New Republican paid to political consultants contributed to the development of the advertisements. Properly itemizing relevant expenditures as in-kind contributions would provide this information. ECU therefore has suffered an informational injury.

The fact that Plaintiff does not already know all the financial details underlying the coordinated communications at issue distinguishes this case from *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001). The *Wertheimer* court held that the plaintiffs in that case had suffered no informational injury when *all* the underlying details of a set of coordinated expenditures were publicly available, and the plaintiffs sought merely an FEC declaration that the expenditures were in fact coordinated. *See id.* at 1074-75. In particular, the expenditures at issue had already been publicly reported, itemized, and "label[ed] . . . as a discrete category." *Id.* at 1074. In contrast, New Republican has not itemized or labeled which of its expenditures went into producing the advertisements at issue, and so, unlike the *Wertheimer* plaintiffs, ECU does not already possess all relevant information about the in-kind contributions—or even basic details, such as amounts and dates. The deprivation of that information constitutes a cognizable injury.[4]

As to either informational injury, "there is no reason to doubt . . . that [this] information would help" Plaintiff. *CLC*, 952 F.3d at 356 (quoting *Envtl. Def. Fund*, 922 F.3d at 452). In *CLC*, the D.C. Circuit recognized informational standing when the plaintiffs relied on accurate FEC disclosures to advance "their efforts to defend and implement campaign finance reform." *Id.* at 356. Like the *CLC* plaintiffs, ECU relies on accurate information being included in FEC reports

[4] A case involving similar standing issues about *Wertheimer*'s scope is currently before the D.C. Circuit. *See CLC v. FEC*, No. 21-5081 (D.C. Cir. argued Nov. 15, 2021).

"in a number of ways" related to campaign finance reform, Muller Decl. ¶ 17, all of which further Plaintiff's mission to "get[] big money out of politics and protect[] the right to vote" by "work[ing] to elect reform-oriented politicians, pass meaningful legislative reforms, and elevate electoral issues in the national conversation," *id.* ¶ 3. For example, Plaintiff uses FEC reports "to track outside and corporate spending in our elections," in order to "highlight issues critical to End Citizens United, such as dark-money spending in elections and the corrosive influence of single-candidate PACs and corporate PACs" and to create reports, craft candidate messaging, and provide statements to the press. *Id.* ¶¶ 18-19. Similarly, ECU depends on accurate and complete information to "determine whether to file [FEC] complaints" regarding violations of campaign finance laws. *Id.* ¶ 21. As a PAC, ECU also relies on FEC reports to inform its political strategy, including to assess how to allocate its resources in "supporting or opposing candidates, making independent expenditures, and organizing to support preferred candidates." *Id.* ¶ 20. Accurate information about the relationship between the Scott Campaign and New Republican would directly advance these efforts and thereby "help" ECU. *CLC*, 952 F.3d at 356 (quoting *Envtl. Def. Fund*, 922 F.3d at 452). In sum, ECU has satisfied all the requirements for informational injury.

### C. Plaintiff's Injuries Were Caused by the Dismissals and Are Redressable by an Order that the Dismissals Were Contrary to Law

Where, as here, an agency acts contrary to law in declining to pursue an enforcement action, injuries caused by the non-enforcement are traceable to the agency's decision and redressable by an order vacating that decision. *See Akins*, 524 U.S. at 25. In *Akins*, the Supreme Court held that a group of voters had standing to challenge the FEC's decision not to proceed with their administrative complaint on allegedly unlawful grounds. *See id.* at 15-18, 25. The plaintiffs were injured by the loss of information that they may have obtained had the FEC pursued their complaint and decided the matter in their favor. *Id.* at 21. The Court recognized that the FEC's alleged legal

error had caused the plaintiffs' injury—but for the Commission's unlawful action, the agency may have resolved the complaint in the plaintiffs' favor. *See id.* at 25. Similarly, by vacating the dismissals, the Court could remove this impediment and remedy the plaintiffs' injury. *See id.*

In the same way, Plaintiff ECU has suffered an injury because of the controlling Commissioners' unlawful dismissals of its complaints. The dismissals block the FEC from resolving the matter in ECU's favor, making the injury traceable to the dismissals under *Akins*. Furthermore, as in *Akins*, a declaration that these dismissals were contrary to law would redress the injury by removing the unlawful barrier to favorable action on Plaintiff's administrative complaints. ECU therefore meets all three requirements for standing.

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

The controlling Commissioners' decision to dismiss ECU's claims at the reason-to-believe stage of the FEC's enforcement process was contrary to law. In failing to find that ECU's claims met the preliminary reason-to-believe standard, the controlling Commissioners drew conclusions counter to the evidence, failed to explain key aspects of their reasoning, and relied on erroneous legal analysis.

### A. The Dismissals of the Claims that Scott and the Scott Campaign Did Not Timely File Required Documentation and Disclosures Were Contrary to Law

#### 1. The Administrative Record Establishes "Reason to Believe"

The record in this case establishes reason to believe that, because Scott became a candidate under FECA in 2017, he failed to timely file his Statement of Candidacy and that his campaign subsequently failed to timely file a Statement of Organization and required disclosure reports (hereinafter, the "Candidacy Filing" claims).

