UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GIFFORDS, *Plaintiff*, v. NATIONAL RIFLE ASSOCIATION OF AMERICA POLITICAL VICTORY FUND, *et al*. *Defendants*.	Civil Action No. 1:21-cv-2887-EGS

DEFENDANT JOSH HAWLEY FOR SENATE'S REPLY IN SUPPORT OF ITS MOTIONS TO DISMISS

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INTRODUCTION

Plaintiff's Complaint must be dismissed by this Court pursuant to Rule 12(b)(1) and Rule 12(b)(6) because Plaintiff lacks standing to bring its claims and has not satisfied necessary preconditions for filing this lawsuit under the Federal Election Campaign Act of 1971, as amended ("FECA"). Plaintiff's arguments to the contrary are precluded by this Circuit's precedent and otherwise lack basis in fact or law.

Plaintiff lacks standing because it has not demonstrated competitor injury or informational injury. Plaintiff is neither a competitor to Defendant Josh Hawley, nor does it sufficiently allege informational injury that supports its claims in the present case. 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 obtain information that has already been disclosed. This alone is enough to dismiss Plaintiff's Complaint.

Moreover, contrary to Plaintiff's unavailing arguments, Defendant's Motion to Dismiss in no way constitutes an impermissible collateral attack on a previous decision of this Court. Defendant was not a party to the previous action, a critical legal question (namely, whether the condition precedent to file a direct suit was satisfied) was specifically reserved by the Court for later consideration, and the parties to the earlier proceedings failed to inform this Court of binding D.C. Circuit precedent on a specific legal question presented.

Finally, Plaintiff's Complaint must be dismissed because Plaintiff has not satisfied the statutory requirements for bringing this lawsuit directly against the administrative respondents pursuant to 52 U.S.C. § 30109(a)(8)(C). Plaintiff's arguments to the contrary run counter to binding precedent from the D.C. Circuit. When presented with exactly the same arguments about the supposed requirement that Commissioners must cast additional votes to dismiss (or close the file)

after deadlocking, the D.C. Circuit held in 2021 that FECA does *not* require a subsequent majority vote to "close the file." Instead, enforcement matters are ended by virtue of a "deadlock dismissal." The vote to close the file is merely a ministerial action without substantive legal significance. In accordance with D.C. Circuit precedent, the FEC acted and dismissed the administrative complaints at issue when it deadlocked.

For these reasons, and those discussed in Defendants' Motions to Dismiss, this Court should grant Defendant Josh Hawley for Senate's Motion to Dismiss.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO BRING ITS CLAIMS.

A. Plaintiff Does Not Suffer Competitor Injury, Let Alone Injury that can be Redressed by This Court.

Contrary to Plaintiff's repeated claims that it views itself as a "competitor" to Defendants, it has suffered no competitor injury whatsoever. No matter how badly Plaintiff may wish to be a political competitor of Defendants, it is not. Plaintiff is simply a nonprofit organization that may occasionally operate in the same space as Defendants. Plaintiff does not "compete" with any of the Defendants in any cognizable way under FECA. It does not run for election or reelection against any defendant. It does not compete for the same resources as any defendant. Plaintiff does not compete for profit with any defendant. Plaintiff is merely "a nonpartisan, nonprofit 501(c)(4) organization . . . that is dedicated to saving lives from gun violence." Compl. ¶ 14, ECF 1.

First, contrary to Plaintiff's incorrect assertions, "competitor" injury for FECA purposes have only a narrow application to "political arena" cases. Indeed, of the cases cited by Plaintiff to support its competitive injury allegations, nearly all of them arose in the context of direct political competition between candidates, their authorized committees, party committees, or other *political committees*. *See, e.g.*, *Nader v. FEC*, 725 F.3d 226, 228 (D.C. Cir. 2013) (Plaintiff was a third-party

