UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

END CITIZENS UNITED PAC, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, and NEW REPUBLICAN PAC, Intervenor-Defendant.	Civil Action No. 1:21-cv-2128-RJL **Response in Opposition to Plaintiff's Motion for Default Judgment and Summary Judgment and Memorandum in Support of Cross-Motion for Summary Judgment**

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff misstates or mischaracterizes several important elements of the statutory framework that controls the Federal Election Commission's ("FEC") consideration of administrative complaints. These misstatements and mischaracterizations form a central component of Plaintiff's arguments below. Plaintiff disregards congressional intent in structuring the FEC and argues for an outcome that would be contrary to that structure. As the D.C. Circuit explained, "Congress vested enforcement power in the FEC, carefully establishing rules that tend to preclude coercive Commission action in a partisan situation, where the Commission, itself statutorily balanced between the major parties … is evenly split." *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000).

The FEC is comprised of six Commissioners and "[n]o more than 3 members of the Commission … may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). FECA provides that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission" and specifies that "the affirmative vote of 4 members of the Commission shall be required in order for the Commission" to: (i) initiate, defend, or appeal any civil action; (ii) render an advisory opinion; (iii) develop prescribed forms and make, amend, and repeal regulations; and (iv) conduct investigations and hearings expeditiously and report apparent violations to the appropriate law enforcement authorities. *Id*. §§ 30106(c); 30107(a)(6) – (9).[1] Notably, while four votes are required to initiate and conduct enforcement actions ("conduct investigations and hearings"), four votes are *not* required to dismiss a complaint or otherwise not pursue an

[1] FECA also requires the vote of four Commissioners to take certain actions pertaining to the public funding system set forth in chapters 95 and 96 of title 26. 52 U.S.C. § 30106(c).

enforcement action. *See CREW v. FEC*, 993 F.3d 880, 891 (D.C. Cir. 2021) ("*CREW 2021*") ("The statute specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list, which suggests that they are not included under the standard construction that *expressio unius est exclusio alterius*. A decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners.").

After the FEC receives a written complaint alleging that someone has violated the Federal Election Campaign Act of 1971, as amended ("FECA"), the agency's General Counsel "may recommend to the Commission whether or not it should find reason to believe that a respondent has committed or is about to commit a violation of statutes or regulations over which the Commission has jurisdiction." 11 C.F.R. § 111.7(a). The FEC will typically vote on the General Counsel's recommendations. In order to conduct an investigation, the Commission must "by an affirmative vote of 4 of its members" determine that there is "reason to believe that a person has committed, or is about to commit, a violation of th[e] Act[.]" 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.9(a). "If four of the six Commissioners conclude there is reason to believe a violation was committed, a full FEC investigation commences. Conversely, if there are fewer than four votes, the FEC dismisses the administrative complaint." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015). Thus, unless four Commissioners vote to find "reason to believe," the Commission cannot proceed with an investigation and the matter is dismissed. FEC regulations further require that "[i]f the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter." 11 C.F.R. § 111.9(b).

Under the FECA, when a "reason to believe" vote is not supported by four Commissioners, the statute requires that consideration of the matter end. Neither the FECA nor FEC regulations

require any subsequent vote or action to formalize or otherwise make "official" the Commission's dismissal of the matter. Rather, the failure of four Commissioners to find "reason to believe" "terminates its proceedings" and results in the dismissal of the complaint. Upon this vote, the General Counsel is then required by Commission regulations to "advise both complainant and respondent by letter." *Id.*

In light of the FEC's structure and four-vote requirement to take most agency actions, the term "deadlock" carries a different meaning in the context of the FEC. While at most agencies, a "deadlock" is treated as a form of inaction, at the FEC, a deadlocked vote in an enforcement matter *is a final agency action resulting in dismissal of the complaint*. The D.C. Circuit explained this distinction in *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016), and noted that "the [FEC] engages in final agency action when … it deadlocks about whether probable cause exists to proceed with an investigation."

Accordingly, precedent holds that at any time, three Commissioners may effectively vote to dismiss an administrative complaint, at which point the agency's consideration of the case ends, and the General Counsel is required to "so advise both complainant and respondent by letter." 11 C.F.R. § 111.9(b). There is no statutory or regulatory requirement that four or more Commissioners consent to ending consideration of the matter following a deadlocked vote. *See FEC v. Nat'l Republican Senatorial Comm*., 966 F.2d 1471, 1474 (D.C. Cir. 1992) ("Four votes are needed for the Commission to find probable cause. A tie results in no such finding being entered, and no action being taken against the target of the complaint."); *Public Citizen, Inc.*, 839 F.3d at 1170 ("[T]he statute compels FEC to dismiss complaints in deadlock situations" and "the treatment of probable cause deadlocks as agency action is baked into the very text of the statute"); *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 8 (D.D.C. 2019) ("If fewer than four

Commissioners find 'reason to believe' that FECA was or will soon be violated, the complaint is dismissed."); *CREW v. FEC*, 316 F. Supp. 3d 349, 417 (D.D.C. 2018) ("*CREW (D.D.C. 2018)*") ("The FEC, when considering whether to commence enforcement proceedings based on an administrative complaint, must dismiss the administrative complaint when the members deadlock three-to-three."); *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407, 428 (E.D.Va. 2012) ("[T]he FEC deadlocked (3:3), and thus was required to dismiss this private party's complaint" and noting that a 3-3 deadlock in an enforcement matter "amounted to final agency action that was reviewable in federal district court").

Thus, the vote to "close the file" that occurred in this matter was not required under either the Act or Commission regulations and was without legal effect. The D.C. Circuit has acknowledged that this vote is only the Commissioners' "typical practice," and no court has ever found this additional vote to be required. *CREW v. FEC*, 971 F.3d 340, 346 (D.C. Cir. 2020). The FEC's *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process* does not mention the "close the file" vote, and instead provides that "the Commission *will dismiss a matter* … when the Commission lacks majority support for proceeding with a matter." 72 Fed. Reg. 12,546, 12,547 (Mar. 16, 2007) (emphasis added). While the vote to "close the file" has historically been a customary, routine, *pro forma*, and ministerial means of signaling the end of the FEC's consideration of an administrative complaint, it creates the misimpression that it is both a substantive and procedurally significant vote, and that four or more Commissioners must agree to dismiss an enforcement matter. This view is contrary to the FECA, which provides that this matter was legally dismissed once the Commissioners deadlocked 3-3 on two motions to find reason to believe and to dismiss. Plaintiff's characterization of the vote to "close the file" as "effectively dismissing" the complaints, *see* ECF No. 23 at 22, is incorrect and

represents an attempt to add another step in the complaint review process by suggesting that a majority vote is required to effectuate a dismissal.

In the case of a so-called "deadlock dismissal," where the Commissioners vote 3-3 on a motion to find reason to believe a violation of the FECA occurred, the Commissioners who vote *not* to proceed with enforcement are tasked with preparing a written Statement of Reasons, and this written explanation is controlling for purposes of judicial review. *See Nat'l Republican Senatorial Comm*., 966 F.2d at 1476 ("Since those Commissioners constitute a controlling group for purposes of the decision [to dismiss], their rationale necessarily states the agency's reasons for acting as it did."). Any Statement of Reasons issued by one or more of the Commissioners who voted to proceed with enforcement is without legal effect for purposes of judicial review. In this way, the D.C. Circuit has made clear that the views of the Commissioners who vote to dismiss a case are favored over the views of their colleagues, and given legal significance, when there are not four votes to find "reason to believe." This favoring of the views of those Commissioners who would dismiss a matter reflects the fact that "Congress uniquely structured the FEC toward maintaining the status quo." *Public Citizen, Inc.*, 839 F.3d at 1171. The FEC's "voting and membership requirements mean that, unlike other agencies – where deadlocks are rather atypical – FEC will regularly deadlock as part of its *modus operandi*." *Id*.