Under FECA, a "candidate" is "an individual who seeks nomination for election, or election to Federal office," and that status is triggered when an individual (or their agent) accepts

or spends more than $5,000 for the purpose of influencing a federal election. 52 U.S.C. § 30101(2). While the Commission's testing-the-waters exemptions allow an individual to raise and spend more than $5,000 without becoming a candidate if that money is used solely to assess whether to commit to a possible run, those exemptions are unavailable to an individual who has already decided to become a candidate. *See* 11 C.F.R. §§ 100.72(b), .131(b); FEC Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) at 5. To assess whether an individual has become a candidate, the Commission looks to a nonexhaustive list of activities that objectively indicate candidacy, such as "rais[ing] funds in excess of what could reasonably be expected to be used for exploratory activities or undertak[ing] activities designed to amass campaign funds that would be spent after he or she becomes a candidate." *Id.* §§ 100.72(b)(2), .131(b)(2).

The record in this case establishes—and the FEC's General Counsel agreed—that Scott became a candidate as early as May 2017 because he used New Republican to raise sums far exceeding $5,000 for the purpose of supporting his eventual Senate campaign. *First*, through his decisions in staffing New Republican, Scott seized control of the super PAC, positioning himself to direct it to fundraise and spend in support of his candidacy. Scott placed former campaign and administration officials in key roles, including installing his former chief of staff and campaign manager as executive director and an administration appointee as finance director. AR2, 7, 9, 129. He also hired key contractors, including fundraising and political consultants, who had previously worked on his campaigns. AR2, 7, 9, 13, 129. Many of these Scott allies remained with New Republican after he stepped down as Chair. AR68, 131.

*Second*, New Republican's fundraising and spending under Scott and after his departure demonstrate that he sought as Chair not to advance the super PAC's ostensible ideological mission but to leave the committee with a war chest that could be used to support him once he publicly

announced his candidacy. *See* AR137-38. Under Scott, New Republican vastly increased its fundraising, from receiving *no* contributions for over a year prior to his arrival to raising almost $1.2 million from his appointment to the end of 2017, and over $1.2 million more in the first quarter of 2018. AR1, 8, 130. Yet Scott did not augment New Republican's spending; the organization made no independent expenditures during his tenure. AR130. Instead, the committee held the funds raised in reserve—until it began spending its millions to support Scott's Senate campaign in 2018. AR130-34. In other words, Scott's fundraising through New Republican served no purpose other than to amass resources to support Scott's campaign.

*Third*, New Republican began using its resources to support Scott's candidacy even before he publicly announced it, indicating that he had led the super PAC to accumulate the funds for his benefit. *See* AR139. New Republican commissioned a poll to test Scott's electoral competitiveness on March 1 or 2, 2018, and paid for it on March 14, before Scott's April 9 announcement. AR30, 69, 139. The committee did not do the same for other candidates—it acted uniquely on Scott's behalf. AR139. Similarly, beginning in February 2018, New Republican preemptively arranged a redesign of its website to support Scott, allowing it to rebrand itself as dedicated to his candidacy on the same day he announced a run. AR3, 133, 139. These actions further indicate that New Republican earmarked the funds Scott raised to support his candidacy and that the committee was aware of and preparing to support Scott's Senate bid, even before his public announcement.

The responses offered by New Republican, Scott, and the Scott Campaign did little to rebut this interpretation. None explained the committee's decision under Scott to raise millions yet make no expenditures in support of its ostensible mission, instead disputing—without supporting evidence—the details of when Scott left the Chair and the super PAC's decisionmaking process after his departure. AR55-56, 68-69. Moreover, the respondents' claims that Scott played no role

in the committee's actions after his departure—commissioning a poll of his race and anticipatorily redesigning its website—were riddled with conspicuous omissions. New Republican submitted an affidavit from its current executive director, Blaise Hazelwood, indicating that she had made the decision to redesign the website and commission the poll without Scott's consent. AR73 ¶¶ 4-8. Yet, as the FEC's General Counsel pointed out, the affidavit does not address whether other New Republican staffers or consultants—such as those affiliated with Scott's past campaigns—played a role in the decisional process or coordinated with the Scott Campaign, or whether she relied on materials or plans developed by Scott during his time as Chair. AR73, 140. Indeed, Hazelwood's own affidavit makes clear that, while she claims to have "made all decisions regarding New Republican PAC's operations and activities," others must have contributed—she acknowledges, for instance, that she was "not involved in planning or organizing" a New Republican fundraiser held at Scott's home in March 2018. AR73 ¶ 9.

Scott's denials of having become a candidate were similarly weak. In responding to Plaintiff's complaint, Scott asserted that he did not become a candidate until March 2018, yet he offered no evidence—not even an affidavit—to support that assertion. AR55-56. And while Scott denied involvement in New Republican's decisionmaking after he left the Chair, AR54, that denial—again unsupported by evidence—does nothing to rebut the possibility that, by the time of his departure, Scott had positioned the super PAC to support his Senate candidacy. Scott's denial also cuts against the record evidence that Scott did maintain some control over the committee after stepping down, such as by hosting a New Republican fundraiser in his home in March 2018. AR19, 54, 132. As the FEC's General Counsel noted, it is difficult to imagine "how he could be a guest in his own home, where he provided free space to hold the event," AR144, or how the event could

be planned without his input, especially since Hazelwood disclaimed any role in the planning process, AR73 ¶ 9.

The record therefore indicates that Scott's activities with New Republican were "designed to amass campaign funds that would be spent [on his behalf] after he . . . [became] a candidate." 11 C.F.R. §§ 100.72(b), .131(b). FECA and Commission regulations thus dictate that Scott became a candidate as soon as he had used New Republican to accumulate $5,000 of such funds. *See* 52 U.S.C. § 30101(2); 11 C.F.R. § 100.72(b). As the FEC's General Counsel observed, on Scott's watch, New Republican raised $5,000 in contributions "as early as May 2017," and over $1 million by the beginning of 2018; thus, at some point during his 2017 fundraising through New Republican, Scott passed FECA's $5,000 threshold and became a candidate. AR140-41.

