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

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| **CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON**,<br><br>Plaintiff,<br><br>v.<br><br>**FEDERAL ELECTION COMMISSION**,<br><br>Defendant. | Civil Action No. 22-35-CRC |

**PLAINTIFF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON'S MOTION FOR SUMMARY JUDGMENT OR DEFAULT JUDGMENT AND OPPOSITION TO THE FEDERAL ELECTION COMMISSION'S MOTION FOR VOLUNTARY REMAND**

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## INTRODUCTION

Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") hereby respectfully requests the entry of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure against the Federal Election Commission ("FEC" or "Commission") or, alternatively, default judgment under Federal Rule of Civil Procedure 55. The FEC failed to offer any cognizable contemporaneous explanation of its dismissal of CREW's complaint against a de facto political committee, Freedom Vote, and thus failed in its "fundamental" obligation to "set forth its reasons" for its decision. *Tourus Recs., Inc. v. Drug Enf't Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001). In light of the conclusive evidence that Freedom Vote independently satisfied the test for political committee status in each of the relevant years, that dismissal was not "self-explanatory," *id.*, and thus the FEC's "failure" to articulate a contemporaneous rationale at the time of dismissal "constitutes arbitrary and capricious agency action." *id.*; *see also End Citizens United PAC ("ECU") v. FEC*, 69 F.4th 916, 921 (D.C. Cir. 2023) (explanation must "issue[] 'at the time when a deadlock vote results in an order of dismissal'" (*quoting Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988)). Accordingly, CREW is entitled to judgment in its favor *See* Fec. R. Civ. P. 56; *see also* Fed. R. Civ. P. 55(d).

Declaring the FEC's dismissal was arbitrary and capricious, and thus "contrary to law," *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir.1986), and remanding to the agency to conform within thirty days is the remedy the Federal Election Campaign Act ("FECA") commands here. Nonetheless, the FEC seeks a last second escape of judgment through a voluntary remand, without admission of error and without a deadline to act, further delaying these proceedings interminably. The FEC's request should be denied, however. First, it would deprive CREW of its only remaining plausible chance at a remedy: a private action that is only possible once CREW secures a judgment that the FEC's dismissal was contrary to law. Second, the FEC's proposed

actions on remand do not cure its mistake here, but rather double-down on them, contemplating yet another post-hoc explanation with the only difference being that the FEC would withhold notice to CREW until that post hoc rationalization was drafted.

Rather, the course set out in the FECA is for the Court to hold the unexplained dismissal was contrary to law and provide the FEC its statutorily allowed thirty days to conform. If on remand the FEC conforms with this judgment and dismisses the complaint with a contemporaneous explanation that is consistent with law, then this matter would be at an end. If they do not, CREW would be permitted to do what the FECA intends: to bring disclosure to a group that has indisputably violated the law and deprived CREW and other Americans of their right to be "fully informed" about "[t]he sources of a candidate's financial support." *Buckley v.* Valeo, 424 U.S. 1, 67, 76 (1976).

## BACKGROUND

### A. Statutory and Regulatory Background

#### 1. Political Committee Disclosures

To ensure the public is "fully informed," *Buckley*, 424 U.S. at 76, about "who is speaking about a candidate" and might have officials "in [their] pocket," *Citizens United v. FEC*, 558 U.S. 310, 369, 370 (2010), the FECA imposes several disclosure obligations. Relevant here, it imposes an obligation on political committees to register and continually report and disclose information about their finances, including the identity of their donors who provide more than $200 a year. 52 U.S.C. § 30103(a), *id.* § 30104(b), (f)(2); 11 C.F.R. §§ 102.1, 104.3, 104.4, 104.20. The political committee's obligations continue until either it or the FEC terminates its status as permitted by the FECA. 52 U.S.C. § 30103(d).

The FECA defines a political committee as any group that takes "contribut[ions] or [makes] expend[itures] [of] more than $1,000 in a calendar year." *CREW v. FEC*, 209 F. Supp.

3d 77, 82 (D.D.C. 2016); 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). An "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A). A "contribution" is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A). Accordingly, a group may qualify as a political committee by spending more than $1,000 in a calendar year on express advocacy, *CREW*, 209 F. Supp. 3d at 83–84 (independent expenditures are expenditures that may qualify maker as a political committee); FEC, Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5604 (Feb. 7, 2007) ("Supplemental E&J") (discussing "Expenditure Path to Political Committee Status"), or making contributions to political committees, *Akins v. FEC*, 101 F.3d 731, 734, 744 (D.C. Cir. 1996) (en banc) (organization qualified as political committee because it "made campaign contributions exceeding the $1,000 threshold"), *vacated on other grounds*, 524 U.S. 11; Advisory Opinion 1996-18 (Int'l Ass'n of Fire Fighters) (July 14, 1996), https://bit.ly/2IiKfhE ("making contributions" qualifies maker as political committee), or by accepting more than $1,000 to influence a federal election, FEC, Supplemental E&J, 72 Fed. Reg. at 5604–05 (discussing "Contribution Path to Political Committee Status").

The Supreme Court has carved out from the statutory test otherwise qualifying groups that are neither under the control of a candidate nor have the requisite "major purpose" to nominate or elect federal candidates. *See Buckley*, 424 U.S. at 79. Determination of a group's "major purpose" is fact intensive and evaluates "fundraising solicitations," "public statements," "internal documents about an organization's mission," and the "full range of campaign

activities" compared to "the organization['s] engage[ment] in any activities that were not campaign related." FEC, Supplemental E&J, 72 Fed. Reg. at 5605. A major purpose may be exhibited solely through a group's spending significant sums to influence federal elections. *FEC v. Mass. Citizens for Life, Inc.* (*"MCFL"*), 479 U.S. 238, 262 (1986).

Consistent with the FECA's focus on a group's "calendar year" of activities, the major purpose test is sensitive to the fact that "an organization's major purpose can change." *CREW*, 209 F. Supp. 3d at 94 (emphasis omitted) (citing *MCFL*, 479 U.S at 262). Further, although neither courts nor the FEC have definitively decided the threshold, only groups that devote a majority of their spending to activity unrelated to influencing elections in a qualifying year may be excused from reporting. *See Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555-57 (4th Cir. 2012) (finding political committee status does not depend on whether "campaign-related speech amounts to 50% of all expenditures"); FEC, Supplemental E&J, 72 Fed. Reg. at 5605 (noting group spending "50-75%" on campaign activity qualified as political committee).