Plaintiff's contention that the controlling Statement of Reasons issued in this matter "is particularly undeserving of deference, where, as here, the agency decided not to defend it in court" is wholly without support. ECF No. 23 at 25. In this matter, the Commissioners voted 3-3 on a motion to appear and defend this litigation. (This vote occurred several months after the Commissioners failed to find "reason to believe," and approximately one month after the controlling Statement of Reasons was issued.) The three Commissioners who voted to find "reason

to believe" voted against authorizing the FEC's lawyers to appear in court to defend this litigation. They explained in a written statement that their vote to block the FEC's lawyers from defending the agency in court was the product of their disagreement with their colleagues' views and the deference that those reviews must be afforded under D.C. Circuit precedent. This obstructionist "protest" vote has no bearing whatsoever on the deference the controlling Statement of Reasons receives under applicable precedent.

For these reasons and the reasons outlined below, Plaintiff's Motion for Default Judgment or, in the Alternative, Summary Judgment should be denied, and Intervenor-Defendant's Cross-Motion for Summary Judgment should be granted.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The FEC is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. *See generally* 52 U.S.C. §§ 30106, 30107, 30108. The FEC is authorized to undertake investigations of possible violations of FECA, and it may also institute a civil action for relief if it is unable to correct or prevent a violation of FECA pursuant to its administrative enforcement processes. *Id.* §§ 30109(a)(2), 30109(a)(6)(A).

Any person who believes a violation of FECA has occurred may file an administrative complaint with the FEC. *Id.* § 30109(a)(1). After reviewing the complaint and any response(s) filed by the respondent(s), the Commission then considers whether there is "reason to believe" a violation of FECA occurred. *Id.* § 30109(a)(2). If at least four of the agency's Commissioners vote to find that such "reason to believe" exists, the FEC may undertake an investigation into the alleged violation. *Id.* §§ 30106(c), 30109(a)(2). Importantly, if at least four Commissioners do

not vote to find "reason to believe," the FEC dismisses the complaint. After at least four Commissioners vote to find "reason to believe" and the agency conducts an investigation, the FEC must determine by a vote of at least four Commissioners whether there is "probable cause to believe" a violation occurred. *Id.* §§ 30109(a)(4)(A)(i), 30106(c). If the FEC votes to find "probable cause," it is required to correct or prevent the violation and to attempt to enter into a conciliation agreement with the respondent(s). *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement with the respondent(s), it may institute a civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A).

If at any point in this process the FEC determines that no violation occurred or decides to dismiss the complaint, the Act authorizes limited judicial review of the Commission's dismissal decision. *Id.* § 30109(a)(8)(A). Whether a dismissal results from the votes of four or more Commissioners, or from an evenly divided 3-3 vote, the same limited review applies. *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476. An administrative complainant must file suit to challenge a dismissal "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B).

The district court's review of a Commission decision to dismiss a complaint is limited in scope. "A court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the Act . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)). The sole remedy available to the district court is to declare "that the dismissal of the complaint . . . is contrary to law" and issue an order "direct[ing] the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). In cases where the FEC's dismissal is the result of a divided vote, judicial review is based on the reasoning of the Commissioners who voted to dismiss the complaint because

"those Commissioners constitute a controlling group for purposes of the decision" since their "rationale necessarily states the agency's reasons for acting as it did." *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476; *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW 2018)*") ("[F]or purposes of judicial review, the statement or statements of those naysayers – the so-called 'controlling Commissioners' – will be treated as if they were expressing the Commission's rationale for a dismissal[.]").

B. Statement of Facts

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

On or about April 10, 2018, End Citizens United PAC filed an administrative complaint with the FEC against New Republican PAC, Rick Scott for Florida, and now-Senator Rick Scott. AR 001-026. End Citizens United PAC filed a supplemental administrative complaint with the FEC against the same administrative respondents on or about April 17, 2018. AR 027-034. The FEC designated this complaint and its supplement as Matter Under Review ("MUR") 7370. This administrative complaint alleged that the named respondents had violated various provisions of FECA.

On or about June 18, 2018, New Republican PAC filed a response with the FEC in MUR 7370. AR 063-075. Rick Scott for Florida filed a response with the FEC in MUR 7370 on or about June 14, 2018. AR 053-062. New Republican PAC and Rick Scott for Florida filed separate responses, each of which argued that the administrative complaint was incorrect and that the respondents had not violated any provision of FECA.

On or about September 5, 2018, End Citizens United PAC filed a second administrative complaint raising related allegations against the same administrative respondents. AR 076-083. This second administrative complaint was designated MUR 7496. The second administrative complaint made further allegations of violations of FECA.

On or about October 23, 2018, New Republican PAC filed a response with the FEC in MUR 7496. AR 095-114. On or about November 9, 2018, Rick Scott for Florida filed a response with the FEC in MUR 7496. AR 115-119. Again, New Republican PAC and Rick Scott for Florida filed separate responses, each of which argued that the administrative complaints were incorrect and that the respondents had not violated any provision of FECA.

The FEC consolidated MUR 7370 and MUR 7496 for consideration, and OGC presented its report and recommendations in the matter to the FEC approximately two years later, in OGC's First General Counsel's Report, on or about December 2, 2020. AR 124-185. OGC recommended that the FEC:

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

(5) take no action at this time as to the allegation that Rick Scott for Florida violated 52 U.S.C. §§ 30104(b), 30116(f), 30118(a), and 30125(e) by accepting and failing to report impermissible and excessive in-kind contributions in the form of coordinated communications; and

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

AR 149-150.

Under the FECA, "[i]f four of the six Commissioners conclude there is reason to believe a violation was committed, a full FEC investigation commences. Conversely, if there are fewer than four votes, the FEC dismisses the administrative complaint." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 315. Accordingly, "[t]he FEC . . . must dismiss the administrative complaint when the members deadlock three-to-three because 'under FECA, the FEC may pursue enforcement only upon an affirmative vote of 4 of its members.'" *CREW (D.D.C. 2018)*, 316 F. Supp. 3d at 416-17 (quoting *CREW 2018*, 892 F.3d at 437). This so-called "deadlock dismissal" is a feature of the statute that has been explicitly recognized by the D.C. Circuit. *See*, *e.g.*, *CREW (2021)*, 993 F.3d at 891 (noting the D.C. Circuit's "previous cases, which have recognized the possibility of 'deadlock dismissals,' namely dismissals resulting from the failure to get four votes to proceed with an enforcement action").

On May 20, 2021, the FEC divided 3-3 on a motion to approve the recommendations made in the OGC's First General Counsel's Report (and set forth above). AR 186-187. Commissioners

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

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

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

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

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

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

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

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

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

(8) close the file.

AR 188-189.

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

After the Commission voted to close the file, the three Commissioners who voted *against* adopting OGC's recommendations, and *against* pursuing the matter further, explained their votes in a written Statements of Reasons dated July 21, 2021. AR 203-213. This explanation from Commissioners Cooksey, Dickerson, and Trainor serves as the "Controlling Statement of Reasons" in this matter for purposes of judicial review. *See Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987) ("[W]hen … the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why."); *CREW (D.D.C. 2018)*, 316 F. Supp. 3d at 417 ("[T]he controlling Commissioners must provide a statement of their reasons for their vote in cases of deadlock[.]").