Yet Scott and his campaign failed to timely file the documentation required once he became a candidate. Scott did not submit a Statement of Candidacy until April 8, 2018, and his campaign did not file a Statement of Organization until April 10, with no disclosure reports following until later that year. AR54. Given that Scott became a candidate in 2017, these filings came well after the relevant deadlines. Plaintiff's complaint thus established, at the very least, that the available evidence in the matter was sufficient to warrant conducting an investigation into whether Scott failed to timely file his Statement of Candidacy, and the Scott Campaign failed to timely file its Statement of Organization and disclosure reports. The FEC's General Counsel agreed and recommended that the Commission find reason to believe that Scott and the Scott Campaign had committed the alleged violations. AR141.

### 2. The Controlling Commissioners' Dismissal of Plaintiff's Candidacy Filing Allegations Was Arbitrary and Capricious

The controlling Commissioners acted contrary to law in rejecting the General Counsel's conclusion and electing to dismiss ECU's claims relating to the date of Scott's candidacy. FEC action is arbitrary and capricious where the agency "offer[s] an explanation for its decision that runs counter to the evidence." *State Farm*, 463 U.S. at 43.

Here, the assessment of the merits of ECU's allegations in the Statement of Reasons—which the FEC voted not to defend in this case—is inconsistent with the record, and, at points, with itself. As discussed above, the record contains voluminous evidence establishing that Scott used New Republican to amass funds to support his eventual Senate run. Yet the controlling Commissioners failed to attend to the evidence regarding New Republican's activities under Scott; instead, they focused almost exclusively on developments after Scott left the super PAC. *See* AR207-13. Their Statement of Reasons addressed Scott's staffing decisions only in a footnote while summarizing the underlying facts. AR 205 n.12. It alluded only indirectly to Scott's fundraising and spending (or lack thereof) as New Republican's Chair, terming those activities "significant evidence"—yet immediately reversing course and calling them too "thin [an] evidentiary reed" to warrant investigation. AR212. This evidence of Scott's activities in 2017, when Plaintiff alleged that he became a candidate, was critical to the General Counsel's reasoning—and rightly so, as a conclusion that Scott used his time as Chair to amass funds to support his eventual Senate run would necessarily mean that he became a candidate in 2017. Yet the controlling Commissioners gave those activities barely a mention.

The Statement of Reasons gave more attention to New Republican's activities after Scott stepped down as Chair, yet even its analysis of those far less relevant facts entirely failed to consider critical omissions in respondents' submissions. The controlling Commissioners relied

heavily on the affidavit submitted by New Republican's executive director asserting that she had made the decision to redesign the committee's website and field a poll on Scott's competitiveness without consulting Scott or his campaign. AR211. Yet they failed to consider the fact—acknowledged in the General Counsel's Report—that the affidavit did *not* discuss whether others associated with New Republican and involved in the decisionmaking process may have discussed those developments with Scott or his campaign or whether the decisions were influenced by materials or plans developed by Scott during his tenure.

After this incomplete and incorrect evaluation of the record, the controlling Commissioners claimed to invoke the agency's prosecutorial discretion as a reason for dismissal. AR212. But as explained below in Part III, *infra* at 36-45, this invocation of prosecutorial discretion cannot justify the dismissal or shield the controlling Commissioners' legal analysis from judicial review.

### B. The Dismissal of Plaintiff's Allegations that the Administrative Respondents Violated the Soft-Money Ban Was Contrary to Law

#### 1. The Administrative Record Establishes "Reason to Believe"

Under FECA, "entit[ies] directly or indirectly established, financed, maintained, or controlled by or acting on behalf of" candidates may not "solicit, receive, direct, transfer, or spend" soft money. 52 U.S.C. § 30125(e)(1). Here, it is undisputed that New Republican raised soft money during 2017. AR144-45. As discussed above, Scott also became a candidate for Senate in 2017. Thus, if Scott "established, financed, maintained, or controlled" New Republican during that period, the organization was subject to and violated the Act's soft-money ban. Commission regulations set forth ten nonexhaustive factors used to assess whether a candidate "established, financed, maintained, or controlled" an entity. 11 C.F.R. § 300.2(c)(2). Several of those factors indicate that Scott controlled New Republican until at least December 2017, and likely beyond.

*First*, the record shows that Scott "ha[d] the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of" New Republican until at least December 2017, and probably well into 2018. 11 C.F.R. § 300.2(c)(2)(iii). The administrative respondents did not dispute that Scott served as Chair until at least December 2017, and even acknowledged that he controlled New Republican during this time. AR54, 66, 71, 142. In fact, Scott's tenure appears to have extended into January or February of 2018: the respondents provided no evidence for their assertions that Scott stepped down in December 2017, AR54, 66; the organization's website listed him as Chair until at least January, AR131, 143; media reports—including comments from a Scott Campaign spokesman—identified him as Chair until February or March, AR77, 131-32, 143; and Scott remained involved in New Republican's fundraising until at least early March 2018, AR19, 54, 132. Regardless of when exactly Scott left his position, the record establishes that, as Chair, he had the power to select New Republican's staff and consultants. *See, e.g.*, AR7, 9, 142. Scott thus enjoyed control of New Republican's personnel until at least December 2017, by which time he had become a candidate.