A qualifying group is a political committee subject to the duties to report, and "the law does not require a committee to register as a [political committee] in order to be one." Statement of Reasons of Chairman Allen Dickerson, MUR 7920 (Oklahomans for T.R.U.M.P.) (June 29, 2022), https://perma.cc/6Q2C-PDY8.

2. Exhaustion of Private Claims

The FECA includes "a feature of many modern legislative programs," *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990): paired civil enforcement through a government agency with private litigation, *see* 52 U.S.C. § 30107(e) (FEC's "exclusive" civil enforcement power subject to "[e]xcept[ion]" of private suits "in section 30109(a)(8)").

Congress subjected both mechanisms to significant safeguards. "To avoid agency capture, [Congress] made the Commission partisan balanced, allowing no more than three of the six Commissioners to belong to the same political party," *CREW v. FEC*, 923 F.3d 1141, 1143 (D.C. Cir. 2019) ("*CHGO II*") (Pillard, J., dissenting), while requiring a majority vote for any enforcement decision, *id.* at 1142 (Griffith, J., concurring) ("FECA thus requires that all actions by the Commission occur on a bipartisan basis."); 52 U.S.C. § 30106(c). "That balance created a risk of partisan reluctance to apply the law," however. *CHGO II*, 923 F.3d at 1143–44 (Pillard, J., dissenting); *cf. also* FEC, Legislative History of Federal Election Campaign Act Amendments of 1976 at 72 (1977), https://perma.cc/G23G-SQ7T (Statement of Sen. Clark) (expressing concern that, beyond the risk of deadlock, FECA enforcement "cannot be left to a commission that is under the thumb of those who are to be regulated").

Accordingly, rather than rely solely on the agency, Congress provided private litigants with an avenue to protect the private rights to which the FECA entitles them, *FEC v. Akins*, 524 U.S. 11, 22 (1998), subject to the safeguard obliging any plaintiff to exhaust their claims through preliminary adjudication by the FEC, *Stockman v. FEC*, 138 F.3d 144, 153 (5th Cir. 1998) (dismissing lawsuit filed without first presenting claim to the FEC and obtaining judgment). The agency then acts as "first arbiter," screening out meritless complaints, while the FECA assures "plausible claims" are pursued either by the agency or by the private litigant. *CHGO II*, 923 F.3d at 1143–44, 1149 (Pillard, J., dissenting).

The Commission does so by first adjudicating what is essentially an automatic motion to dismiss: judging whether a complaint raises a "reason to believe" a violation may have occurred. 52 U.S.C. § 30109(a)(2). If a majority concludes it does, then "the Commission shall make an investigation." *Id.*; *CREW v. FEC*, 55 F.4th 918, 923 (D.C. Cir. 2022) ("*New Models II*")

(Millett, J., dissenting) ("If at least four of the six commissioners determine there is reason to believe a violation occurred, the Commission must go forward with an investigation."); *accord CHGO II*, 923 F.3d at 1144 (Pillard, J., dissenting). After an investigation, the Commission then decides whether it has established "probable cause to believe" a violation occurred. 52 U.S.C. § 30109(a)(4). If four commissioners agree there is probable cause, the Commission "shall attempt, for a period of at least 30 days, to correct or prevent such violation." *Id.*

If a majority does not conclude the complaint raises a reason to believe or that an investigation raises a probable cause to believe, the FEC may then choose to close the case by a majority vote. A complainant may then seek judicial review of that dismissal to determine if the dismissal was contrary to law and, if so, establish it exhausted its claims before the agency and may pursue its own meritorious claim in court. 52 U.S.C. § 30109(a)(8)(A). Accordingly, if the vote to close is against the recommendation of the Commission's general counsel to pursue the matter, the commissioners who judged the complaint to lack merit must "state their reasons why" they deadlocked the case on the merits in way that led a majority to vote to close to permit a court to "intelligently determine whether the Commission is acting 'contrary to law.'" *DCCC v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987). The commissioners must "give reasons for that action that are subject to judicial review." *CREW v. FEC*, 892 F.3d 434, 445 (D.C. Cir. 2018) ("*CHGO I*") (Pillard, J., dissenting). The explanation may not be a "post hoc rationalization," but must rather be a "contemporaneous statement," *ECU*, 69 F.4th at 921–22, one that is part of the record that is "before the agency at the time the decision was made," *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

### B. Factual Background

On August 8, 2018, CREW filed an administrative complaint with the FEC alleging, among other things, that Freedom Vote qualified as a political committee no later than 2016 but

that it failed to register and file required disclosures. AR0001–23.[1] The FEC unanimously voted to find the complaint raised a reason to believe Freedom Vote violated the law and authorized an investigation. AR104–05. That investigation revealed CREW's allegations were well-founded and in fact that "71% of [Freedom Vote's] expenditures aggregating over $3.4 million constituted federal campaign activity." AR1532 (General Counsel's Brief). Accordingly, the FEC's nonpartisan staff recommended the Commission find probable cause to believe Freedom Vote qualified as a political committee but failed to register as one. AR1559.

Notwithstanding this extensive record, on November 9, 2021, the Commission deadlocked three-to-three on the agency's general counsel's recommendation to proceed with enforcement. AR1815–16. The Commission then declined to exercise prosecutorial discretion to dismiss the matter. *Id.* Nonetheless, with proceedings unable to move forward, one commissioner who voted to find probable cause that Freedom Vote violated the law and voted against dismissing the case as an exercise of prosecutorial discretion provided the necessary fourth vote to close the matter in order to submit the matter to judicial review. *Id.*

Thereafter, CREW brought the instant action pursuant to 52 U.S.C. § 30109(a)(8) challenging the FEC's dismissal of CREW's complaint against Freedom Vote as contrary to law. The FEC failed to respond, however, and on March 29, 2022, the Clerk for the United States District and Bankruptcy Courts for the District of Columbia entered default against the FEC. Default, ECF No. 5. The FEC also failed to produce any documents, never mind the whole administrative record, within the thirty days required by Local Civil Rule 7(n).