In their Controlling Statement of Reasons, Commissioners Cooksey, Dickerson, and Trainor explained that they voted to dismiss the Plaintiff's administrative complaints because "neither the wise use of Commission resources nor the available evidence supported such a sweeping approach [as recommended by the FEC's Office of General Counsel]. Accordingly, we found no reason to believe that New Republican violated the soft money rules and dismissed the allegations that Scott untimely filed his candidacy and organization paperwork under *Heckler v.*

Chaney." AR 204. The controlling Commissioners further explained that "we determined that this Matter merited the invocation of our prosecutorial discretion," and:

> Moreover, we would have been authorizing an expensive and resource-consuming investigation while the Commission is still working through a substantial backlog of cases that accumulated while it lacked a quorum. As a result, the Commission is obligated to make difficult decisions about whether or not to enforce against Respondents in Matters nearing the expiration of the statute of limitations. In the instant case, we were unable to justify the commitment of the Commission's scarce enforcement resources to such a lengthy and cumbersome investigation on the basis of such a thin evidentiary reed. Accordingly, as regards Rick Scott's alleged failure to timely file his candidacy and committee paperwork, we invoked our prosecutorial discretion pursuant to *Heckler v. Chaney*.

AR 212.

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

End Citizens United PAC filed their complaint in this Court on August 9, 2021, pursuant to 52 U.S.C. § 30109(a)(8). New Republican PAC moved to intervene on October 8, 2021, and simultaneously filed a proposed Answer and Motion to Dismiss. ECF No. 9. Plaintiff then filed an

Affidavit of Default, ECF No. 11, which the clerk entered on November 2, 2021, ECF No. 12. Also on November 2, 2021, the Court granted New Republican's Motion to Intervene, and ordered that both the Motion to Dismiss and the Proposed Answer be filed by the clerk. Minute Order, Nov. 2, 2021; *see also* ECF No. 14; ECF No. 15. Subsequently, Plaintiff and Intervenor-Defendant met and conferred regarding case scheduling and other matters and filed a notice with the Court of the same. ECF No. 18. In the Joint Meet and Confer Statement, Plaintiff and Intervenor-Defendant agreed that, *inter alia*, Intervenor's Motion to Dismiss should be held in abeyance pending the FEC serving the administrative record on the parties and filing a certified list of contents of the administrative record with the Court within 30 days of the Court's order. *Id*. at ¶¶ 2-3. The Court granted the motion the same day. Minute Order, November 12, 2021. Thirty days thereafter, on December 13, 2021, the FEC filed a certified list of the administrative record with the Court and served the record upon the parties. *See* ECF No. 19. On December 27, 2021, Plaintiff filed a Motion for Default Judgment or, in the Alternative, Summary Judgment. ECF No. 23.

ARGUMENT

Default judgments are extreme remedies, normally "available only when the adversary process has been halted because of an essentially unresponsive party." *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980); *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) (stating that because of its "drastic nature," a default judgment "must be a sanction of last resort"). Default judgments are generally disfavored because of the "strong policy favoring the adjudication of a case on its merits," *Baade v. Price*, 175 F.R.D. 403, 405 (D.D.C. 1997), and because they "depriv[e] a party completely of its day in court." *Webb*, 147 F.3d at 971.

Entry of default judgment is particularly disfavored where, as here, the government is a defendant. *See Means v. Reich*, No. 98-5182, 1998 WL 796417, at *1 (D.C. Cir. Oct. 16, 1998)

("[W]hen the government's default is due to a failure to plead or otherwise defend, the court typically either will refuse to enter a default or, if a default is entered, it will be set aside." (citation omitted)); *Carvajal v. DEA*, 246 F.R.D. 374, 375 (D.D.C. 2007) ("[D]efault judgment may not be entered against the United States absent an independent factual showing of a meritorious claim."). A default judgment against the United States is thus only warranted where the plaintiff "establishes his [or her] claim or right to relief by evidence satisfactory to the court." *Hill v. Republic of Iraq*, 328 F.3d 680, 684 (D.C. Cir. 2003); *Estate of Botvin v. Islamic Republic of Iran*, 772 F. Supp. 2d 218, 227 (D.D.C. 2011) (citation omitted) (noting that the "satisfactory to the court" standard for entry of default judgments against foreign states is "identical" to the standard for entry of default judgments against the United States under Federal Rule of Civil Procedure 55(d)).

The party moving for default judgment against the government must do more than point to unsupported factual allegations to prevail; it must affirmatively present evidence establishing a claim or right to relief. *See Stansell v. Republic of Cuba*, 217 F. Supp. 3d 320, 336 (D.D.C. 2016) (noting courts should not "unquestioningly accept a complaint's unsupported allegations as true"). This is especially true where, as here, the plaintiff's allegations are not "uncontroverted" because an opposing party is actively challenging the merits of those allegations. *Cf. Thuneibat v. Syrian Arab Republic*, 167 F. Supp. 3d 22, 33 (D.D.C. 2016) (noting that when default is sought under the Foreign Sovereign Immunities Act, uncontroverted factual allegations supported by admissible evidence are taken as true).

Furthermore, because "entry of a default judgment is not automatic," *Mwani v. bin Laden*, 417 F.3d 1, 6 (D.C. Cir. 2005) (footnote omitted), the procedural posture of a default does not relieve a federal court of its typical obligations, including its "affirmative obligation" to determine whether it has subject-matter jurisdiction over a case, *James Madison Ltd. by Hecht v. Ludwig*, 82

F.3d 1085, 1092 (D.C. Cir. 1996). Additionally, "a court should satisfy itself that it has personal jurisdiction before entering judgment against an absent defendant." *Mwani*, 417 F.3d at 6.

Separately, summary judgment is only appropriate if the moving party demonstrates that "no genuine dispute [about] any material fact" exists and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When applying this standard, the court must view the evidence and draw reasonable inferences from the underlying facts as established in the record in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). An issue of fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the non-moving party" on the issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Id.* The moving party bears the initial burden of production on a motion for summary judgment to make a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). 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.*, *Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 357 (D.C. Cir. 2020).

Here, Plaintiff does not meet either of these standards because (1) this Court lacks subject matter jurisdiction over Plaintiff's claims and (2) Plaintiff's arguments fail on the merits. Even in the absence of FEC action here, default judgment is inappropriate because Plaintiff's allegations are controverted by Intervenor-Defendant who is actively participating in defending this case. Plaintiff also fails to meet its burden of presenting evidence establishing a claim or right to relief, as it must when the government is the defendant. Similarly, Plaintiff's Motion for Summary Judgment must be denied because genuine issues of material fact preclude entry of judgment as a

matter of law regarding its claims. On the other hand, because the FEC's dismissal of the complaint was a permissible interpretation of the FECA, there is no triable issue regarding whether dismissal was contrary to law; Intervenor-Defendant is entitled to summary judgment. Accordingly, this Court should deny Plaintiff's motion and grant Intervenor-Defendant's Cross-Motion for Summary Judgment.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS.[2]

Because the FECA does not confer Article III standing, parties seeking review under the FECA must make a separate showing of standing. Plaintiff advances two theories of standing in its Complaint, "competitive disadvantage standing" and "informational standing," but neither of these theories is applicable here.

"Competitive standing" is inapt because it rarely applies in the political arena, *Shays v. FEC*, 414 F.3d 76, 120 n.4 (D.C. Cir. 2005) (Henderson, J., dissenting), and a plaintiff challenging a FEC dismissal cannot base standing on a claim "that he was 'forced to compete' in an 'illegally structured campaign environment' because his opponents were flouting election laws without suffering any consequences from the FEC." *Nader v. FEC*, 725 F.3d 226, 228 (D.C. Cir. 2013). And while an "informational injury" can sometimes confer Article III standing, *ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011) (noting that informational injury can only be established where the defendant is "obligated to disclose information the plaintiff has a right to obtain"), this circuit's precedent states that a plaintiff's desire for a legal determination about whether the FECA has been violated cannot support standing on that basis, nor can a desire to

[2] Intervenor's arguments as to standing are set forth fully in Intervenor's Renewed Motion to Dismiss, ECF No. 22-1. To avoid needless repetition, Intervenor's standing argument is summarized, rather than restated, herein. To the extent necessary, Intervenor incorporates by reference Section III.A of its Memorandum in Support of its Motion to Dismiss.

obtain information that has already been disclosed. *Campaign Legal Center. v. FEC*, 507 F. Supp. 3d 79, 85, 89-90 (D.D.C. 2020) ("*CLC 2020*"). Here, because Plaintiff seeks either (i) legal determinations that previously disclosed transactions were unlawful, or (ii) information about relationships for which no disclosure is statutorily required, Plaintiff fails to allege a legally cognizable injury sufficient to confer informational standing.