candidate for president who alleged various organizations violated election laws during efforts to keep him off ballot); *Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005) (two members of Congress claimed injury from having to run for reelection against opponents in a legal environment tainted by FEC regulations that permitted what the FECA prohibited); *La Botz v. FEC*, 889 F. Supp. 2d 51, 56 (D.D.C. 2012) (Socialist candidate in 2010 Ohio U.S. Senate election excluded from candidate debates); *Buchanan v. FEC*, 112 F. Supp. 2d 58, 60 (D.D.C. 2000) (two third-party candidates for United States President excluded from candidate debates); *Natural Law Party of the U.S. v. FEC*, 111 F. Supp. 2d 33, 45-47 (D.D.C. 2000) (party committee and its 1996 candidates for President and Vice President challenged debate criteria because they were excluded). *Cf. Gottlieb v. FEC*, 143 F.3d 618 (D.C. Cir. 1998); *Hassan v. FEC*, 893 F. Supp. 2d 248 (D.D.C. 2012).[1] To the extent Plaintiff relies on *Air Line Pilots Ass'n, Int'l v. Chao*, 889 F.3d 785, 788 (D.C. Cir. 2018) to claim competitive standing, it fails for the same reasons. No "government action [has] illegally structure[d] a competitive environment" here. *Id*. (cleaned up). Indeed, it is telling that Plaintiff cannot point to a single case where a similarly structured and situated organization has been found to have standing to pursue a similar claim. That is because there is simply no competitive environment in which Plaintiff has been disadvantaged. Plaintiff is not a competitor to Defendant Josh Hawley for Senate—or any defendant for that matter—and therefore it cannot be disadvantaged. Plaintiff's novel standing arguments should be dismissed by this Court. For Defendant Josh Hawley for Senate, this point is only strengthened by the fact that Plaintiff is a 501(c)(4), which means it cannot operate primarily to participate or intervene in political campaigns on behalf of or in opposition to any candidate, nor can it directly contribute to candidates for federal

[1] To the extent Plaintiff relies on *Chamber of Commerce v. FEC* to support its competitive injury arguments, the language cited by Plaintiff is both hypothetical and dicta, and does not address who qualifies as a "political competitor" in the first instance. 69 F.3d 600, 603 (D.C. Cir. 1995).

office. 26 C.F.R. 1.501(c)(4)-1(a)(2)(i); 52 U.S.C. § 30118(a). Plaintiff simply cannot be (1) a competitor to Defendant Josh Hawley for Senate; (2) a nonpartisan organization; and (3) legally operating as a 501(c)(4)—all at the same time.

The commercial competitor cases involving for-profit businesses to which Plaintiff cites also do not support its competitive injury argument. Plaintiff does not assert any true economic injury in its complaint, and it suffered absolutely no economic injury in this case whatsoever.[2] Instead, Plaintiff baldly asserts that it suffers some amorphous competitive disadvantage compared to the NRA without actually detailing any economic harm whatsoever. ECF 1 ¶ 6. Plaintiff cannot now claim economic harm to somehow bootstrap its claims, let alone use this new economic harm to somehow support a claim under FECA.

If this Court recognizes competitor standing here, it would be a novel finding inconsistent with precedent that would greatly expand the previous notions of what a "competitor" is for standing purposes, and would have the effect of conveying standing to virtually every plaintiff in similar cases. Ultimately, to permit Plaintiff to assert competitor standing here would result in nonsensical jurisprudence, where any individual, group, business, nonprofit, charity, or other institution could claim competitive standing sufficient to support a suit under FECA because they ideologically "oppose" some candidate in a metaphysical sense. That is essentially what Plaintiff is demanding here, and this Court should not countenance such demands.

Because Plaintiff and Defendants are not competitors, action by this Court also cannot redress Plaintiff's asserted harms. Assuming arguendo the Court grants all of Plaintiff's requested relief—which it should not do—the Plaintiff will be in the same situation that it is in now. Plaintiff

[2] *Cf. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 6 (1968); *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 870 (D.C. Cir. 2001).

would not be able to raise more money or somehow be placed on an equal playing field as Defendant Josh Hawley for Senate, because there is no playing field on which they both compete.

B. Plaintiff's Alleged "Informational" Injuries are Insufficient to Confer Article III Standing.

Plaintiff also claims that it suffers "informational injuries." Pl.'s Opp'n at 35-38, ECF 39. Plaintiff offers absolutely no facts sufficient to support this new theory of standing in its complaint. *See generally* ECF 1.[3] Plaintiff's Complaint does not allege facts or information sufficient to support the claims of "informational standing" and defeat Defendant's Motions to Dismiss. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Even if Plaintiff did somehow claim facts sufficient to support its new informational standing arguments in its Complaint, which it did not, 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 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 between entities for which no disclosure is statutorily required, Plaintiff fails to allege a legally cognizable injury sufficient to confer informational standing.

A plaintiff suffers an informational injury only when it "fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also Nader*, 725 F.3d at 230. As the D.C. Circuit recently explained, "[t]he law is settled that a denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading)

[3] Tellingly, Plaintiff only advanced its new theory of competitive injury in its Opposition brief.

requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *Campaign Legal Ctr. & Democracy 21 v. FEC* ("*CLC & Democracy 21 (2020)*") 952 F.3d 352, 356 (D.C. Cir. 2020) (*per curiam*) (quoting *EDF v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019).