[1] Pursuant to Local Civil Rule 7(n), relevant materials in the administrative record will be provided to the Court as part of a joint appendix filed once briefing is completed.

CREW then took various efforts over the next year and a half to obtain the record in this matter, ranging from attempts to confer with opposing counsel, serving requests for production and a subpoena, and filing and serving a motion to compel production, all of which the FEC ignored.

In the interim, the Court enquired into the effect on its jurisdiction caused by a statement of reasons issued on March 7, 2022, by the commissioners blocking the probable cause vote. Min. Order (Feb. 8, 2023); *see also* AR1834–45. CREW demonstrated that the statement could not impact the court's jurisdiction, was a post-hoc rationalization not cognizable on judicial review and, in any event, could not serve to block review of the whole case. Pl. CREW's Resp. to Ct.'s Order to Show Cause, ECF No. 8 (citing *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (holding reviewability is not jurisdictional)); *CHGO I*, 892 F.3d at 438 n.6 (recognizing commissioners' dismissal of one charge on prosecutorial discretion grounds did not preclude challenge to dismissal of "the remaining charge"); *Common Cause*, 842 F.2d at 449 (holding only explanations existing "at the time when a deadlock vote results in an order of dismissal" are cognizable on judicial review)). The Court agreed the statement was a "post-hoc rationalization" that could not preclude review here. Min. Order (Oct. 30, 2023).

Eventually, on October 30, 2023, the Court ordered the FEC to respond to CREW's motion to compel, at which point the FEC decided to appear, but only "to respond to plaintiff's Motion to Compel and complete administrative record requirements." Certification, Civ. No. 22-35 (CRC) (D.D.C.), Nov. 9, 2023, https://www.fec.gov/resources/cms-content/documents/fec-certification-11-09-2023.pdf. After additional wrangling by CREW, the FEC finally agreed to produce an administrative record.

The record demonstrated the validity of CREW's claims conclusively.

First, it demonstrated that Freedom Vote easily satisfied the statutory threshold for political committee status independently in 2014, 2015, and 2016. Specifically, the record demonstrated Freedom Vote made an independent expenditure of over $174,607 in 2014. *See* AR0199, AR1310–11 (Freedom Vote's 2014 financials), AR1136–41 (Freedom Vote's FEC report on independent expenditures); *see also* AR1552.[2] In 2015, Freedom Vote made contributions to a federally registered political committee of $200,000 in 2015. *See* AR0198, AR1314–15 (Freedom Vote's 2015 financials showing $200,000 grant to "Fighting for Ohio Fund (Super PAC)"); *see also* AR1542. Freedom Vote also made contributions of $1,755,000 in 2016 to a federally registered political committee. AR0198; AR1318–22 (Freedom Vote's financials showing six payments to "Fighting for Ohio Fund (Super PAC)"); AR1955, *see also* AR1544. Freedom Vote also accepted multiple contributions over $1,000 in 2016 made for the purpose of influencing federal elections, which would satisfy the statutory test independently from Freedom Vote's spending. *See* AR0532 (contribution to Freedom Vote of $500,000 for "reelection of Rob Portman"), AR2074 (contribution of $50,000 to "help [Freedom Vote] elect pro-growth, pro-business leaders); AR2076 ($10,000 contribution to Freedom Vote "for the general election"), AR1498–1501, AR2166 ($1,000,000 to Freedom Vote to be used "in the Senate race"); *see also* AR1318–22 (Freedom Vote's financials showing receipts of $500,0000, $50,000, $10,000 and $1,000,000 deposits). It is also likely Freedom Vote accepted contributions in 2014 and 2015. *See, e.g.*, AR2174, AR2203–12 (2014 email correspondence with recipient's name redacted, indicating donor, discussing need for funds to cover Freedom Vote's May outlays, which were Freedom Vote's independent expenditures in support of John Boehner).

[2] There is evidence that Freedom Vote may have falsified this record and that it merely acted as a conduit for an expenditure actually made by a different dark money operation, American Action Network. *See* AR1406, AR1988–89, AR1997, AR2032–33.

Second, the record demonstrated conclusively that Freedom Vote's major purpose changed in 2014 to nominate or elect federal candidates. In the words of the FEC's General Counsel, "Freedom Vote's comparative spending on activities indicat[es] its purpose of nominating or electing a federal candidate, in each of 2014, 2015, and 2016, or all of these years together." AR1556.

Specifically, the record demonstrated that Freedom Vote spent $239,877.81 on electioneering in 2014, about 82.67% of its calendar year expenditures, *see* AR1541, consisting of sums Freedom Vote reported spending on an independent expenditure as well as other unreported associated expenses like "DTD" (door-to-door), "poll ride calls," "GOTV" efforts, consulting services, and opposition research. AR0291, AR0294–95, AR1034, AR1036, AR1038, AR1040, AR1042, AR1044, AR1046, AR 1048, AR1050, AR1092, AR1095–98, AR1310–11, AR1426–27 (Nathanson Dep. Tr. 56:24–57:8); *see also* AR1537–42 (discussing Freedom Vote's 2014 expenses). Indeed, Freedom Vote's executive director confirmed that he could not recall the organization engaging in any activities other than electioneering and never recalled Freedom Vote advocating for any of its "issues" outside of the election context. AR1395 (Nathanson Dep. Tr. 23:4-25:12), AR1443 (Nathanson Dep. Tr. 73:11).

The record further demonstrated that, in 2015, Freedom Vote spent about $217,539 on electioneering, about 66.28% of its total calendar year expenditures. AR1543. Those expenses consisted of contributions to political committees discussed above, as well as expenses like polling on candidates' favorability that did not address any issue or policy questions, AR0422, AR0424, AR1314–15, *see also* AR1542–43 (discussing Freedom Vote's 2015 expenses).