Yet even if Plaintiff could establish standing, which it cannot, the FEC's decision to dismiss the underlying administrative complaints was an exercise of prosecutorial discretion, which is not judicially reviewable. *CREW 2021*, 993 F.3d at 884 ("[A] Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review.").

For the reasons discussed further below, this Court lacks standing and jurisdiction over these claims. Plaintiff's motion must be denied.

A. Plaintiff Lacks Competitive Disadvantage Standing.

As set forth in the Memorandum in Support of Intervenor-Defendant's Renewed Motion to Dismiss Plaintiff's Complaint, ECF No. 22-1 at 18–21, Plaintiff's attempted invocation of the "competitive disadvantage" theory of standing is inapplicable to this case.

B. Plaintiff Lacks Informational Standing.

For the reasons detailed in Intervenor-Defendant's Renewed Motion to Dismiss, ECF No. 22-1 at 21–31, and for the reasons set forth below, Plaintiff has not suffered any recognized informational injury sufficient to confer Article III standing.

1. Testing The Waters Activity

Plaintiff argues that it "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." ECF No. 23 at 28.

Plaintiff cites to a recent district court decision in support of its claims, but Plaintiff's reliance suffers from two flaws. *First*, the portion of that decision upon which Plaintiff relies has since been reconsidered and a new opinion issued holding that the plaintiff in that case lacks standing. *Second*, even if that decision had not been reconsidered, Plaintiff misstates the initial decision's holding. According to Plaintiff, the since-reconsidered decision held that "Bush's failure to begin reporting on the proper date had deprived them of information to which FECA entitled them." *Id.* at 29. However, the court's initial holding concerned information that it believed had gone unreported altogether and had nothing to do with the question of *when* Governor Bush was first required to file FEC reports.

The decision on which Plaintiff bases it claims for standing, *Campaign Legal Center v. FEC*, 520 F. Supp. 3d 38 (D.D.C. 2021), held that the plaintiff in that case suffered informational injury because the administrative respondent, Gov. Jeb Bush, had failed to report *all* of his testing-the-waters expenses when he filed his first FEC report. Specifically, the court's initial holding accepted the plaintiff's claim that "Bush engaged in testing-the-waters activities as early as January 2015 but only disclosed them as of June 4, 2015. . . .Thus, on plaintiffs' read of FECA, they have been deprived of over five months of information that is statutorily required to be disclosed." *Id.* at 46. In other words, the court accepted plaintiff's claim that approximately five months' worth of reporting *was missing from the public record*, and it was this missing information which formed the basis of plaintiff's informational injury. *See id*. at 45 ("Deprivation of the disclosures that FECA requires for that disputed period constitutes an informational injury to sustain Article III standing.").

However, after the intervenor-defendant demonstrated that the supposedly missing information had in fact been reported by an entity other than Governor Bush's campaign, the court

reconsidered and issued a revised decision finding that plaintiff lacked standing after all. *See Campaign Legal Ctr. v. FEC*, 2021 U.S. Dist. LEXIS 248159 (D.D.C. Dec. 30, 2021). In its reconsidered opinion, the court acknowledged that its earlier decision that plaintiff had informational standing was based on the court's understanding that "Bush had failed to disclose months of spending that FECA required him to disclose in his campaign's first report." *Id.* at *4. During a hearing, however, the intervenor-defendant explained that Governor Bush had in fact disclosed all of his testing the waters expenses, and certain of the alleged "missing" expenses had been reported by another entity (intervenor-defendant Right to Rise Super PAC, Inc.). *Id*. at *5-6. After further briefing, the court accepted "that all the information FECA requires to be disclosed has already been disclosed in some format," and concluded that there was no evidence to suggest "that there is more spending to be disclosed." *Id*. at *8-9, 13. As a result, the court held that plaintiff lacked standing, and the case was dismissed. *Id*. at *14.

In this matter, Plaintiff has not alleged that any testing-the-waters receipts or expenses went unreported. There is no evidence indicating that information pertaining to the testing-the-waters period was not already "disclosed in some format," and Plaintiff cannot claim informational standing on the basis of allegedly undisclosed testing-the-waters receipts and expenses.

2. Alleged Coordinated Spending

Plaintiff next claims that it has been denied "information about the precise amounts that New Republican contributed to the Scott campaign in the form of coordinated communications," and contends that its argument is not precluded by the D.C. Circuit's decision in *Wertheimer v. FEC*. ECF No. 23 at 29-30. Plaintiff suggests that "[p]roperly itemizing relevant expenditures as in-kind contributions would provide this information" that Plaintiff claims to seek. *Id.*

Plaintiff's claims are precluded by clear D.C. Circuit precedent, which Plaintiff appears to acknowledge in a footnote claiming that "*Wertheimer*'s scope is currently before the D.C. Circuit." *Id.* at 30 n.4. Regardless of how Plaintiff characterizes its supposed injury, what it seeks is a legal determination that New Republican made contributions to the Scott campaign in the form of coordinated communications. The D.C. Circuit has already determined that no standing exists where a plaintiff seeks a determination that already disclosed expenditures were "coordinated," *Wertheimer v. FEC*, 268 F.3d 1070, 1074-75 (D.C. Cir. 2001), and this court previously held that no standing exists where the plaintiff seeks a legal determination that previously reported expenditures should be treated as in-kind contributions. *CREW v. FEC*, 799 F. Supp. 2d 78, 88-89 (D.D.C. 2011).

II. THE FEC'S EXERCISE OF PROSECUTORIAL DISCRETION IS NOT SUBJECT TO JUDICIAL REVIEW.

Under D.C. Circuit precedent, Commission decisions to dismiss an administrative complaint on the basis of prosecutorial discretion, whether in whole or in part, are not subject to judicial review.[3] "[A] commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review." *CREW 2021*, 993 F.3d at 884. The Controlling Statement of Reasons, which provides the FEC's rationale for its dismissal of the administrative complaint, makes clear that the controlling bloc of Commissioners who voted to dismiss the underlying administrative complaint based their votes on the exercise of prosecutorial discretion. As such, the

[3] In some circumstances agency discretion does not operate as a jurisdictional bar to judicial review, *see Oryszak v. Sullivan*, 576 F.3d 522, 524 (D.C. Cir. 2009), but Intervenor contends that this is not one of those circumstances. *Compare id.* (holding that the APA "is not a jurisdiction-conferring statute") *with* 52 U.S.C. § 30109(a)(8)(A) (expressly conferring jurisdiction on this Court for cases in which a party is "aggrieved by an order of the [FEC] dismissing a complaint filed by such party") *and* ECF No. 1 ¶ 13 (invoking jurisdiction under 52 U.S.C. § 30109(a)(8)(A)). In any event, whether jurisdictional or not, the result should be the same—dismissal of Plaintiff's claims.

Court may not review the FEC's dismissal. *See CREW 2021*, 993 F.3d at 884; *see also CREW 2018*, 892 F.3d at 440 n.8 ("[E]ven if the APA is out of the picture, an agency's prosecutorial discretion is still presumptively immune from judicial review.").