The D.C. Circuit has also specified that "the nature of the information allegedly withheld is critical to the standing analysis." *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997). This principle applies to this case in two key ways. First, "a plaintiff does not suffer an injury in fact if it seeks only information that the applicable statute does not require to be disclosed." *Campaign Legal Ctr. v. FEC* ("*CLC (2017)*"), 245 F. Supp. 3d 119, 125 (D.D.C. 2017). *Second*, "where 'plaintiffs have all of the information they are entitled to pursuant to FECA,' their coming to court anyway makes it 'apparent that what they really want is a legal determination' they have no standing to seek.'" *CLC 2020*, 507 F. Supp. 3d at 84 (quoting *All. for Democracy v. FEC*, 362 F. Supp. 2d 138, 148 (D.D.C. 2005)). A plaintiff does not suffer an informational injury where the plaintiff seeks only information that is not required to be disclosed or information that has already been disclosed.

1. Plaintiff Does Not Seek New Information to Be Disclosed.

Following *Akins*, courts have recognized that plaintiffs in Section 30109(a)(8)(A) suits may have standing if the underlying matter is one in which FEC action may lead to new public disclosures required by FECA. *See, e.g.*, *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001) (plaintiffs "have failed to show that either they are directly being deprived of any information or that the legal ruling they seek might lead to additional factual information"); *CREW v. FEC* ("*CREW (2017)*"), 267 F. Supp. 3d 50, 54 (D.D.C. 2017) (describing the standing requirement of "*Akins*, where the complainants had a cognizable injury because they sought to enforce a provision of the FECA that would make the target of the enforcement action subject to additional reporting

requirements"). Thus, to establish standing under *Akins*, plaintiffs must show that the information they seek and have not received: (1) is actually required to be disclosed under the relevant statutory provision; and (2) that the information has not already been disclosed in some other manner. The information identified in Plaintiff's Complaint does not satisfy the requirements of *Akins*.

"[A] plaintiff lacks a cognizable informational injury where the information she seeks 'is already required to be disclosed' elsewhere and, pursuant to that obligation, 'reported in some form.'" *CLC (2020)*, 507 F. Supp. 3d at 84 (quoting *Wertheimer*, 268 F.3d at 1074-75).[4] If "the plaintiffs already have access to 'everything they are entitled to under the FECA,' their alleged 'informational injury' is not cognizable injury under the FECA, sufficient to satisfy the standing requirement." *All. for Democracy*, 362 F. Supp. 2d at 148-149 (internal citations omitted); *see also All. for Democracy v. FEC*, 335 F. Supp. 2d 39, 48 (D.D.C. 2004) (finding no Article III standing where "plaintiffs already possess the information they claim to lack").

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

As has been repeatedly held, if the information a plaintiff seeks "is simply the fact that a violation of FECA has occurred," the plaintiff does not suffer an injury in fact under *Akins*. *Common Cause*, 108 F.3d at 417; *see also Judicial Watch, Inc. v. FEC*, 293 F. Supp. 2d 41, 47 (D.D.C. 2003) (Plaintiff "does not have a justiciable interest in the enforcement of the law"); *Wertheimer*, 268 F.3d at 1074 ("[T]he government's alleged failure to 'disclose' that certain

[4] *See, e.g.*, *CREW v. FEC*, 401 F. Supp. 2d 115, 121 n.2 (D.D.C. 2005) ("*CREW (2005)*") (plaintiff not injured where it seeks information such as exact valuation of mailing list because FECA does not require such disclosure); *All. for Democracy*, 362 F. Supp. 2d at 145 (accord); *see also CREW (2017)*, 267 F. Supp. 3d at 54 (holding that an advocacy group lacked standing to challenge FEC dismissal of alleged violation of FECA's "prohibition on pass-through contributions" because "nothing in the statute or regulatory regime" would have required the alleged violator to disclose such information).

conduct is illegal by itself does not give rise to a constitutionally cognizable injury."); *CLC & Democracy 21 v. FEC*, 520 F. Supp. 3d 38, 47 (quoting *Wertheimer*, 268 F.3d at 1075) ("[A] plaintiff has no legally cognizable interest in a 'legal conclusion that carries certain law enforcement consequences.'"); *CLC (2020)*, 507 F. Supp. 3d at 83 (quoting *Vroom v. FEC*, 951 F. Supp. 2d 175, 179 (D.D.C. 2013)) ("[A] plaintiff's mere 'desire for information concerning a violation of FECA' does not give rise to an Article III injury-in-fact."); *CREW (2017)*, 267 F. Supp. 3d at 55 ("[A]n interest in knowing or publicizing that the law was violated is akin to claiming injury to the interest in seeing the law obeyed, which simply does not present an Article III case or controversy.").