The record also demonstrated that in 2016, Freedom Vote spent about $2,987,563.45 on electioneering, or about 77.35% of its expenses that year. AR1548. That spending consisted of

the contributions to political committees referred to above, as well as payments for "large-number analytics" and "straightforward polling" for the Senate race, AR1320–22, AR1459 (Nathanson Dep. Tr. 89:1–91:5), and $1,102,713.45 to produce and air an advertisement attacking a federal senate candidate in the context of his Senate campaign. AR0568, AR1320–22, AR1367, AR1369, AR1992–94 (quoting ad as stating "Now Ted Strickland wants to bring his job-killing policies to Washington" via election to the Senate and urging viewers to oppose him because "[w]e can't afford more lost jobs"); *see also* AR1545. Freedom Vote's executive director confirmed that "[t]he Senate race was [Freedom Vote's] primary activity in 2016." AR1464 (Nathanson Dep. Tr. 94:22-23); *accord* AR1501(Nathanson Dep. Tr. 131:4-6) ("The main thing we did in 2016 was concerned about what was happening in the Senate race."), AR1507 (Nathanson Dep. Tr. 137:16-18) ("[O]ur activities in 2016, which were primarily those involved around the Senate race.").

The record also demonstrated that Freedom Vote largely ceased operations after it became the subject of an IRS complaint and audit. *See* AR1548–50. It would eventually vote for dissolution in 2019 after receiving CREW's complaint in the underlying administrative matter here. *See* AR1550. Freedom Vote, however, never sought to terminate its political committee status with the FEC. *See* Freedom Vote, *Committee Filings*, https://www.fec.gov/data/committee/C90014754/?tab=filings (last visited July 2, 2024).

## ARGUMENT

### A. Jurisdiction

The action arises under the FECA, 52 U.S.C. § 30101 et seq. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and venue is appropriate under 28 U.S.C. § 1391(c). CREW has standing pursuant to *FEC v. Akins*, 524 U.S. 11 (1998), because it has not received

information to which it is legally entitled under the FECA, *id.* at 21; *accord CLC*, 952 F.3d at 356; *see* Compl. ¶¶ 7–16, ECF No. 1; Fed. R. Civ. P. 8(b)(6) (failure to deny allegation is admission).

### B. Standard for Summary Judgment

"The Court will grant summary judgment 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *CREW*, 209 F. Supp. 3d at 85 (quoting Fed. R. Civ. P. 56(a)). "Under these circumstances, where summary judgment is sought regarding certain of the FEC's dismissal decisions, this Court will grant summary judgment to the challenger only if the agency's decisions are 'contrary to law,'" *id.* (citing 52 U.S.C. § 30109(a)(8)(C)), "meaning either that 'the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA],' or that 'the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion,'" *id.* (quoting *Orloski*, 795 F.2d at 161). In determining whether a dismissal is "arbitrary or capricious, or an abuse of discretion," courts employ the same standard as under the APA. *See id.* at 88.

### C. Standard for Default Judgement

Rule 55(b) of the Federal Rules of Civil Procedure permits default judgment to be entered if the party against whom judgment is sought has failed to plead or otherwise defend in the action. While the law generally favors decisions on the merits, when unresponsive parties threaten to halt the progress of litigation, judgment by default is available to protect the responsive party "lest he be faced with interminable delay and continued uncertainty as to his rights." *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 965 (D.C. Cir. 2016) (citing *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) (per curiam)).

Where the party in default is the United States, default judgment may be entered "only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). This rule, however, "'does not relieve the government from the duty to defend cases or obey the court's orders. Indeed this privilege against default judgment . . . heightens the government's duty …." *Payne v. Barnhart*, 725 F. Supp. 2d 113, 119 (D.D.C. 2010) (quoting *Alameda v. Sec'y of Health, Ed. And Welfare*, 622 F.2d 1044, 1048 (1st Cir 1980)). Nor is this evidentiary burden an especially high one. After entry of default against the government, "the quantum and quality of evidence that might satisfy a court can be less than that normally required." *Alameda*, 622 F.2d at 1048 (discussing Rule 55(e), which is now Rule 55(d)).

"Once the clerk enters the default pursuant to Rule 55(a)," as it has here, *see* Default, ECF No. 5, "Rule 55(b) authorized either the clerk or the court to enter a default judgment against a defendant." *Teamsters Local 539 Emps. Health Trust v. Boiler and Furnace Cleaners, Inc.*, 571 F. Supp. 2d 101, 107 (D.D.C. 2008). Despite appearing, the FEC has not sought to set aside the default or suggested it could have good cause to do so, *cf.* Fed. R. Civ. P. 55(c), and accordingly cannot oppose judgment or, for that matter, present any other matter to this Court, *see N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996) ("Because [defendant] defaulted, he must succeed in setting aside the default before he will be permitted to respond to the motion for summary judgment"); *Cohen v. Rosenthal*, No. 3:15-cv-01043-CHS, 2015 WL 7722391, at *2 n.2 (D. Conn. Nov. 30, 2015) (collecting cases). "Given the absence of any request to set aside the default or suggestion by the defendant that it has a meritorious defense," as is the case here, then "it is clear … the standard for acquiring default judgment has been satisfied by the plaintiff." *Id.*

### D. The Dismissal Below Was Contrary to Law

The dismissal below occurred on November 9, 2021, when four commissioners—Commissioners Broussard, Cooksey, Dickerson, and Trainor—voted to close the file. AR 1815. They did so over the recommendation of the General Counsel to find probable cause to believe Freedom Vote qualified as a political committee as early as 2014, and again in 2015 and 2016, but failed to register and report as one. AR1559. The General Counsel's recommendation was well supported by the record. That record demonstrated Freedom Vote met the statutory qualifications for political committee status in 2014, 2015, and again in 2016, through independent expenditures, contributions made to other political committees, and contributions it received. The record further demonstrated "Freedom Vote's comparative spending on activities indicat[es] its purpose of nominating or electing a federal candidate, in each of 2014, 2015, and 2016, or all of these years together." AR1556. The General Counsel also concluded that the statute of limitations imposed no impediment because political committee registration and reporting violations are "ongoing" and, in any event, less than five years had elapsed from the due date for Freedom Vote's report on its 2016 activities. AR1528, AR1809.

Notwithstanding the substantial and conclusive record amassed by the General Counsel, three commissioners voted against finding probable cause to believe Freedom Vote qualified as a political committee. AR1815–16. The Commission declined to exercise prosecutorial discretion to terminate the case notwithstanding its non-partisan staff confirming its merit. AR1815. Nevertheless, as mentioned, four commissioners then voted to close the file.