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

The D.C. Circuit's holding regarding the reviewability of FEC dismissals of enforcement matters based upon prosecutorial discretion applies regardless of the extent to which the agency's determination rests on prosecutorial discretion. "The Supreme Court has recognized that federal administrative agencies in general . . . and the Federal Election Commission in particular . . . have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." *CREW 2018*, 892 F.3d at 438. Thus, "even if some statutory interpretation could be teased out of the Commissioner's statement of reasons," "[t]he law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'" *Id.* at 441-442 (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994)); *see also CREW 2021*, 993 F.3d at 882 ("Here, the Commissioners who voted against enforcement invoked prosecutorial discretion to dismiss CREW's complaint, and we lack the authority to second guess a dismissal based even in part on enforcement discretion."); *CREW v. FEC*, 380 F. Supp. 3d 30,

41 (D.D.C. 2019) ("*CREW 2019*") ("Thus, because the Controlling Commissioners here invoked prosecutorial discretion in dismissing Plaintiffs' administrative complaint—a 'non-reviewable' action under CREW/CHGO —this Court cannot evaluate the 'reviewable legal rulings' contained in the Controlling Commissioners' statement of reasons.").

The three Commissioners who voted to dismiss the Plaintiff's administrative complaint did so on the basis of the agency's broad prosecutorial discretion to pursue or not pursue enforcement matters. The Controlling Statement of Reasons discusses the three Commissioners' reasons for invoking prosecutorial discretion. After describing OGC's recommended approach, the Commissioners explained: "[N]either the wise use of Commission resources nor the available evidence supported such a sweeping approach. Accordingly, we found no reason to believe that New Republican violated the soft money rules and dismissed the allegations that Scott untimely filed his candidacy and organization paperwork under Heckler v. Chaney." AR at 204.

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

> Ultimately, we determined that this Matter merited the invocation of our prosecutorial discretion. The only significant evidence of Scott's potential earlier candidacy was predicated on the fundraising and operational activities that occurred during his seven-month term as Chair. To probe his subjective intent during this period would have necessitated a wide-ranging, costly, and invasive investigation into both Scott and New Republican's activities during that period of time, and possibly after. As the Commission is the only agency whose enforcement docket "has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak[,] and associate for political purposes'"—this was not an action we could take lightly.
>
> Moreover, we would have been authorizing an expensive and resource-consuming investigation while the Commission is still working through a substantial backlog of cases that accumulated while it lacked a quorum. As a result, the Commission is obligated to make difficult decisions about whether or not to enforce against Respondents in Matters nearing the expiration of the statute of limitations. In the instant case, we were unable to justify the commitment of the Commission's scarce enforcement resources to such a lengthy and cumbersome

> investigation on the basis of such a thin evidentiary reed. Accordingly, as regards Rick Scott's alleged failure to timely file his candidacy and committee paperwork, we invoked our prosecutorial discretion pursuant to Heckler v. Chaney.

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

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

As was the case in *CREW 2021*, "[t]he statement of reasons issued by the controlling Commissioners explicitly relies on prosecutorial discretion" and "expresses discretionary considerations at the heart of Chaney's holding." *Id.* at 885. For example, the Controlling

Statement of Reasons expresses concerns regarding "the wise use of Commission resources," AR at 204, the likely necessity of "a wide-ranging, costly, and invasive investigation" to pursue the evidence needed to proceed, *id.* at 212, the wisdom of "authorizing an expensive and resource-consuming investigation while the Commission is still working through a substantial backlog of cases," *id.*, and the approaching expiration of the statute of limitations, *id*. These expressed concerns are consistent with the reasons identified for invoking prosecutorial discretion that were examined in *CREW 2021*. The Commissioners' justification for exercising prosecutorial discretion far exceeds what is required to sustain that decision as unreviewable.

Accordingly, even if the Plaintiff did have standing to bring this suit, it would not be "entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *CREW 2018*, 892 F.3d at 441. Where judicial review is precluded, the Court must grant summary judgment. *See Heckler v. Cheney*, 470 U.S. 821, 825 (1985) (noting that district court granted summary judgment on prosecutorial discretion grounds and then effectively affirming the district court by reversing the Court of Appeals); *CREW 2018*, 892 F.3d at 441 (affirming the district court's summary judgment grant on the basis of prosecutorial discretion and holding that "agency enforcement decisions, to the extent they are committed to agency discretion, are not subject to judicial review for abuse of discretion."); *see also Public Citizen*, 2021 U.S. Dist. LEXIS 49769, at *2 (while granting the FEC's motion for summary judgment the district court noted: "[T]he FEC decision [not to further investigate Administrative Respondent] is not subject to judicial review because the Commission exercised its prosecutorial discretion to dismiss this matter."); *CREW 2019*, 380 F. Supp. 3d at 33 (granting FEC's cross-motion for summary judgment based on its exercise of prosecutorial discretion);

A. Plaintiff's Attempt to Argue that the Controlling Commissioners' Invocation of Prosecutorial Discretion May be Disregarded Is Unavailing.

Plaintiff urges this Court to disregard the D.C. Circuit's recent decisions holding that FEC enforcement matters that are dismissed even in part on the basis of prosecutorial, or enforcement, discretion are nonreviewable on four different grounds. First, Plaintiff claims that "a court may review the FEC's dismissal of other claims in that complaint for which the agency did not invoke prosecutorial discretion." ECF No. 23 at 46. Second, Plaintiff argues that the controlling Commissioners are not allowed to cite prosecutorial discretion because the Commission voted 3-3 on a motion to dismiss on the basis of prosecutorial discretion. Third, Plaintiff attempts yet another formulation of the repeatedly rejected argument that legal analysis may be extricated from prosecutorial discretion and considered separately. Fourth, Plaintiff makes the novel argument that prosecutorial discretion may be rejected and subjected to review on the grounds that it was invoked pretextually.

In short, Plaintiff tries mightily to argue that the invocation of prosecutorial discretion in the controlling Statement of Reasons may be disregarded, but the D.C. Circuit's two recent decisions on the subject preclude this result. The D.C. Circuit spoke very clearly when it held "the Commissioners who voted against enforcement invoked prosecutorial discretion to dismiss [the administrative] complaint, and we lack the authority to second guess a dismissal based even in part on enforcement discretion." *CREW 2021*, 993 F.3d at 882.

1. *When the FEC Dismisses on the Basis of Prosecutorial Discretion, the Court Cannot Carve Out Legal Analysis For Review.*

Plaintiff's first argument, that portions of the controlling Statement of Reasons that include legal analysis are separately reviewable, is no different than the arguments the D.C. Circuit already considered in *CREW 2018* and *CREW 2021.* The Court rejected the plaintiff's "attempt to carve

out the Commission's statutory interpretation from its exercise of enforcement discretion." *CREW 2021*, 993 F.3d at 886. The D.C. Circuit explained that "[w]e are unable to review the Commission's exercise of its enforcement discretion, irrespective of the length of its legal analysis," and concluded that "[t]he Commission's nonenforcement decision in this case rested on both legal grounds and enforcement discretion, and we again reject [plaintiff's] attempt to separate potentially reviewable legal analysis from the Commission's unreviewable exercise of its enforcement discretion." *Id*. at 887. As a result, neither the fact that the Controlling Statement of Reasons includes legal analysis of the merits of Plaintiff's administrative complaint and the General Counsel's recommendations, nor the reliance on prosecutorial discretion changes the outcome. A FEC "decision [to dismiss] based *even in part* on prosecutorial discretion is unreviewable." *CREW 2021,* 993 F.3d at 882 (emphasis added). Thus, if prosecutorial discretion serves as even one basis among many for dismissing a complaint, that decision is not reviewable.

Plaintiff's appeal to the Supreme Court's decision in *Akins v. FEC* in support of its position has also already been rejected by the D.C. Circuit. In *CREW 2018*, the D.C. Circuit explained that "[t]he only issue the [Supreme] Court decided in *Akins* dealt with standing," 892 F.3d at 438 n.6, while in *CREW 2021*, the D.C Circuit further explained that "prosecutorial discretion did not shield the Commission's decision from judicial review in *Akins* because the Commission had not relied on it." 993 F.3d at 893.