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

Courts have held that a plaintiff seeks only a legal determination when the object of the plaintiff's lawsuit is to force the FEC to apply a certain legal characterization to an already- reported transaction. For example, in *Wertheimer*, the D.C. Circuit found no standing existed where the plaintiff sought a determination that publicly disclosed expenditures were "coordinated." *Wertheimer*, 268 F.3d at 1074-75. Similarly, a plaintiff has no standing to seek a legal determination that previously reported expenditures exceeded applicable limits, *see Vroom*, 951 F. Supp. 2d at

178-79, should be treated as in-kind contributions, *see CREW v. FEC*, 799 F. Supp. 2d 78, 88-89 (D.D.C. 2011), or that a contribution should be attributed to a different donor, *CREW (2017)*, 267 F. Supp. 3d at 54.

Here, under the *Akins* test, Plaintiff has "failed to show either that [it is] directly being deprived of any information or that the legal ruling [it] seek[s] might lead to additional factual information." *Wertheimer*, 268 F.3d at 1074; *see also Free Speech for People v. FEC*, 442 F. Supp. 3d 335, 345 (D.D.C. 2020) ("Plaintiff does not seek any presently unknown information that is otherwise subject to disclosure under FECA" and "therefore lacks standing to sue"). Plaintiff seeks only legal determinations or information not required to be disclosed under FECA. The spending at issue has already been disclosed; Plaintiff simply wants it declared "coordinated," meaning that Defendants violated the law. In other words, Plaintiff seeks only to "get" those whom it considers " bad guys." Hence, Plaintiff's claim is just another way of alleging that it has been deprived of its preferred legal determination, and, as this Court recently made clear, "such claimed informational injury is insufficient to confer standing." *Free Speech for People*, 442 F. Supp. 3d at 343. Accordingly, none of Plaintiff's new information-based allegations support Article III standing.

II. THE MOTION TO DISMISS IS NOT AN IMPERMISSIBLE COLLATERAL ATTACK.

Defendants' challenge to the underlying basis for the Court's Order in *Giffords v. FEC* is not an impermissible collateral attack given the unique features of the judicial review process under FECA. Section 30109(a)(8) prescribes an unusual two-step process for administrative complainants who claim to be "aggrieved by an order of the Commission dismissing a complaint filed by such party" or by "a failure of the Commission to act on such complaint." First, the complainant must bring an action *against the FEC* in this Court (an action to which an administrative respondent is not a party, unless a respondent intervenes). 52 U.S.C. § 30109(a)(8)(A). Then, only after the Court has

determined the FEC's actions were "contrary to law" and that the FEC failed to comply with the court's order, may the complainant bring a civil suit directly against the respondent. *Id.* § 30109(a)(8)(C). Thus, the fortunes of the defendant in the second lawsuit depend on the FEC's defense of itself in the first lawsuit.

Here, the Defendant never had the opportunity to present argument in the first proceeding because it was not a party. Further, even though it is the FEC's responsibility under the statute to defend its own action or inaction at step one of the process, it is not necessarily true that the FEC shares the interests of the administrative respondent who is the subject of the underlying administrative complaint. And, as this case readily demonstrates, the FEC's "defense" in the initial lawsuit may be less than vigorous. None of the Defendants in this case were present at the pivotal hearing that ultimately led to this second lawsuit, although this Court wisely anticipated the objection Defendant now offers and specifically noted that defense counsel could raise this issue.

While the Court ultimately authorized Plaintiff to proceed to step two and file the instant lawsuit, the Court expressly noted that the question of whether Plaintiff had satisfied the statutory requirements for proceeding with a direct civil lawsuit against Defendant pursuant to 52 U.S.C. § 30109(a)(8)(C) had not been resolved. In the Court's words, "*if the Court hypothetically today were to say to the plaintiff, Proceed with your private action, then that would be a legitimate issue to be raised by defense counsel, that it was premature at that point*." *Giffords v. FEC*, No. 1:10-cv-1192, Nov. 1, 2021 Hr'g Trans., ECF No. 89 at 10 (emphasis added). The Court correctly identified this question as a "legitimate issue" that remains subject to dispute and legally unresolved, and the collateral attack doctrine does not prevent it from now being properly raised by Defendant in this case.