Nothing in the record that existed at the time of the vote to close provides an explanation for the vote to close or the vote against probable cause over the General Counsel's recommendation. Unlike in other matters, the commissioners did not draft, revise, or approve a Factual and Legal Analysis at the time of the vote to close that would explain their actions. *Cf,*

*e.g.*, Certification, MUR 8122 (Lafazan for Congress), Feb. 6, 2024, *available at* https://www.fec.gov/files/legal/murs/8122/8122_13.pdf (approving, prior to vote to close the file, "the Factual and Legal Analysis … subject to the revisions circulated by Chairman Cooksey's Office …."). Rather they took an action that is completely unexplained and, in the face of the General Counsel's brief, inexplicable. The Commission's failure to discuss, approve, or review an explanation for their actions at the time of the vote to close renders the vote contrary to law.

Where the FEC dismisses a case "in spite of the FEC's General Counsel's contrary recommendation," the FEC must provide the explanation for the vote. *DCCC*, 831 F.2d at 1135. The explanation must be "issued 'at the time when a deadlock vote results in an order of dismissal.'" *ECU*, 69 F.4th at 921 (quoting *Common Cause*, 842 F.2d at 449); *see also DHS v. Regents of U. of Cal.*, 591 U.S. 1, 20–21 (2020) (emphasizing the "foundational principal of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action" (internal quotation marks omitted)). While the agency may later "provid[e] an 'amplified articulation' of its prior 'conclusory' statement," it may not provide a late "post-hoc rationalization[]" where the record includes no contemporaneous one. *ECU*, 69 F.4th at 922. Only a contemporaneous explanation for the vote to close the file provides "an opportunity for self-correction" whereby the statement can be reviewed and corrected before the action is taken or the action altered. *Id.* at 923. Here, there was no contemporaneous explanation. *See* Min. Order (Oct. 30, 2023).

"A 'fundamental' requirement of administrative law is that an agency 'set forth its reasons' for decision; an agency's failure to do so constitutes arbitrary and capricious agency action." *Tourus Recs.*, 259 F.3d at 737(quoting *Roelofs v. Secretary of the Air Force*, 628 F.2d

594, 599 (D.C. Cir. 1980)); *accord Ohio v. EPA*, No. 23A349, 2024 WL 3187768, at *7 (U.S. June 27, 2024) ("An agency action qualifies as arbitrary or capricious if it is not reasonable and reasonably explained" (internal quotation marks omitted)); *FEC v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986) ("[A]n agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct."). A document in the record that "is 'not a statement of reasoning, but of conclusion,'" fails to show the action was anything but "arbitrary because it says nothing about 'why'" the agency acted. *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350–51 (D.C. Cir. 2014) (citing *Tourus Recs.*, 259 F.3d at 737). In order to avoid a finding that the challenged agency action was arbitrary or capricious, the "agency must [have] examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *PPL Wallingford Energy LLC v. Fed. Energy Regul. Comm'n*, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

Here, the FEC has offered no cognizable explanation in the record, and indeed has fought any attempts to locate that explanation, that might explain its dismissal of CREW's complaint. That dismissal was hardly "self-explanatory." *Tourus Recs.*, 259 F.3d at 737. The record conclusively demonstrated Freedom Vote independently met both the statutory and Supreme Court's tests for political committee status in 2014, 2015, and 2016. Freedom Vote "ma[de] expenditures" in excess of $1,000, including independent expenditures and distributions to other political committees, and accepted contributions in excess of $1,000 in each of those calendar years. 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). Each of those activities is independently sufficient to satisfy the FECA's test for political committee status. *See Akins*, 101 F.3d at 734; *CREW*, 209 F. Supp. 3d at 83–84; FEC, Supplemental E&J, 72 Fed. Reg. at 5604–05; Advisory Op. 1996-18 (Int'l Ass'n of Fire Fighters). Moreover, as succinctly stated by the FEC's general counsel, "Freedom Vote's comparative spending on activities indicat[es] its purpose of

nominating or electing a federal candidate, in each of 2014, 2015, and 2016, or all of these years together." AR1556; *see* FEC, Supplemental E&J, 72 Fed. Reg. at 5601. Thus, in light of this record, the only self-explanatory action the Commission could have taken, if any, was to vote to find probable cause rather than voting to close the file.

Nor does the record demonstrate any "self-explanatory" statute of limitations concerns. First, as the FEC has itself admitted in court, there is no statute of limitations prohibition that precludes the FEC from seeking equitable relief from a de facto political committee. *See CREW v. FEC*, 993 F.3d 880, 902 n.4 (D.C. Cir. 2021) ("*New Models I"*) (Millett, J., dissenting); *see also CLC v. FEC*, 646 F. Supp. 3d 57, 68 (D.D.C. 2022) (the statute of limitations "does not preclude equitable relief"). Second, Freedom Vote has never terminated its political committee status with the FEC, the sole action that would terminate its continuing obligation to file reports. *See* 52 U.S.C. § 30103(d); 11 C.F.R. § 102.3(a)(1); *see also* Advisory Op. 1997-47 (Hansen) (Nov. 16, 1977), *available at* https://saos.fec.gov/aodocs/1977-47.pdf ("Under the Act and the Commission's regulations, a political committee is a continuing organization until specific action is taken to terminate the registration of, or disband, the committee."). Third, even considering Freedom Vote's 2016 activities, those activities would have been reported on a Commission report due within five years of the FEC's vote to dismiss CREW's complaint, and thus within the purported statute of limitations. *See* 52 U.S.C. § 30104(a)(4)(B) ("year end" report due by January 31 of year following expenditures); AR1815–16 (vote to close November 9, 2021); *cf.* 28 U.S.C. § 2462 (providing five-year statute of limitations on "civil fine, penalty, or forfeiture").

In light of this record, judgment in favor of the FEC is not "possible absent a contemporaneous explanation of the Commission's decision for the Court to assess." *Cf.* FEC's

Mot. for Voluntary Remand 12, ECF No. 33. Rather, it leaves the Court with a single conclusion: that the dismissal was "arbitrary and capricious," *Tourus Recs.*, 259 F.3d at 737, and thus "contrary to law," *Orloski*, 795 F.2d at 161.