2. No Grounds Exist for Limiting the Rationales Upon Which The Controlling Commissioners May Base Their Decision

To circumvent application of the D.C. Circuit's recent holdings, Plaintiff next claims that the Commissioners who invoked prosecutorial discretion in their controlling Statement of Reasons were not allowed to do so "because the full Commission had already explicitly voted not to exercise that prosecutorial discretion." ECF No. 23 at 46-47. Plaintiff refers to the FEC's 3-3

divided vote on a motion to dismiss the complaint on grounds of prosecutorial discretion and claims that vote renders prosecutorial discretion unavailable to the controlling Commissioners as a basis for dismissal.

There is no basis for Plaintiff's novel claim. As explained above, Congress intentionally structured the FEC and its voting requirements to favor the status quo and non-enforcement. As a result, there is only one scenario in which the FEC may take enforcement action against an administrative respondent, and that is with the agreement of a bipartisan group of four or more Commissioners. Were this not the case, the targets of administrative complaints would be presumptively in violation of FECA whenever the Commissioners deadlocked. At the same time, the statute provides for multiple ways in which a complaint may be dismissed. The Plaintiff, along with the three Commissioners whose separate statement they rely upon,[4] misrepresent the effect of the FEC's 3-3 vote to dismiss on the basis of prosecutorial discretion. Plaintiff's claim that "the full Commission explicitly voted not to exercise . . . prosecutorial discretion" misstates the plain requirements of FECA. Under FECA, a complaint can be dismissed if a bipartisan group of four or more Commissioners votes to dismiss. But the same result obtains simply through the absence of four votes to take enforcement action. *See* 52 U.S.C. § 30109(a)(2). Thus, the FEC also dismisses a matter when it deadlocks, which refers to a situation in which there are not four votes to proceed with enforcement. A dismissal occurs *any time* three or more Commissioners vote

[4] On October 15, 2021, over two months after the Complaint in this litigation was filed, the three Commissioners who voted to find reason to believe issued a statement intended to influence this litigation. These three Commissioners offered commentary on their colleagues' Controlling Statement of Reasons, and generally explained that they voted against allowing the FEC to defend itself in this litigation as a way of intentionally complicating matters because they disagree with the D.C. Circuit's holdings on the reviewability of dismissals based on prosecutorial discretion. However, these three Commissioners' views are not controlling in this matter, and the D.C. Circuit previously noted that "[a]n agency cannot *sua sponte* update the administrative record when an action is pending in court." *CREW 2018*, 892 F.3d at 438 n.5.

against proceeding in an enforcement matter, whether that vote takes the form of voting *against* a "reason to believe" motion, *for* a "no reason to believe" motion, or *for* a motion to dismiss. Thus, the three Commissioners who voted to dismiss in the underlying matter did so with legal effect because a 3-3 vote to dismiss an enforcement matter has the legal effect of dismissing that matter.

In addition to these misstatements of the law, Plaintiff also fails to identify any precedent that would place limits on the content of the controlling Statement of Reasons. Plaintiff's suggestion that prosecutorial discretion cannot feature in the controlling Statement of Reasons is without any basis whatsoever. When the Commissioners deadlock on an enforcement matter and there are not four votes to find reason to believe, the D.C. Circuit requires the Commissioners who voted against finding reason to believe to set forth their views in writing. *See Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476 ("[T]he three Commissioners who voted to dismiss must provide a statement of their reasons for so voting."). If these Commissioners were simultaneously precluded from relying on certain positions and rationales that informed their vote(s), how could these Commissioners possibly produce the required statement of reasons?

The D.C. Circuit has made clear that the views of the controlling Commissioners provide the Commission's rationale in a case such as this. *See id.* ("Since those Commissioners constitute a controlling group for purposes of the decision [to dismiss], their rationale necessarily states the agency's reasons for acting as it did."). The views of the Commissioners who voted against finding reason to believe, and against taking enforcement action, are favored over the views of the Commissioners who voted to find reason to believe. This is an unavoidable, yet intentional, consequence of how Congress structured the FEC, which, as the D.C. Circuit explained, values preserving the *status quo* and favoring enforcement *inaction* over enforcement *action*. For over 30 years, it has been established law that when the Commission votes 3-3 to dismiss an

enforcement matter, only the votes of the three dismissing Commissioners are deemed controlling. *See, e.g.*, *CREW 2021*, 993 F.3d at 897-98 (noting that where "a deadlocked Commission fails to follow the General Counsel's recommendation, those who voted to reject that recommendation—often referred to as the 'controlling commissioners'—determine the final position of the Commission on the matter"); *CLC*, 952 F.3d at 355 (same); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017) ("[I]n cases of 3-3 deadlocks as is the case here, the Court looks to the reasoning of the three commissioners voting to dismiss."). The votes of the other Commissioners, who voted against dismissing and for pursuing enforcement, do not control in any way and their views are not considered by a reviewing court. Those Commissioners certainly cannot deprive the controlling Commissioners of the ability to fully express their views as the D.C. Circuit requires. Plaintiff's novel theory – that the controlling Commissioners cannot rely on prosecutorial discretion in this matter – would upend established law and give the non-controlling Commissioners a say in the outcome of this matter that is not supported by FECA, the FEC's unique structure, or D.C. Circuit precedent.

Plaintiff's underlying intention is revealed in a footnote suggesting that the court "requir[e] a majority of Commissioners to vote affirmatively in order to exercise prosecutorial discretion." ECF No. 23 at 50 n.8. The D.C. Circuit has rejected this effort once before, noting that such "purposivist policy arguments cannot override the unambiguous text, nor can they be reconciled with our previous cases, which have recognized the possibility of 'deadlock dismissals,' namely dismissals resulting from the failure to get four votes to proceed with enforcement action." *CREW 2021*, 993 F.3d at 891.

3. Plaintiff's Attempt to Convert the Exercise of Prosecutorial Discretion Into Legal Analysis Should Be Rejected.

Plaintiff contends that "[t]he controlling Commissioners' purported invocation of prosecutorial discretion rested squarely on two erroneous legal conclusions about FECA," and this makes the matter reviewable. ECF No. 23 at 50-51. Plaintiff points to footnote 11 in *CREW 2018* which notes that "if the Commission declines to bring an enforcement action on the basis of its interpretation of FECA, the Commission's decision is subject to judicial review to determine whether it is 'contrary to law.'" *CREW 2018*, 892 F.3d at 441 n.11. This footnote also makes clear that review is available only where "the agency's action was based entirely on its interpretation of the statute." *Id*. However, as Plaintiff's analysis makes clear, this argument is simply another impermissible effort "to carve out the Commission's statutory interpretation from its exercise of enforcement discretion." *CREW 2021*, 993 F.3d at 886.

Plaintiff argues that the controlling Commissioners invoked prosecutorial discretion by application of two erroneous interpretations of FECA. ECF No. 23 at 51. Plaintiff, however, cherry-picks language from the controlling Statement of Reasons while ignoring surrounding language that demonstrates Plaintiff's proposition is untrue. Contrary to Plaintiff's claims, the Controlling Statement of Reasons "expresses discretionary considerations at the heart of *Chaney*'s holding, such as concerns about resource allocation . . . and statute of limitations hurdles." *CREW 2021*, 993 F.3d at 885. Specifically, the Commissioners explained that pursuing the administrative complaint "would have necessitated a wide-ranging, costly, and invasive investigation" which would be an "expensive and resource-consuming investigation while the Commission is still working through a substantial backlog of cases." In addition, "the Commission is obligated to make difficult decisions about whether or not to enforce against Respondents in Matters nearing the expiration of the statute of limitations." AR 212.