*Second*, the record indicates that Scott "had the authority . . . to participate in the governance of" and "maintained an ongoing relationship" with New Republican through at least December 2017, and, again, likely beyond. 11 C.F.R. § 300.2(c)(2)(ii), (v). The administrative respondents did not dispute that Scott maintained a relationship with New Republican or played a role in the super PAC's governance while serving as its Chair until at least December 2017. AR54, 66, 71, 142. Again, the evidence from New Republican's website, media coverage, and Scott's engagement with the super PAC suggests Scott's role as Chair continued beyond this point, but the record is undisputed that Scott maintained control until at least December.

*Third*, the evidence shows that Scott directed or participated in New Republican's fundraising during his time as Chair and until at least March 2018. *See* 11 C.F.R. § 300.2(c)(2)(ii), (vii). The administrative respondents once more did not dispute that Scott led the super PAC's fundraising efforts during his tenure as Chair, AR54, 66, 71, 142, and Scott's hosting of a New Republican fundraiser in his home in March 2018 demonstrates that his fundraising role continued until at least that date, AR19, 144. While the respondents argued that Scott was merely a guest at that event, as the FEC's General Counsel pointed out, they "fail[ed] to explain how he could be a guest in his own home, where he provided free space to hold the event." AR144. Moreover, New Republican's executive director indicated in an affidavit that she did not plan or participate in the event, AR73 ¶ 9, thus leaving it an open question who else but Scott (or someone he had hired and supervised) could have done so.

Thus, the undisputed facts before the agency established that Scott controlled New Republican until at least December 2017, and likely until March 2018. Therefore, because Scott became a candidate before December 2017, New Republican was subject to FECA's soft-money ban. Because it was also undisputed that New Republican raised soft money throughout 2017, the record contained, at the very least, evidence sufficient to warrant investigating whether New Republican violated the soft-money ban, justifying the General Counsel's recommendation that the Commission find reason to believe.

### 2. The Controlling Commissioners' Dismissal of Plaintiff's Soft-Money Allegations Was Arbitrary and Capricious

In rejecting the General Counsel's recommendation and dismissing the case, the controlling Commissioners acted contrary to law. First, the Commissioners' Statement of Reasons did not dispute—and the undisputed facts established—that Scott controlled New Republican through at least December 2017. Thus, had the Commissioners concluded that Scott became a

candidate in 2017, they would have had no choice but to conclude that New Republican had violated the soft-money ban. *Cf.* AR209 (acknowledging the relationship between the allegations). Because the Commissioners' conclusion that there was no reason to believe New Republican had violated the soft-money ban therefore necessarily relied on their decision to dismiss the allegations that Scott became a candidate in 2017, that conclusion is contrary to law for all the same reasons as the underlying determination about Scott's candidacy. *See* Part II.A, *supra* at 23-29.

Second, while the controlling Commissioners did not need to conclude that Scott's control extended into 2018 to find a violation of the soft-money ban, their conclusion that Scott did not maintain such control is also arbitrary and capricious. Their Statement of Reasons credited the administrative respondents' unsupported assertion that Scott stepped down from his position in December 2017 despite multiple facts in the record suggesting he remained in the post well into 2018. AR209-10; *see La Botz v. FEC*, 889 F. Supp. 2d 51, 61-62 (D.D.C. 2012) (refusing to credit *post hoc* assertions, offered without support and contradicted by contemporaneous evidence, even when submitted via affidavit). The respondents provided no evidence to show that Scott left New Republican in December 2017 beyond unsworn statements by counsel in their responses to Plaintiff's complaint. *See* AR54, 66. Meanwhile, New Republican's own website, media reports, and statements by a Scott Campaign spokesperson all indicated that his tenure ran into 2018. AR77, 131-32, 142-44. Yet the controlling Commissioners summarily dismissed this evidence and credited the respondents' assertions. AR 209-10. This conclusion ran counter to the evidence.

The controlling Commissioners also downplayed the significance of Scott's attendance at a New Republican fundraiser in his own home in March 2018. Rejecting this evidence of Scott's ongoing relationship with or control of the super PAC, they concluded that Scott was merely a "special guest." AR210. Like the respondents, the Commissioners neglected to explain how Scott

could be a guest in his own home, or who had planned the event, given New Republican's executive director's denial that she had planned it. AR73 ¶ 9, 144, 210.

Because Scott's control of New Republican extended into 2018, New Republican's violation of the soft-money ban also extended into 2018. While the Commissioners need not have concluded that Scott's control of New Republican extended into 2018 in order to find reason to believe that New Republican committed soft-money violations, their failure to do so was nevertheless arbitrary and capricious as counter to the evidence.

### C. The Dismissals of Plaintiff's Claims that the Scott Campaign and New Republican Unlawfully Coordinated Communications Were Contrary to Law

#### 1. The Administrative Record Establishes "Reason to Believe"

ECU's second administrative complaint, together with other materials in the administrative record, provided reason to believe that Scott, his campaign, and New Republican unlawfully coordinated a pair of advertisements aired by the super PAC in May and June 2018, resulting in unlawful contributions from New Republican to the Scott Campaign. Under FECA, super PACs may not contribute to candidates or their authorized committees. *See supra* at 4-5. This ban includes in-kind contributions, such as coordinated communications. *Id*. Thus, if the May and June advertisements qualified as coordinated communications, then New Republican unlawfully made, and Scott and his campaign unlawfully accepted, prohibited in-kind contributions.