"When an agency provides a statement of reasons insufficient to permit a court to discern its rationale, or states no reasons at all, the usual remedy is a 'remand to the agency for additional investigation or explanation.'" *Tourus Recs.*, 259 F.3d at 738 (quoting *Fl. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Here, the FEC may not supply additional "explanation." *Tourus Recs.*, 259 F.3d at 738. The FEC may only offer a "fuller explanation" on remand if the record contained an "initial explanation" that "indicat[ed] the determinative reasons for the final action," but here it does not. *Regents.*, 591 U.S. at 20–21 That leaves remand for "additional investigation." *Tourus Recs.*, 259 F.3d at 738. That is the remedy commanded by the FECA, which provides that after a court declares a dismissal was contrary to law, a remand to the agency for new action in conformity with the declaration within thirty days. 52 U.S.C. § 30109(a)(8)(C); *see also CREW v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015) ("FECA's legislative history only confirms that Congress meant for the Act's delicately balanced scheme of procedures and remedies to be the exclusive means for vindicating rights and declaring duties stated in the Act." (internal quotation marks omitted)).

Accordingly, when the D.C. Circuit threw out a similar post-hoc rationalization, *see ECU*, 69 F.4th at 921–22, leaving the FEC's dismissal of a complaint entirely unexplained, the D.C. Circuit recognized the action was "contrary to law" and remanded for "further action," not explanation, *id.* at 923–24. The district court, complying with the D.C. Circuit's order, issued a declaration finding the dismissal was "contrary to law" and an order remanding the matter to the FEC for action in conformity therewith within thirty days pursuant to 52 U.S.C.

§ 30109(a)(8)(C). Order, *ECU v. FEC*, No. 21-cv-1665-TJK (D.D.C. Sept. 7, 2023) (attached as Exhibit A).

The FEC preemptively suggests the D.C. Circuit and district court erred. *See* FEC's Mot. for Voluntary Remand 11–12, ECF No. 33. The FEC primarily relies, however, on the fact that it did not appear in the *ECU* case because a majority of the Commission could not conclude the agency's actions were defensible or that there was any error on the part of the courts that it needed to correct or appeal. But the FEC also ignores the involvement of able counsel in support of its position in the form of a court-appointed amicus curiae, *see ECU*, 69 F.4th at 920, and the FEC identifies no error on amicus's part.

The FEC further relies on an overreading of this Court's order denying CREW's motion to compel, *see* FEC's Mot. for Voluntary Remand 9-10, ECF No. 33, which did not, as the FEC suggests, preclude final judgment here. Rather, the Court merely noted that an explanation was necessary to "assess whether the agency acted 'contrary to law'" but that it would not order the disclosure of the FEC's deliberations to provide one. Mem. Op. and Order 14, ECF No. 28. In other words, the Court recognized that, without an explanation, there is no way for the Court to find the dismissal was anything other than arbitrary or capricious, consistent with D.C. Circuit authority. *See Tourus Recs.*, 259 F.3d at 738; *see also ECU*, 69 F.4th at 923–24. Further, while the D.C. Circuit remanded an action to the agency to provide a missing statement of reasons from the controlling commission when it first implemented that requirement, *see DCCC*, 831 F.2d at 1133, it did so in light of the "new principle of law" announced in that decision, *Common Cause*, 842 F.2d at 450, and in the absence of the subsequent development of case law that confirms that an agency may not offer new explanations for action where there is no explanation

in the record, *Regents*, 591 U.S. at 20–21.[3] Here, the commissioners were aware of their nearly forty-year-old obligation to provide a contemporaneous explanation "at the time when a deadlock vote results in an order of dismissal," *Common Cause*, 842 F.2d at 449, as well as the binding case law precluding them from offering new explanation where none was in the record.

"[T]he [FEC's] failure to" offer a contemporaneous explanation at the time of the non-self-explanatory vote to close means the dismissal "constitutes arbitrary and capricious agency action." *Tourus Recs.*, 259 F.3d at 737. Accordingly, the only possible conclusion is that the dismissal was "contrary to law," *Orloski*, 795 F.2d at 161, and this Court should declare such and remand this action to the FEC for action in conformity therewith within thirty days, Order, *ECU*, 21-cv-1665-TKJ, Ex. A.

**E. Voluntary Remand is Inappropriate**

In an effort to avoid what is the only possible conclusion about the FEC's unexplained and inexplicable dismissal, the FEC proposes a "last second" voluntary remand. *See* FEC Mot. for Remand, ECF No. 33; *cf. Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying untimely motion for voluntary remand). While courts "generally grant an agency's motion to remand," *Clean Wis. v. Env't Prot. Agency*, 964 F.3d 1145, 1174 (D.C. Cir. 2020), the court has "broad discretion to grant or deny such a motion" *id.*, and should deny the FEC's request here. Even assuming the request is properly before the Court, *but see Cohen*, 2015 WL 7722391, at *2 n.2 ("default cuts off the defendant's right to file any document" (quotation

[3] The D.C. Circuit rejected the district court's attempt, in the face of a non-explanation, to go beyond holding the dismissal arbitrary and capricious and to dictate the "ultimate outcome," *DCCC*, 831 F.2d at 1135, namely ruling on the underlying administrative complaint and finding that the relevant communications were electioneering communications, *see DCCC v. FEC*, 645 F. Supp. 169, 174 (D.D.C. 1986). That decision was beyond the district court's ability to give, which is limited to holding the dismissal was contrary to law. *See Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996).

marks omitted)), the FEC's proposal "unduly prejudice[s]" CREW, *id.* at 1175, and, moreover, the FEC's proposed action on remand fails to "cure [its] own mistakes." *id.*

First, the FEC proposes a voluntary remand for the FEC to take new action on CREW's complaint within some indeterminate time. The FEC specifically seeks to evade the FECA's obligation to take new, lawful action within thirty days of remand. FEC's Mot. for Voluntary Remand 11, ECF No. 33. The FEC's proposal is further expressly designed to evade a declaration that the prior dismissal was contrary to law. *Id.* at 9.