Plaintiff first claims that "the controlling Commissioners relied on the erroneous legal conclusion that determining when Scott became a candidate would require 'prob[ing] his subjective intent.'" ECF No. 23 at 51. According to Plaintiff, when one becomes a candidate is an objective inquiry, and the Commissioners' "misunderstanding of the relevant law underlay *all* the justifications the controlling Commissioners offered for employing the agency's discretion." *Id.* at 51-52. The sources Plaintiff cites for this proposition do not support Plaintiff's position. For example, FEC Advisory Op. 2015-09 (Senate Majority PAC) explains that "if an individual has raised or spent more than $5,000 on 'testing-the-waters' activities, the individual becomes a candidate when he or she *decides to run* for federal office." FEC Advisory Op. 2015-09 (Senate Majority PAC) at 5 (emphasis added). The cited enforcement matter, MUR 5363, explains that "when an individual raises or spends more than $5,000 and engages in activities indicating that he or she has *decided to run* for a particular office, or in activities relevant to conducting a campaign, the individual is deemed to have crossed the line from 'testing the waters' to 'candidate' status under the Act." MUR 5363 (Sharpton), Factual and Legal Analysis at 2 (emphasis added).

When examining "testing the waters" allegations, such as those at issue in the underlying administrative complaint, the relevant regulation turns on the question of whether "an individual has decided to become a candidate." 11 C.F.R. § 100.72(b). While the FEC's testing-the-waters regulation has been expressed in a variety of ways, the FEC typically examines objective factors designed to discern the individual's subjective intent. For example, in MUR 5934, the Commissioners explained, "[b]ecause we do not believe Senator Thompson's public statements establish that he had definitively decided to become a federal candidate before he filed his Statement of Candidacy . . . we voted against finding reason to believe that a violation occurred." MUR 5934 (Thompson), Statement of Reasons of Vice Chairman Matthew S. Petersen and

Commissioners Caroline C. Hunter, Donald F. McGahn, and Ellen L. Weintraub at 1. The FEC's inquiry focused on Senator Thompson's own statements about whether he was a candidate or not, and specifically noted "the contrast between Senator Thompson's ambiguous phrasings and Reverend Sharpton's unambiguous statements" in MUR 5363 (Sharpton). In the present matter, the controlling Commissioners' reference to "prob[ing] his subjective intent" does not evidence an erroneous legal conclusion, and more importantly, it does nothing to undermine the Commissioners' assessment that "a wide-ranging, costly, and invasive investigation into both Scott and New Republican's activities" would be necessary. AR 212.

Plaintiff next claims that the controlling Commissioners rendered their decision reviewable when they assessed the existing record as "a thin evidentiary reed," *Id.* at 212. According to the Plaintiff, "they rested their invocation of prosecutorial discretion on their view of the legal merits," and this "renders their purported exercise of discretion reviewable." ECF No. 23 at 52. Plaintiff's argument fails for two reasons. *First*, assessing the record evidence as "thin" does *not* express a "view on the legal merits." It expresses a view on whether an adequate factual basis exists to support the General Counsel's recommendation to undertake further investigation. *Second*, insufficient evidence is a quintessential basis for invoking prosecutorial discretion and dismissing a complaint. *See, e.g.*, *Heckler*, 470 U.S. at 831 (describing an agency's "decision not to enforce" as an example of an agency's exercise of enforcement discretion involving peculiar determinations within its expertise that are generally unsuitable for judicial review); *see also Akins v. FEC*, 736 F. Supp. 2d 9, 23 n.12 (D.D.C. 2010) ("[T]he Commission acted within its prosecutorial discretion in considering the lack of evidence supporting the plaintiffs' position.").[5]

[5] In addition to these administrative reasons that the FEC's exercise of enforcement discretion is not reviewable, the Supreme Court has also given weight to the fact that "when an agency refuses

The controlling Commissioners' observation that the General Counsel's recommended investigation rested on "a thin evidentiary reed" fits squarely within the "complicated balancing" calculus identified by the Supreme Court:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler, 470 U.S. at 831-832; *see also Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007) ("Each decision implicates a number of factors bearing on the agency's enforcement authority, including policy priorities, allocation of resources, and likelihood of success – and it is the agency's evaluation of those factors that this court should not attempt to review.").

The controlling Commissioners' rationale is consistent with the reasons identified for invoking prosecutorial discretion that were examined in *CREW 2021*, and the justification for exercising prosecutorial discretion in this matter far exceeds what is required to sustain that decision as unreviewable.

4. The FEC's Dismissal on the Basis of Prosecutorial Discretion Was Not Pretextual and Is Not Reviewable On That Basis.

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to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Heckler*, 470 U.S at 832 (emphasis in original). By contrast, "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner." *Id.* (emphasis in original). Finally, "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch[.]" *Id.* (citing U.S. Const., Art II, § 3.)

Finally, Plaintiff contends that the controlling Commissioners invoked prosecutorial discretion as a "pretext" to justify their "substantive conclusion on the merits that the Candidacy Filing allegations did not warrant a reason-to-believe finding." ECF No. 23 at 53. Plaintiff argues that the pretextual invocation of prosecutorial discretion is "necessarily arbitrary, capricious, and contrary to law." *Id.* at 54.

Plaintiff is demonstrably incorrect when it claims that the controlling Commissioners invoked prosecutorial discretion as a mere pretext. *See* ECF No. 22-1 at 33–34. In addition, the D.C. Circuit indicated that the FEC cannot be required to demonstrate its sincerity when it relies on prosecutorial discretion because "[w]e take the Commission at its word when it invokes prosecutorial discretion, irrespective of how many words it uses or the structure of its sentences." *CREW 2021*, 993 F.3d at 889 n.8.

There also is no legal basis for Plaintiff's suggestion that the controlling Commissioners' use of prosecutorial discretion can be reviewed for "pretext." Plaintiff cites the Supreme Court's decision in *Dep't of Com. v. New York*, 139 S.Ct. 2551 (2019), for the broad proposition that "[a]gency action is arbitrary and capricious . . . when the agency's justification for that action is pretextual." That decision did not involve an agency decision to forgo enforcement action on the basis of prosecutorial discretion; rather, it involved a clear case of agency action that was subject to judicial review. The Supreme Court specifically distinguished between the judicial review it applied to "census-related decisionmaking" and the non-reviewability of an agency "decision not to institute enforcement proceedings" under *Heckler v. Chaney*. *Dep't of Com.*, 139 S. Ct. at 2568. *Department of Commerce v. New York* has no application to this case and Plaintiff has not cited any authority that supports a "pretext" exception to the general rule that agency dismissals of enforcement matters on the basis of prosecutorial discretion are not subject to judicial review.

The D.C. Circuit's recent decisions indicate that when the FEC dismisses an administrative complaint based upon prosecutorial discretion, even in part, that dismissal is not reviewable on any grounds. *See CREW 2018*, 892 F.3d at 439 (FECA "imposes no constraints on the Commission's judgment about whether, in a particular matter, it should bring an enforcement action"). In fact, the D.C. Circuit has already rejected a variation of the Plaintiff's argument. In *CREW 2018*, the Court explained that:

> [A]gency enforcement decisions, to the extent they are committed to agency discretion, are not subject to judicial review for abuse of discretion. It follows that CREW is not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings.

Id. at 441. The D.C. Circuit's decisions necessarily preclude this court from reviewing for pretext.

Clearly Plaintiff disagrees with the D.C. Circuit's decisions in *CREW 2018* and *CREW 2021* regarding the non-reviewability of FEC enforcement matters that are dismissed on the basis of prosecutorial discretion. See ECF No. 23 at 54 n.9. Nonetheless, in its decisions in *CREW 2018* and *CREW 2021*, the D.C. Circuit declared that in cases where the FEC deadlocks in an enforcement matter, the controlling Commissioners may base their dismissal in part on prosecutorial discretion and this decision is not subject to judicial review. That is exactly what has occurred here, and *CREW 2018* and *CREW 2021* provide the applicable rule of law. This case must be dismissed because the controlling Commissioners' invocation of prosecutorial discretion is not subject to judicial review.