FEC rules create a three-part test to assess whether a communication is coordinated and, therefore, an in-kind contribution. *See* 11 C.F.R. § 109.21(a). First, the communication must be "paid for . . . by a person other than [the] candidate" or her authorized committee. *Id.* § 109.21(a)(1). Second, the communication must meet one or more defined "content standards," one of which covers "public communication[s] . . . that expressly advocate[] . . . the election or defeat of a clearly identified candidate." *Id.* § 109.21(a)(2), (c)(3). Finally, the communication

must meet one or more "conduct standards." *Id.* § 109.21(a)(3). The record shows, and the administrative respondents did not dispute, that the May and June advertisements satisfy the first two elements: New Republican paid for the commercials, which used a public medium—television—to expressly advocate the defeat of Scott's opponent, Bill Nelson. AR78-80, 97-98, 147. The only question before the Commission, then, was whether the communications satisfied one or more conduct standards.

The administrative record establishes reason to believe that the advertisements satisfy at least two of the conduct standards. One such standard applies to communications "created, produced, or distributed at the request or suggestion of a candidate." 11 C.F.R. § 109.21(d)(1). Another covers communications "created, produced, or distributed after one or more substantial discussions about the communication between" the payor or its agents and the candidate whom the message benefits, during which discussions "[material] information about the candidate's . . . campaign plans, projects, activities, or needs is conveyed to [the entity] paying for the communication." *Id.* § 109.21(d)(3).

The record before the agency demonstrated that Scott had taken control of New Republican, AR7, 9, 54, 66, 71, 142; staffed it with political allies, AR7, 9, 142; used it to raise funds in service of his eventual Senate campaign, *see supra* at 23-29; and run it until at least December 2017, and likely longer, *see supra* at 30-33. Moreover, Scott remained involved in the super PAC's fundraising until at least March 2018, AR19, 54, 132, and participated in a conference call with donors in August 2018, AR116, 133. The ads at issue aired only shortly after Scott's departure from the super PAC and his participation in the March fundraiser, and while key Scott allies continued to hold high-ranking positions within New Republican. *See* AR68 (noting that Scott's former chief of staff and campaign manager was a senior adviser to New Republican when

the advertisements aired). This sequence of events provides ample reason to believe that Scott either requested that his allies at New Republican produce the advertisements to benefit his campaign or at least conducted material discussions with those allies that affected the super PAC's decisionmaking with respect to the communications. The record thus shows that the FEC had reason to believe that the May and June advertisements were prohibited coordinated communications.[5]

**2. The Controlling Commissioners Provided No Valid Explanation for Their Decision to Dismiss Plaintiff's Allegations**

The controlling Commissioners failed to discuss the coordinated-communications allegations and explain their decision to dismiss the underlying administrative complaint, *see* AR203-04, 207-13, and this lack of reasoning renders the dismissal contrary to law, *see State Farm*, 463 U.S. at 43 (requiring agency to "articulate a satisfactory explanation for its action"). The Statement of Reasons referenced the allegations only in the context of summarizing the General Counsel's Report, *see* AR203 n.1, and at no point assessed their merits. Absent any substantive discussion of the coordinated-communications issue, the Statement of Reasons cannot meet the controlling Commissioners' burden to supply a "satisfactory explanation" for their decision. *State Farm*, 463 U.S. at 43.

The controlling Commissioners' catchall rationale (in a footnote) for dismissing the coordinated-communications claims, *see* AR204 n.2, cannot remedy this deficiency because it relies on "an impermissible interpretation" of law. *Orloski*, 795 F.2d at 161. The footnote states

[5] Although the Commission's General Counsel did not recommend an immediate-reason-to-believe finding with respect to these allegations, she also did not recommend dismissal. AR148-49. Rather, her Report indicated that the allegations had some factual support and warranted further investigation, which the Commission could accomplish by acting on the General Counsel's recommendation to find reason to believe the allegations in ECU's first complaint. AR 148-49.

that "the remainder of the allegations" made by ECU's complaints were dismissed on the grounds that "those allegations would have required . . . a threshold finding that Scott had failed to file a statement of candidacy at the appropriate time, or that New Republican had violated the soft money rules." AR204 n.2. But this is not true: in fact, the merits of the coordinated-communications allegations do not depend on when Scott became a candidate or on whether there was a soft-money violation. Illegal coordination is an independent issue. It would be perfectly consistent with the law (albeit contrary to the evidence) for the Commission to determine that the Candidacy Filing and soft-money claims fail on their merits, but find that after Scott's April 2018 announcement of candidacy, he had coordinated with New Republican on the airing of its May and June 2018 advertisements supporting his campaign. The controlling Commissioners' argument that such a violation would require "a threshold finding" that ECU's distinct claims had merit was therefore a legal error and contrary to law.

## III. The Dismissals of Plaintiff's Claims Are Reviewable

Despite Intervenor's assertions to the contrary, ECF No. 14 at 24-28, the controlling Commissioners did not shield their faulty legal analysis from judicial review by claiming to invoke the agency's prosecutorial discretion. Although the D.C. Circuit has held that dismissals in which the FEC relies on its prosecutorial discretion are sometimes unreviewable, *see CREW v. FEC*, 993 F.3d 880, 884-85 (D.C. Cir. 2021) ("*CREW 2021*"); *CREW v. FEC*, 892 F.3d 434, 440-42 (D.C. Cir. 2018) ("*CREW 2018*"), the dismissals at issue in the *CREW* decisions are distinguishable from those at issue here, which may be reviewed despite the assertion of prosecutorial discretion.[6]

[6] Although Intervenor incorrectly claims otherwise, *see* ECF No. 14 at 24-25, the issue of whether an assertion of prosecutorial discretion renders a dismissal unreviewable "is not a jurisdictional issue." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020).