A declaration that a dismissal is contrary to law is a necessary step in the process to exhaust FECA claims. *See* 52 U.S.C. § 30109(a)(8)(C). As the FEC is essentially moribund, *Status of Enforcement – Second Quarter 2024 (01/01/24-03/31/24)*, FEC (Apr. 30, 2024), https://perma.cc/Q42M-6Q6K (noting FEC only has three open investigations and has not opened an investigation in the past year), the sole plausible hope for any plaintiff deprived of their rights under the FECA to obtain relief is through a private right of action. Yet the FEC expressly seeks to deprive CREW of any possibility to vindicate that right here. Thus, CREW not only is prejudiced in losing its right to a final judgment and the development of precedent, *cf. FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 74 (D.D.C. 2015), it is losing its only remaining chance to obtain the disclosure the FECA required Freedom Vote to produce. CREW is thus unlike parties who enjoyed a pending injunction during the interim of remand, *id.*, but rather like the party who must suffer "hardship" from "the "wait for an answer to [its] complaint and for judicial review of the [agency's] actions," *Byrd v. Heckler*, 576 F. Supp. 549, 550 (D.D.C. 1983) (denying motion for voluntary remand). The delay, moreover, deprives CREW of its First Amendment rights to information and to use those facts to formulate its own speech. *CREW v. FEC*, No. 19-cv-2753-RCL (D.D.C. Feb. 5, 2021) ("[S]o long as a party is unable to obtain such

information, it does not matter whether the information is out of reach because the FEC denied the party's administrative complaint or because the FEC has yet to act" (citing *Akins*, 524 U.S. at 21)) (attached as exhibit B); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury).[4] CREW filed its original complaint against Freedom Vote six years ago, and has been forced to litigate the FEC's unlawful dismissal for almost two-and-a-half years notwithstanding the obvious fact that the FEC dismissal was unlawful for lack of contemporaneous explanation from the moment of the vote to close. During all that time, evidence in support of CREW's claims—and evidence of the facts to which CREW is ultimately entitled—spoliate. Rather than permit CREW its last chance at relief, the FEC proposes only additional delay.

A voluntary remand would also not preserve "the courts' and the parties' resources." *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C. 2013). The FEC's motion is being briefed in conjunction with CREW's motion for summary judgment as part of court-ordered joint briefing. Min. Order (May 28, 2004). As discussed above, a judgment that the dismissal was contrary to law requires no great analysis: the FEC's failure to offer a timely explanation—which all parties concede is the case here—on a non-self-explanatory dismissal renders the dismissal contrary to law. Parsing the various equities involved in the FEC's novel and admittedly "uncommon" motion for remand, FEC's Mot. for Voluntary Remand 8, ECF No. 33, is likely a

[4] Although the district court in *Kean for Congress Comm. v. FEC*, No. 04-cv-0007-JDB (D.D.C. Feb. 15, 2005) (attached as exhibit C), granted the FEC's motion for voluntary remand, the plaintiffs in that case did not identify the prejudice such remand would have against their rights to a private action, *see, e.g.,*, Resp. of Pl. in Opp. to Def.s' Mot. for Voluntary Remand, No. 1:04-cv-00007-DJB (D.D.C. Feb. 11, 2005) (attached as exhibit D).

greater tax on the Court's resources than an obvious judgment and remand pursuant to the FECA.

Nor, moreover, does the FEC even propose to "cure [its] own mistakes" on remand. *Clean Wis.*, 964 F.3d at 1175. Here, the FEC's post hoc explanation was not cognizable to explain the dismissal because the statement did not exist "at the time when a deadlock vote result[ed] in an order of dismissal," *ECU*, 69 F.4th at 921; something that is far from a "new" rule, *compare* FEC's Mot. for Voluntary Remand 8, ECF No. 33 (calling requirement for contemporaneous explanation the result of "new legal decision") *with Common Cause*, 842 F.2d at 449 (imposing contemporaneous explanation rule on FEC in 1988) *and* Pl. CREW's Resp. to Ct.'s Order to Show Cause 7–12, ECF No. 8 (demonstrating statement was inadmissible post hoc rationalization prior to decision in *ECU*). Accordingly, to cure its error, if the FEC on remand chooses to again dismiss, it must draft and consider an explanation for the vote to close at the time of that vote, just as they do when a majority of the commission rejects the General Counsel's recommendations. *See, e.g.*, Certification, MUR 8122 (Lafazan for Congress) (approving, prior to vote to close the file, "the Factual and Legal Analysis … subject to the revisions circulated by Chairman Cooksey's Office ….''). Yet what the FEC contemplates is simply to repeat its error: to vote to close in the absence of any contemporaneous justification for doing so, and then to only later supply a rationale if the vote turns out successful. *See* FEC's Mot. for Voluntary Remand 12–13, ECF No. 33 (discussing *FEC implements new enforcement case closure procedures*, FEC (Apr. 3, 2024) ("Case Closure Procedures"), https://www.fec.gov/updates/fec-implements-new-enforcement-case-closure-procedures/.). The only difference is that the FEC proposes not to notify CREW of its actions until after this post-hoc rationale is drafted. *Id.*

Yet the FEC's proposal amounts to a promise to once again dismiss in violation of the "foundational principle of administrative law" that obliges agencies to defend their action solely on "the grounds that the agency invoked when it took the action." *ECU*, 69 F.4th at 921 (quoting *Regents*, 591 U.S. at 4). Thus, "[i]t is a long-established principle of administrative law that the agency must explain its reasons *in its decision*." *Nat'l Fed'n of Fed. Emps., Loc. 1669 v. Fed. Lab. Rels. Auth.*, 745 F.2d 705, 708 (D.C. Cir. 1984) (emphasis added). While it may later expand on an "initial explanation," the FEC, like every other agency, may not craft a new explanation after it acts—whether that be five months, five days, or five minutes after the action—but must "defend its actions based on the reasons it gave *when it acted.*" *Regents*, 591 U.S. at 21, 24 (emphasis added).