III. JURISDICTIONAL AND REVIEWABILITY ISSUES ASIDE, PLAINTIFF'S ARGUMENTS FAIL ON THE MERITS.

Should this Court find that Plaintiff has standing *and* the exercise of prosecutorial discretion in the controlling Statement of Reasons was ineffective, this case should still be dismissed on the merits.

A. The FEC's Dismissal of Plaintiff's Administrative Complaint Was Not Contrary to Law.

The FEC's dismissal of administrative complaints is reviewed under the "contrary to law" standard. 52 U.S.C. § 30109(a)(8)(C). The FEC's decision is contrary to law "'if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act, or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.'" *CLC*, 952 F.3d at 357 (quoting *Orloski*, 795 F.2d at 161). In this "deferential inquiry," courts ask only "whether the Commission's decision was 'sufficiently reasonable to be accepted.'" *Id.* (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981)).

In this matter, because the FEC's decision was more than "sufficiently reasonable," as described below, it was not contrary to law, and Plaintiff's arguments fail on the merits. Denial of Plaintiff's motion on the merits is warranted here. Furthermore, because there is no genuine issue of material fact that the FEC's dismissal of the complaint was a permissible (*i.e.*, "sufficiently reasonable") interpretation of the FECA, this Court's deferential review is satisfied. Intervenor-Defendant is therefore entitled to judgment as a matter of law. This Court should grant Intervenor-Defendant's Cross-Motion for Summary Judgment.

Specifically, three Commissioners determined that the administrative complaint and record provided inadequate grounds for proceeding; the other three Commissioners would have pursued the matter. In keeping with Circuit precedent, the three Commissioners who voted to dismiss—the controlling Commissioners—supplied a Statement of Reasons on behalf of the Commission. The

controlling commissioners rejected the General Counsel's analysis and recommendation and based their decision on both legal grounds and prosecutorial discretion. *See* AR 204 ("[N]either the wise use of Commission resources nor the available evidence supported [the General Counsel's proposed] sweeping approach.").

The controlling Commissioners credited the sworn statement of New Republican PAC's Executive Director attesting that she "made all decisions regarding New Republican PAC's operations and activities" after she became the Executive Director in February 2018. *Id.* at 206. The controlling Commissioners also took the Executive Director at her *sworn* word when she attested that she had "not spoken with, or otherwise communicated with, Governor Rick Scott about any matters pertaining to the plans, activities, or strategies of New Republican PAC." *Id.* at 207.

With respect to alleged "soft money" violations, the controlling Commissioners explained that "whether or not a soft money violation occurred depends on whether an individual is a 'candidate' within the meaning of the Act." *Id.* at 208. More specifically, "New Republican can commit a soft money violation only if Scott is a candidate," "[b]ut if Scott was not a candidate, then there can be no soft money violation." *Id.* at 209. The controlling Commissioners explained that "the evidence marshaled by OGC does not rise to the level of the RTB standard." They found that OGC's recommendations were premised on "speculation based on press reports and unattributed comments from 'Republican officials,'" which were contradicted by a "sworn statement from someone with personal knowledge of the matter at hand." *Id.* at 211. The controlling Commissioners explained that they could not "simply ignore or evade [the Executive Director's] sworn attestations." *Id.*

The controlling Commissioners then explained that the matter "merited the invocation of our prosecutorial discretion" because they "were unable to justify the commitment of the Commission's scare enforcement resources to such a lengthy and cumbersome investigation on the basis of such a thin evidentiary reed." *Id.* at 212.

As discussed above, the controlling Statement of Reasons is not suitable for review under the "contrary to law" standard because the dismissal is ultimately based on prosecutorial discretion. However, to the extent the controlling Commissioners engaged in legal analysis informed by their assessment of the strength of the evidence in the record, the controlling Commissioners did not act contrary to law. The controlling Commissioners reasonably interpreted FECA's soft money provisions and the FEC's "testing the waters" regulation. Their decision was the product of reasoned decision making that easily satisfies arbitrary-and-capricious review. *See Orloski*, 795 F.2d at161.

The controlling Commissioners reasonably addressed the legal questions presented by the administrative complaints. One question raised in the complaints involves the application of the soft money provision. It is evident from the statute that FECA's soft money provisions apply only in situations involving "[a] candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office." 52 U.S.C. § 30125(e). Now-Senator Scott was not a federal officeholder at the time of the events in question, so the soft money issue hinges on whether Senator Scott qualified as a "candidate" at some point before he formally declared himself a candidate. The controlling Commissioners correctly identified the ultimate legal issue: "New Republican can commit a soft

money violation *only if* Scott is a candidate," "[b]ut if Scott was not a candidate, then there can be no soft money violation." AR 209 (emphasis added).

A second question presented is when Senator Scott legally became a candidate, which requires application of the FEC's testing the waters regulation. The controlling Commissioners observed that the regulation includes "a non-exhaustive list of five 'activities [which] indicat[e] that an individual has decided to become a candidate," and that while "[s]ome of the listed activities are fairly intuitive and objective," others "are not as clear-cut." *Id.* at 208-209. The controlling Commissioners then explained how and why they found OGC's argument that Senator Scott became a candidate earlier than his filing indicated "unpersuasive." *Id.* at 209-211

Plaintiff contends that the controlling Commissioners did not adequately address allegations of coordinated communications, but this is incorrect. As Plaintiff notes, the controlling Commissioners stated that any violations alleged to occur *before* Senator Scott declared his candidacy necessarily rested on the issue of "candidacy." ECF No. 23 at 44-45. Plaintiff, however, contends that coordination could have occurred *after* Senator Scott became a candidate and the controlling Commissioners did not address this possibility. That too is incorrect. The controlling Commissioners specifically referenced the sworn affidavit of New Republican PAC's Executive Director, who attested that she "made all decisions regarding New Republican PAC's operations and activities," and that she had "not spoken with, or otherwise communicated with, Governor Rick Scott about any matters pertaining to the plans, activities, or strategies of New Republican PACAR 206-207. The controlling Commissioners separately noted the Executive Director's "categorical denial of any improper collusion" with the Scott campaign. *Id.* at 211. This evidence speaks directly to the independence of New Republican PAC's activities and makes clear that the

controlling Commissioners did not believe there was convincing evidence of improper "coordination."

Plaintiff has not identified legal error (or "an impermissible interpretation of law") or established that the controlling Commissioners otherwise acted contrary to law, and appears to object only to the controlling Commissioners' "evaluation of the record." ECF No. 23 at 38. Plaintiff argues that the evidence in the record should be interpreted differently, and would apparently weigh and interpret certain factors differently than the controlling Commissioners, but that is not the relevant standard for review. It "is not the court's function" to reweigh the record evidence before the agency. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC v. Pension Benefit Guar. Corp.*, 707 F.3d 319, 325 (D.C. Cir. 2013). Rather, courts must affirm an agency decision if a "'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (citation omitted). The court does "not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the [agency's] ultimate decision." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010). The controlling Commissioners assessed the evidence in the record and reached a reasonable conclusion. The controlling Commissioners' legal analysis was consistent with the FECA and FEC regulations, they properly relied on prosecutorial discretion as a basis for their dismissal, and they rationally explained their decision.

CONCLUSION

For the aforementioned reasons, Plaintiff's Motion for Default Judgment or, in the alternative, Summary Judgment should be denied and Intervenor-Defendant's Cross-Motion for Summary Judgment should be granted.

Dated: January 18, 2022

Respectfully submitted,

/s/*Jason Torchinsky*
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CERTIFICATES OF SERVICE

I certify that on January 18, 2022, I served the foregoing on all counsel of record through this Court's CM/ECF system. I further certify that on January 19, 2022, I served the foregoing on the FEC by USPS First Class mail.

/s/ Jason Torchinsky