III. THE REQUIRED PRECONDITIONS FOR FILING THIS LAWSUIT WERE NOT SATISFIED BECAUSE THE FEC HAS ACTED.

Contrary to Plaintiff's assertions, Plaintiff has *not* satisfied the statutory requirements for bringing this lawsuit directly against the administrative respondents pursuant to 52 U.S.C. § 30109(a)(8)(C). Pursuant to FECA, direct suit may be brought only after the District Court "declare[s] that the dismissal of the complaint or the failure to act is contrary to law." *Id.* As noted above, the Court specifically reserved for later consideration the crucial underlying legal question of whether the "condition precedent" required under the statute had been met.[5] The issue of whether the FEC "failed to act" was never properly briefed, and both parties to the litigation in *Giffords v. FEC* failed to inform this Court of binding D.C. Circuit precedent on a key issue. Plaintiff continues to hide the ball, claiming that "FEC counsel accurately informed the Court at the time [that] those deadlocked votes did not dismiss the enforcement matters." ECF 39 at 12. While not surprising that Plaintiff would join the FEC's non-defense of this issue, to the extent the FEC represented to the Court that the underlying administrative complaints remained "open," that representation was inaccurate in light of *CREW 2021*. This Court issued its order *after* being misled by both parties to *Giffords v. FEC* and *after* specifically reserving the question of whether the condition precedent to bring direct suit had been met. As the Court anticipated, this is "a legitimate issue to be raised by defense counsel," and we do so here. The statutory requirement that the FEC be found to have acted "contrary to law" before a Plaintiff may bring direct suit has not been satisfied because the Court has not fully considered and ruled on the issue.

[5] *See Giffords v. FEC*, No. 1:10-cv-1192, Nov. 1, 2021 Hr'g Trans., ECF No. 89 at 10 ("[I]f the Court hypothetically today were to say to the plaintiff, Proceed with your private action, then that would be a legitimate issue to be raised by defense counsel, that it was premature at that point.").

Plaintiff contends that when the FEC deadlocks in an enforcement matter, the vote is legally inconsequential and Commissioners are still *required* to vote to dismiss the matter by four or more votes to end the agency's consideration. According to Plaintiff, if "the agency lacks four votes to pursue the allegations in the complaint," the Commission must separately dismiss via a vote to close the file. *Id.* at 16. In 2021, the D.C. Circuit rejected this very argument, and Plaintiff does not attempt to explain how its supposed requirement can coexist with that contrary precedent. Plaintiff claims "[t]he Commission has been dismissing cases by voting to close the file for at least the last 46 years," *id.*, but offers no evidence that the FEC, or any individual Commissioners, regard the vote to close the file as anything more than a ministerial act. Plaintiff's characterizations of what the FECA requires and how the FEC has historically managed its enforcement docket are historically inaccurate. Just like the proponents of the "Weintraub Scheme,"[6] Plaintiff conflates a "vote to dismiss" with a "vote to close the file," incorrectly argues that those two types of votes are functionally indistinguishable, misrepresents the Commission's historical use of the phrase "close the file," and ignores and disregards binding D.C. Circuit precedent.

A. The D.C. Circuit Has Already Held That FECA Does Not Require A Majority Vote to "Close The File" Following an Enforcement Deadlock.

Plaintiff claims that "[a]bsent majority support for a motion to close the file, an enforcement matter remains pending before the Commission even though, at that moment, there are not four votes to find reason-to-believe a violation occurred." ECF 39 at 16. This is simply untrue. This question is not one of first impression, has already been litigated, and the D.C. Circuit rejected the exact position advanced by Plaintiff. Plaintiff advances identical arguments as the appellants in

[6] *See* Mem. of Points and Authorities in Support of the National Rifle Association of America Political Victory Fund and National Rifle Association of America's Mot. to Dismiss Plaintiff's Compl. (Jan. 28, 2022), Doc. 35-1, pp. 16-20 (detailing the "Weintraub Scheme").