That rule is of particular importance for the FEC. While other agencies require the decisionmaker to explain their decisions, *Loc. 814, Int'l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976), the FEC enjoys special privilege "under a rather apparent fiction." *CHGO 1*, 892 F.3d at 437–38. That fiction permits a subset of commissioners who are not the decisionmakers for purposes of dismissal to offer an explanation that is "treated as if [it] were expressing the Commission's rationale for dismissal." *Id*. It does so under the theory that the commissioners were able to deadlock proceedings by declining to accept the merits of a matter, and it was "for that reason [of the merits deadlock that the majority of the Commission] dismisses a complaint." *DCCC*, 831 F.2d at 1132. Yet their task is the same, they must explain the deadlock that was in fact the "reason [the majority] dismissed [the] complaint" and thus did "not act in conformity with its General Counsel's" recommendation. *Id.*. Where dismissal follows a deadlock, the controlling commissioners will likely have to explain the decision of a non-authoring commissioner. That excluded commissioner will be one who wished to proceed

with an investigation but, faced with an intractable disagreement over the merits of the complaint, concluded dismissal was preferable to continued negotiation and provided the essential vote to convert a deadlock into a majority vote to close. So, for example, here, Commissioner Broussard provided the pivotal fourth vote to close the file and dismiss the case. AR1816. Accordingly, in order to accurately explain the dismissal, a statement of reasons must accurately reflect what she understood to be the disagreement that was so intractable that no further negotiation was productive.[5]

In the absence of a contemporaneous explanation, a commissioner voting to close is left only to guess what the stated reason for her vote will be. Her colleagues could, for example, offer one explanation in deliberations that the commissioner unsuccessfully attempted to correct, and then she may choose to dismiss in the face of that intractable disagreement. Those colleagues could then, after the vote, realize their error and substitute some entirely different ground—one that, had it been offered at deliberation, could have been negotiated or addressed in a way that the closing-commissioner would not have felt compelled dismissal. Or a commissioner may simply face silence from her colleagues for their reasons in order to prevent any attempt to

[5] For example, it appears Commissioner Broussard was unaware of her colleague's views of the prudence of moving forward, *see* AR1824–32, AR1829 ("Turning to the statute of limitations issue – which is apparently the primary basis for our colleagues' refusal to support OGC's recommendation"); concerns that she in any event evidently did not share, *see* AR1815–16 (Commissioner Broussard's vote against exercising prosecutorial discretion).Further, given the fact that three commissioners' prudential concerns would not stymie proceedings, 52 U.S.C. § 30109(a)(2) (if four commissioners vote to find reason to believe, the Commission "shall" investigate); *id.* § 30109(a)(4)(A) (if four commissioners vote to find probable cause, the Commission "shall attempt … to correct or prevent such violation"), three commissioners' prudential concerns would not motivate a fourth commissioner to close the file because they would not deadlock the agency. In any event, had Commissioner Broussard been presented with the statement prior to voting to close, she could have either insisted any portion be removed if it did not accurately reflect her understanding of the dispute on the merits underlying the deadlock motivating her vote to close, or withheld her vote.

address their concerns. Or a commissioner might vote to close in the hope of submitting a legal disagreement to judicial review, only to discover after the fact her colleagues would invoke prudential grounds that would preclude the very review that motivated the vote to close.

To ensure the statement does not differ, whether by faulty memory, neglect, or willfulness, from the rationale actually motivating the vote to close, the written statement must exist at the time to vote to close and be "before the agency at the time the decision was made," *James Madison Ltd*., 82 F.3d at 1095. That ensures the commissioners have "an opportunity for self-correction" that the rule against post-hoc rationalizations requires, *ECU*, 69 F.4th at 923, an opportunity lost the moment a vote to close becomes final.

The FEC's delay of its announcement of its dismissal hardly makes up for its failure to offer a timely statement assured to be an accurate representation.[6] Rather, the notice is not the act of dismissal, it is the vote to "clos[e] the file" that "terminate[s] [the FEC's] proceedings." *Doe 1 v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019); *see also CREW v. FEC*, No. 22-cv-3281-CRC, 2023 WL 6141887, at *6 (D.D.C. Sept. 30, 2023) ("The August 2022 vote to close the file was indeed the dismissal …."); *CREW v. FEC*, 236 F. Supp. 3d 378, 387 (D.D.C. 2017) (recognizing matter "ultimately dismiss[ed]" with vote to close file); *CREW v. FEC*, 799 F. Supp. 2d 78, 83 (D.D.C. 2011) ("[T]he FEC voted to dismiss MUR 5908 on June 29, 2010, thereby triggering Plaintiffs' 60-day clock in which to appeal the dismissal"). That vote to close "consummat[es]"

[6] It is at least doubtful that the FEC could extend a plaintiff's time to sue by simply declaring a dismissal does not happen until notification. FEC, Case Closure Procedures, *supra* (stating "Administrative complainants will have a full 60 days from the day they are notified of the case's outcome to determine whether to seek judicial review of the Commission's actions under 52 U.S.C. § 30109(a)(8), as they will be notified on the day the file officially closes."). The FECA's clock for judicial review does not run from the date of notification. *See Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993) (per curiam). Rather, it runs from the "date of dismissal," *id.*, i.e., the final action that terminates the possibility of administrative enforcement, which is the vote to close.

the FEC's decision-making process, "determine[s]" CREW's "rights or obligations," and is the act from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (setting forth test for final agency action); *cf. CREW*, 2023 WL 6141187, at *7 (vote to close was dismissal that "adversely affect[s]" legal rights). The FEC does not suggest that the vote to close is merely tentative or that a commissioner could withdraw their vote in the affirmative once they were presented with a statement of reasons if that statement did not accurately reflect their understanding of the disagreement motivating their vote to close the file. *See* Case Closure Procedures, *supra* (vote to close "*will be effectiv*e 30 days after the Commission Secretary certifies the Commission's vote" (emphasis added)). Accordingly, the vote is a final act, and under black letter administrative law, the agency must have a reason, in the record, for so acting "when it acted." *Regents*, 591 U.S. at 24.

The FEC's request for voluntary remand is a request to simply repeat its error here, likely resulting in yet more litigation in this case, to CREW's continued and severe prejudice. Considering the lack of any genuine dispute that could complicate the entry of judgment against the FEC pursuant to the FECA here, its request for voluntary remand here can be understood as no more than an attempt evade final judgment and should be denied.

## CONCLUSION

There is no genuine dispute that the dismissal below occurred without any contemporaneous justification, and therefore was contrary to law. Accordingly, CREW is entitled to summary judgment under Rule 56 or, alternatively, default judgment under Rule 55.

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Respectfully submitted,

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