### A. The Controlling Commissioners Did Not Assert Prosecutorial Discretion as a Reason for Their Dismissals of the Soft-Money and Coordinated-Communications Claims

As the D.C. Circuit explained in *CREW 2018*, even when the FEC has invoked prosecutorial discretion to explain its dismissal of one claim in an administrative complaint, a court may review the FEC's dismissal of other claims in that complaint for which the agency did not invoke prosecutorial discretion. 892 F.3d at 438 n.6. Indeed, in *Akins*, the U.S. Supreme Court reviewed the FEC's dismissal of "one of two charges in a complaint," even though the FEC had "invoked prosecutorial discretion to dismiss the other charge[.]" *Id.* (citing *Akins*, 524 U.S. at 25; *Akins v. FEC*, 736 F. Supp. 2d 9, 13-15 (D.D.C. 2010)).

Although the controlling Commissioners here purported to assert the agency's prosecutorial discretion as a justification for dismissing Plaintiff's three Candidacy Filing claims, AR212-13 ("[We] exercised our prosecutorial discretion regarding the allegations that Scott and his campaign committee failed to timely file candidacy and organization forms . . . ."), they did not do so for Plaintiff's soft-money and coordinated-communications claims, AR212-13. For those claims (some of which were alleged in Plaintiff's second complaint), the controlling Commissioners instead asserted that there is "no reason to believe that New Republican violated the soft money ban," and that "the remaining allegations" fail "for lack of evidence." *Id.* Those dismissals therefore rested "solely on legal interpretation" and so this Court may review whether those interpretations were contrary to law. *CREW 2021*, 993 F.3d at 884 (emphasis omitted).

### B. The FEC Expressly *Declined* to Exercise Its Prosecutorial Discretion

To the extent the Controlling Commissioners purported to invoke the agency's prosecutorial discretion to justify their dismissals of the Candidacy Filing claims, AR204, 212-13,

that invocation was ineffective, because the full Commission had already explicitly voted *not* to exercise that prosecutorial discretion.

FECA provides that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under . . . this Act shall be made by a majority vote of the members of the Commission." 52 U.S.C. § 30106(c). One of the Commission's "powers" is its ability to exercise its prosecutorial discretion. *Akins*, 524 U.S. at 25; *see also* FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* 12 (2012), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf ("Pursuant to an exercise of its prosecutorial discretion, the Commission may dismiss a matter when, *in the opinion of at least four Commissioners*, the matter does not merit further use of Commission resources." (emphasis added)).

Here, the Commission voted on whether to exercise its power to dismiss, as a matter of prosecutorial discretion, the very same claims for which the Controlling Commissioners later purported to invoke prosecutorial discretion in their Statement of Reasons. AR188, 204. Those votes failed. AR188. As a result, the Commission expressly *declined* to exercise its prosecutorial discretion. *Id.*; *see also* Broussard Statement, *supra*, at 2 ("The Commission specifically considered whether to dismiss under *Heckler v. Chaney*, and specifically voted not to do so."). The dismissals at issue here were not unreviewable exercises of prosecutorial discretion because the FEC had already explicitly declined to employ that discretion.

This explicit vote against exercising prosecutorial discretion distinguishes this case from circuit precedent finding FEC dismissals unreviewable because the controlling Commissioners' statements of reasons invoked prosecutorial discretion. *See CREW 2021*, 993 F.3d 880; *CREW 2018*, 892 F.3d 434. Neither *CREW* case involved an administrative proceeding in which the

Commission took a separate vote on whether to exercise its prosecutorial discretion.[7] *See* Certification, MUR 6872 (New Models) (Nov. 15, 2017), https://eqs.fec.gov/eqsdocsMUR/17044432619.pdf (*CREW 2021*); Certification, MURs 6391 & 6471 (Commission on Hope, Growth and Opportunity) (Oct. 2, 2015), https://eqs.fec.gov/eqsdocsMUR/15044380400.pdf (*CREW 2018*).

This factual distinction goes to the heart of the D.C. Circuit's reasoning in the *CREW* cases: the unreviewability determinations in *CREW 2018* and *CREW 2021* are inapposite here, where the Commission expressly declined to exercise its prosecutorial discretion. Both decisions explained that the controlling Commissioners' invocation of prosecutorial discretion rendered the dismissals at issue unreviewable because "a court would have no meaningful standard against which to judge the [Commissioners'] exercise of discretion." *CREW 2018*, 892 F.3d at 439 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)); *see CREW 2021*, 993 F.3d at 885 (following *CREW 2018*'s reasoning). But where, as here, the Commission voted separately on whether to exercise its discretion and declined to do so, FECA's ordinary majority-vote requirement, *see* 52 U.S.C. § 30106(c), provides straightforward law to apply—a court can simply tally the votes. Put another way, because the FEC expressly chose not to exercise its discretion in this case, reviewing the dismissals would not require this Court to "judge the . . . exercise of discretion," but simply to recognize that *there was no exercise of discretion*. The Commission's vote on whether to exercise its prosecutorial discretion thus provides the "meaningful standard" for review that the courts found lacking in the *CREW* cases.

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[7] A recent decision by this Court concluding that three Commissioners' invocation of prosecutorial discretion barred judicial review, *see Public Citizen v. FEC*, No. 14-148, 2021 WL 1025813, at *4-6 (D.D.C. Mar. 17, 2021), also involved a matter in which the FEC did not hold a separate vote regarding prosecutorial discretion, *see* Certification, MUR 6396 (Crossroads Grassroots Policy Strategies) (Dec. 5, 2013), https://eqs.fec.gov/eqsdocsMUR/14044350869.pdf.