CREW 2021, apparently hoping that this Court will disregard (or overlook) the Circuit Court's ruling. In its briefing to the D.C. Circuit, appellant in *CREW 2021* argued that "[w]here four votes are unavailable for any option, *nothing* happens–neither an investigation nor a dismissal–until a bipartisan coalition of four commissioners can come to an agreement. The FECA does not automatically dismiss cases that do not enjoy four votes to proceed." Br. of Appellants, *CREW v. FEC*, 2019 U.S. D.C. Cir. Briefs LEXIS 1084, at *38-39 (Oct. 22, 2019). The D.C. Circuit directly rejected CREW's arguments, writing:

> [Appellant CREW] relies heavily on the "bipartisan structure" of the Commission to argue that four commissioners must concur not only in enforcement actions, but also in nonenforcement actions. CREW argues that "[w]here four votes are unavailable for any option, *nothing* happens–neither an investigation nor a dismissal–until a bipartisan coalition of four commissioners can come to an agreement." CREW Br. 28. *This argument, however, is unsupported by the text of FECA,* which clearly states that four members are necessary only "to initiate," "defend," or "appeal any civil action." 52 U.S.C. § 30107(a)(6). *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. . . . *CREW's 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 an enforcement action.*

CREW v. FEC, ("*CREW 2021*"), 993 F.3d 880, 891 (D.C. Cir. 2021) (emphasis added).

Here, Plaintiff has recycled CREW's already-rejected arguments that enforcement matters "remain pending" following deadlocked votes and are not "automatically dismissed." In *CREW 2021*, the D.C. Circuit specifically rejected this argument and held that neither FECA nor circuit precedent supports the view that "nothing happens" when Commissioners deadlock and that, consequently, enforcement cases remain open until four commissioners agree to dismiss them. To the contrary, the D.C. Circuit noted that it has long recognized that "deadlock dismissals" are, in fact, dismissals because FECA does *not* require four votes to dismiss an enforcement matter. *Id.* at

891. While Plaintiff disputes Defendant's contention that a failed reason-to-believe vote results in a self-executing dismissal and claims that "Defendants assert their position with a conspicuous lack of statutory or regulatory authority," ECF 39 at 44, it is Plaintiff that completely ignores clear D.C. Circuit precedent rejecting its argument.

The D.C. Circuit's decision in *CREW 2021* is not an outlier. Decades ago, when the D.C. Circuit first considered how deadlocked enforcement matters would be treated for purposes of judicial review, the Court assumed that deadlock and dismissal were not separate concepts. In *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988), the Court used the term "deadlock dismissal" and noted that a statement of reasons was required "at the time when a deadlock vote results in an order of dismissal . . .". In *DCCC v. FEC*, then-D.C. Circuit Judge Ruth Bader Ginsburg referred to "dismissal due to a deadlock." 831 F.2d 1131, 1132 (D.C. Cir. 1987); *see also CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018) ("The deadlock meant that the Commission could not proceed[.]"); *In re Sealed Case*, 223 F.3d 775, 777 (D.C. Cir. 2000) ("The Commission split 3-3, and because a majority of commissioners is required to find probable cause . . . the vote precluded Commission enforcement action."); *CREW v. FEC*, 380 F. Supp. 3d 30, 35 (D.D.C. 2019) ("Four votes are required to move forward with an investigation. Thus, if a full complement of six Commissioners participates in the process, three negative 'reason to believe' votes may block any investigation or enforcement action. But, . . . when fewer than six Commissioners participate, even fewer negative votes may block further action."). More recently, the D.C. Circuit explained, "we have held the [FEC] engages in final agency action when, after receiving a complaint alleging certain types of campaign finance violations, it deadlocks about whether probable cause exists to proceed with an investigation." *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016). The Court further explained that the "FEC cannot investigate complaints absent majority vote . . .

meaning the statute *compels* FEC to dismiss complaints in deadlock situations." *Id*. (emphasis added).

In *FEC v. NRSC*, the D.C. Circuit explained that in *DCCC*, it "held that when the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable," but "to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting." 966 F.2d 1471, 1476 (D.C. Cir. 1992). The D.C. Circuit's prescribed procedure for ensuring that deadlocked enforcement matters would be subject to judicial review presupposes that deadlocked enforcement cases must end. The required process cannot work if the Commissioners who wish to pursue enforcement—which is *not* the controlling group under *NRSC*—remain empowered to block judicial review of the controlling Statement of Reasons by falsely claiming that the matter has not been dismissed since there was never a vote to affirmatively close the file. In *CREW 2021*, the D.C. Circuit specifically rejected the argument that "nothing happens" following a deadlocked vote because FECA does not require four votes to dismiss. Accordingly, the "Weintraub Scheme," and the position taken by the FEC in *Giffords v. FEC*, is incompatible with the D.C. Circuit's decisions in *DCCC, Common Cause*, and *NRSC*, and directly contradicts *CREW 2021*.