Nor does Circuit precedent establishing the concept of "controlling Commissioners" in deadlock FEC dismissals require or support allowing three Commissioners to insulate their reasoning from judicial review by invoking prosecutorial discretion after the FEC as a whole expressly declines to exercise that discretion. The D.C. Circuit has explained that, in deadlock dismissals, the controlling Commissioners, who voted against proceeding, must issue a Statement of Reasons explaining their decision because such a statement "is necessary to allow meaningful judicial review of the Commission's decision." *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). In other words, if the controlling Commissioners' Statement of Reasons offers the only explanation for the Commission's decision to dismiss a complaint, a court has no choice but to rely on that statement. But when the Commission as a whole has chosen on the record not to exercise its prosecutorial discretion, a group of three Commissioners cannot override that decision by claiming to rely on the *agency's* prosecutorial discretion to explain their reasoning for voting to dismiss. Indeed, while that group of three Commissioners may be "controlling" with respect to the dismissal, they are not "controlling" with respect to the agency's decision not to exercise its prosecutorial discretion; instead, *it is the other three Commissioners* who voted against the FEC's exercising its prosecutorial discretion who controlled that decision. Permitting the reference to prosecutorial discretion in the Statement of Reasons to override the full FEC's decision not to exercise that discretion would divorce *Common Cause*'s rule from its rationale.

Allowing three Commissioners to render a deadlock dismissal unreviewable by referencing prosecutorial discretion when the full Commission explicitly voted not to exercise that discretion would also undermine the agency's "inherently bipartisan" structure. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Congress recognized that the FEC "must decide issues charged with the dynamics of party politics," and responded by implementing a

number of safeguards against partisanship in the Commission's design, such as the rule "that no more than three of its six voting members may be of the same political party" and the requirement that the agency ordinarily act by majority vote. *Id.*; *see* 52 U.S.C. §30106(a)(1), (c). Giving three Commissioners—potentially, as in this case, all members of the same political party—the absolute power to bar judicial review of the dismissal of any administrative complaint cuts against this carefully configured bipartisan structure.[8]

### C. The Controlling Commissioners' Alleged Invocation of Prosecutorial Discretion Depended on an Incorrect Legal Analysis of FECA

Even if the Controlling Commissioners could override the FEC's decision not to exercise the agency's prosecutorial discretion, the dismissals in this case would nevertheless be reviewable because the Controlling Commissioners' invocation of prosecutorial discretion was premised on an erroneous interpretation of FECA.

The FEC's decision to dismiss a claim is reviewable where that decision was made "on the basis of its interpretation of FECA." *CREW 2018*, 892 F.3d at 441 n.11; *see also CREW 2021*, 993 F.3d at 884. While *CREW 2021* held that an FEC dismissal is unreviewable when it "rests even in part on prosecutorial discretion," 993 F.3d at 885, the invocation of prosecutorial discretion in that case provided a ground for dismissal that was adequate and independent of any FECA interpretation: The court emphasized that the dismissal "rested on two *distinct* grounds: the

[8] *CREW 2021* explained that a desire to comport with the Commission's bipartisan structure does not support an argument "that four Commissioners [rather than a simple majority] must concur not only in enforcement actions, but also in nonenforcement actions," because FECA's text expressly indicates that four votes "are necessary only 'to initiate,' 'defend,' 'or appeal any civil action.'" 993 F.3d at 891 (quoting 52 U.S.C. § 30107(a)(6)). However, requiring a majority of Commissioners to vote affirmatively in order to exercise prosecutorial discretion and thereby render the decision unreviewable does not produce any similar conflict with the statutory text. Rather, it aligns with "FECA's general rule that the Commission must make decisions by majority vote." *Id.* (citing 52 U.S.C. § 30106(c)).

Commission's interpretation of FECA *and* its exercise of prosecutorial discretion." *Id.* at 884 (cleaned up) (emphases added); *see also id.* at 887 (emphasizing that "prosecutorial discretion [had been] exercised *in addition to the legal grounds*" offered by the agency). Moreover, the agency's invocation of prosecutorial discretion was premised not on any interpretation of FECA, but instead "rested squarely on prudential and discretionary considerations relating to resource allegation and the likelihood of successful enforcement." *Id.* at 886 (stressing that the FEC offered these considerations "in addition to its legal analysis of FECA's . . . requirements"). Since this invocation of prosecutorial discretion provided a separate "basis for dismissal," the court explained, a ruling finding that the controlling Commissioners' FECA interpretation is contrary to law would effectively be an advisory opinion that "would not affect the Commission's ultimate decision to dismiss." *Id.* at 889.

The same is not true here: The controlling Commissioners' purported invocation of prosecutorial discretion rested squarely on two erroneous legal conclusions about FECA. First, the controlling Commissioners relied on the erroneous legal conclusion that determining when Scott became a candidate would require "prob[ing] his subjective intent." AR212. In fact, Commission regulations and precedent establish that determining whether an individual has become a candidate or instead can claim to be simply testing the waters is an *objective* inquiry. *See* 11 C.F.R. §§ 100.72(b), .131(b); FEC Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) at 5; Factual and Legal Analysis at 7-8, MUR 5363 (Sharpton *et al.*) (Nov. 13, 2003). The FEC must consider whether the individual has engaged in "activities indicating that [she] has decided to become a candidate," *not* whether the individual has *actually* decided to run. 11 C.F.R. §§ 100.72(b), .131(b); *see* Factual and Legal Analysis at 7-8, MUR 5363 (Sharpton *et al.*) (Nov. 13, 2003); *see also* AR136-37 (explaining that the inquiry is "objective[]"). This misunderstanding of the relevant law

underlay *all* the justifications the controlling Commissioners offered for employing the agency's discretion. Ostensibly relying on their (erroneous) belief that the candidacy determination would require a subjective assessment of Scott's intent, the Commissioners cited the difficulty, intrusiveness, and expense of such an investigation as reasons to dismiss the matter. AR212. The fact that the inquiry is in reality an objective one undercuts all those concerns.

Second, and relatedly, the controlling Commissioners suggested that the record in this case provided too "thin [an] evidentiary reed" to justify pursuing the matter. AR212. In other words, they rested their invocation of prosecutorial discretion on their view of the legal merits (a view colored by their misunderstanding of the candidacy inquiry). This reasoning, too, renders their purported exercise of discretion reviewable. Moreover, the fact that the merits of ECU's administrative complaint are in fact quite strong, *see* Part II.A, *supra* at 23-29, makes the decision not only reviewable, but substantively arbitrary and capricious as contrary to the evidence.

Because the controlling Commissioners premised their invocation of prosecutorial discretion "on the basis of [their] interpretation of FECA," *CREW 2018*, 892 F.3d at 441 n.11, the *CREW* rulings are distinguishable and the resulting dismissals here are reviewable. In contrast to an invocation of prosecutorial discretion premised squarely on prudential and discretionary considerations (like that in *CREW 2021*), this Court would have a meaningful standard against which to judge the Commissioners' exercise of discretion—FECA provisions and FEC regulations governing when an individual has become a candidate. Furthermore, the D.C. Circuit's advisory-opinion concerns are not implicated here, since a ruling concluding that the FECA interpretation underlying the controlling Commissioners' invocation of prosecutorial discretion is contrary to law would in fact undermine the basis of the agency's ultimate decision to dismiss.

### D. The Dismissals Are Reviewable Because the Invocation of Prosecutorial Discretion Was Pretextual

Agency action is arbitrary and capricious—and therefore contrary to law—when the agency's justification for that action is pretextual. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573-76 (2019). For example, in *Department of Commerce*, the Supreme Court held that the Secretary of Commerce's proffered reasons for including a citizenship question on the 2020 Census were pretextual—the Secretary had decided his preferred course of action in advance, then retroactively composed a rationale—and that the agency's decision was therefore arbitrary and capricious. *See id.*

The record in this case similarly shows that the controlling Commissioners reached a substantive conclusion on the merits that the Candidacy Filing allegations did not warrant a reason-to-believe finding, then retroactively applied the prosecutorial discretion rationale to justify that decision. The Statement of Reasons acknowledges that ECU's allegations regarding when Scott became a candidate overlap with its allegations of soft-money violations by New Republican, both in that the allegations rested on similar evidence arising from Scott's activities as the super PAC's Chair, AR212, and in that, as a legal matter, "New Republican can commit a soft money violation only if Scott is a candidate," AR209. Logically, then, the Commissioners could not have reached their conclusion that there was no reason to believe New Republican had committed soft-money violations, *see* AR212, without also making a legal determination that the Candidacy Filing allegations similarly did not warrant a reason-to-believe finding. In fact, the Commissioners' Statement of Reasons indicates that they had reached just such a substantive conclusion, stating that they "[we]re not persuaded" by the General Counsel's conclusion that the FEC should find reason to believe the alleged violations occurred, AR 209, and that the record offered too "thin [an] evidentiary reed" to warrant an investigation of the Candidacy Filing allegations. AR 212.

Because the controlling Commissioners' invocation of prosecutorial discretion was pretextual, it was necessarily arbitrary, capricious, and contrary to law. *See Orloski*, 795 F.2d at 161. Although the *CREW* decisions found that the exercises of prosecutorial discretion in those cases were not reviewable under the "contrary to law" standard, *e.g.*, *CREW 2021*, 993 F.3d at 895, there was no dispute in either case that the Commission's decisions *genuinely* rested on prosecutorial discretion. Because here, in contrast, the Commissioners' application of prosecutorial discretion was pretextual, it was arbitrary and capricious under *Department of Commerce* and thus cannot justify dismissing Plaintiff's claims or insulate the dismissals from review, *Orloski*, 795 F.2d at 161.[9]

## CONCLUSION

For the foregoing reasons, Plaintiff's motion should be granted, and the attached proposed order should be entered finding that the FEC acted contrary to law and ordering the FEC to conform to the Court's judgment within 30 days.

[9] For the reasons explained herein, *CREW 2018* and *CREW 2021* are distinguishable from this case. But in the event the Court disagrees, Plaintiffs note that *CREW 2021* is the subject of a pending petition for rehearing *en banc*. *See* Petition for Rehearing En Banc, *CREW 2021*, No. 19-5161 (D.C. Cir. June 23, 2021). Moreover, the *CREW* rulings are inconsistent with previous rulings of the Supreme Court, *see Akins*, 524 U.S. at 26 (holding that FECA "explicitly indicates" that FEC dismissals are subject to review, notwithstanding *Chaney*), and the D.C. Circuit, *see Chamber of Commerce of the U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (holding that a dismissal based on FEC's "unwillingness" to proceed is subject to judicial review); *DCCC*, 831 F.2d 1134-35 & n.5 (declining to "confin[e] the judicial check [in § 30109(a)(8)(C)] to cases in which . . . the Commission acts on the merits"); *Orloski*, 795 F.2d 156 (recognizing dismissals could be contrary to law *either* because they contained legal error or because they were otherwise arbitrary, capricious, or an abuse of discretion). "[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail." *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).

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Respectfully submitted,

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