To the extent that the FEC has behaved as if the underlying administrative complaints remain pending, as opposed to dismissed due to deadlock, the FEC has acted unlawfully and ignored clear precedent from the D.C. Circuit. In the preceding litigation (*Giffords v. FEC*), neither the Plaintiffs nor the FEC made this Court aware of the D.C. Circuit's holdings in *CREW 2021*. Moreover, the FEC never notified this Court that its representations that the administrative complaints in this matter were still open and pending were inconsistent with the holding in *CREW 2021*. Thus, Plaintiff's rehashed argument that an enforcement matter remains open at the FEC

following a deadlocked vote "[a]bsent majority support for a motion to close the file" should be rejected, ECF 39 at 16, just as D.C. Circuit precedent commands.

B. The D.C. Circuit Has Prescribed Procedures for the FEC to Follow in the Event of a Deadlocked Enforcement Vote.

The D.C. Circuit's holdings since the 1980s have indicated that deadlocked enforcement votes are, in fact, self-executing. *See CREW 2021*, 993 F.3d at 891. Plaintiff ignores the fact that the D.C. Circuit has prescribed procedures for the FEC to follow in the event of deadlock and that the agency has followed these procedures for decades. Recently, however, the D.C. Circuit's deadlock procedure has been defied by certain Commissioners who have broken with longstanding practice and mandatory precedent by purporting to transform the act of "closing the file" from a ministerial instruction to staff into a substantive vote to dismiss. The effect has been a breakdown in the FEC's longstanding practice for enforcement deadlocks and costly private litigation.

For decades, the courts explained that when the FEC's Commissioners deadlock in an enforcement matter, and there are not four votes to find reason to believe or probable cause to believe a violation of the FECA occurred, the FEC's consideration of the matter ends and the Commissioners who voted against pursuing enforcement are responsible for preparing a controlling statement of reasons. This statement of reasons is then subject to judicial review, and different standards of review apply depending on whether the Commissioners rested their decision on a substantive legal bases or exercised prosecutorial discretion.

In 1992, the D.C. Circuit explained that "[f]our votes are needed for the Commission to find probable cause [or reason-to-believe]. A tie results in no such finding being entered, and no action being taken against the target of the complaint." *NRSC*, 966 F.2d at 1474. Following a tie vote, "the three Commissioners who voted to dismiss must provide a statement of reasons for so voting. Since

those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Id*. at 1476.

The FEC's consideration of the administrative complaint that ultimately led to the litigation in *FEC v. NRSC* is instructive. The *NRSC* litigation stemmed from a 3-3 vote by the FEC on a particular legal issue in the underlying administrative complaint. The FEC settled with the respondent as to three allegations in the complaint, but with respect to the "fourth charge" "the Commission deadlocked 3-3." *Id.* at 1474. No further action of any sort was taken with respect to that tie vote. The Commissioners did *not* vote again to dismiss the "fourth charge," and they did *not* vote to close the file on that allegation. *See* MUR 2282, p. 587; *see also NRSC*, 966 F.2d at 1474. Once the NRSC agreed to pay a penalty, "[a]s far as the Federal Election Commission was concerned, that concluded the matter." *Id*. The agency's consideration of the "fourth charge" ended with the deadlocked vote. Both the plaintiff and the Court deemed the FEC's consideration of the matter complete and subject to judicial review, allowing the deadlock dismissal to be litigated.

In *NRSC*, it is undeniable that the D.C. Circuit viewed deadlock and dismissal as one and the same. The Court was fully aware that the FEC's deadlocked vote on "the fourth charge" was the agency's only vote on that allegation. The Court understood the deadlocked vote to be a "vote to dismiss" which determined the Commissioners who "constitute[d] a controlling group for purposes of the decision." *Id.* at 1476. In fact, it appears that the courts in this circuit never even contemplated the possibility that matters left with a deadlocked enforcement vote could, under the statute, remain undismissed. When that possibility was raised in *CREW 2021*, the D.C. Circuit specifically addressed and rejected it.

C. Closing The File Is Merely An Administrative and Ministerial Task.

1. The Closing the File Reference in 11 C.F.R. § 5.4 Confirms that it is Administrative and Ministerial, not Substantive.

The reference to closing the file in 11 C.F.R. § 5.4(a)(4) does not establish that a vote to close the file is a substantive action or that it is legally required to end a deadlocked enforcement matter. Section 5.4 is an administrative provision that exists under the section heading "Access to Public Disclosure and Media Relations Division Documents." Section 5.4 details the "material" that "the Commission shall make . . . available for public inspection and copying through the Commission's Public Disclosure and Media Relations Division[.]" 11 C.F.R. § 5.4(a). Section 5.4(a)(4) provides the Public Disclosure and Media Relations Division will make "[o]pinions of Commissioners rendered in enforcement cases" available to the public "no later than 30 days from the date on which all respondents are notified that the Commission has voted to close such an enforcement file." *Id.* This provision does not suggest that voting to close the file is synonymous with a substantive vote to dismiss an enforcement matter, and this provision has nothing whatsoever to do with questions of deadlocked enforcement matters.

Section 5.4 has existed in substantially the same form in the FEC's regulations since 1980—long before the D.C. Circuit specified procedures for deadlocked enforcement matters in *NRSC*. *See* FEC Final Rule on Access to Public Disclosure Division Documents, 45 Fed. Reg. 31,292 (May 13, 1980). To the extent that the FEC's administrative procedure at 11 C.F.R. § 5.4 purports to block the public issuance of the controlling Statement of Reasons in the enforcement matter at issue in this litigation, that provision is inconsistent with both D.C. Circuit precedent and 11 C.F.R. § 111.20(a), which requires that FEC action be made public within a specified amount of time after the FEC "makes a finding of no reason to believe or no probable cause to believe *or terminates its proceedings*." *Id.* (emphasis added). Plaintiff contends that since it has not received notification that

the FEC terminated its proceedings, that must mean that the complaints have not been dismissed. *See* ECF 39 at 45-46. To the contrary, the FEC's failure to send notification letters means only that the FEC failed to act in accordance with the law when the administrative complaints were dismissed. The relevant question is not whether the FEC has notified respondents and complainants that the matter has ended and placed documents on the public record, but whether the FEC *should have* done so but did not. Under applicable regulations, the FEC's General Counsel is required to "advise both complainant and respondent by letter" when "the Commission finds no reason to believe, or otherwise terminates its proceedings[.]" 11 C.F.R. § 111.9(b). In the present matter, the General Counsel has not done so, in violation of agency regulations.

Under D.C. Circuit precedent, where there are not four votes to proceed with an enforcement matter, a "deadlock dismissal" results and the FEC has "terminate[d] its proceedings" regardless of whether it votes to close the file. The agency has failed to notify the parties that the administrative complaints were dismissed, and the controlling Statement of Reasons in the underlying enforcement matter has been unlawfully withheld from the public and this Court.

2. The FEC Has Always Treated "Closing The File" As An Administrative and Ministerial Act After Substantive Consideration of an Enforcement Matter Has Concluded.

Plaintiff argues that the FEC "has been dismissing cases by voting to close the file for at least the last 46 years." ECF 39 at 16. This is incorrect and Defendant does *not* "concede . . . that the FEC has long dismissed matters by holding a distinct vote to close the enforcement file." *Id.* at 43. Defendant's position is that under FECA, *as construed by the D.C. Circuit*, a deadlocked enforcement vote dismisses a matter, and any subsequent vote to close the file is purely ministerial and does *not* have the legal effect of a vote to dismiss. Defendant does *not* contend that the FEC's

vote to close the file is "a meaningless exercise," only that it is ministerial in nature and does not have the substantive legal effect that Plaintiff claims. *Id.* at 44.

As explained above, the FEC has *never* treated a vote to dismiss and a vote to close the file as functional equivalents. Commissioner Cooksey recently explained:

> Closing the file is a ministerial act . . . . Voting to close the file is not a vote to dismiss. Voting to dismiss is a vote to dismiss. Voting to close the file is an acknowledgement that we have adjudicated the case and that it's over, and to that point, as evidence of the fact that it's a ministerial act, we have closed files or it is possible to close files with fewer than four votes, which is evidence that it is not a substantive action under the statute. So it's simply wrong to say that closing the file is a substantive action under the statute. It's incorrect.

FECTube: FECConnect OnDemand, *Open Meeting of April 22, 2021*, YouTube (Apr. 22, 2021), at 24:48 – 25:27, https://www.youtube.com/watch?v=qMozMP5sPIE&t=178s.

A closer review of the two enforcement matters that Plaintiff cites in support of its argument makes this clear. ECF 39 at 16. The FEC did not "dismiss" either Matter Under Review 002 or Matter Under Review 003 "by voting to close the file." *Id.* at 16 n.2. Rather, the FEC treated the act of "closing the file" as a signal it had completed its substantive consideration of the matters. In MUR 002, the FEC did not dismiss the complaint at all; it pursued enforcement and reached a settlement with the administrative respondent. Commission Action, MUR 002 (Litton) (1976), https://www.fec.gov/files/legal/murs/2.pdf (*see* p. 22-24). The FEC in no way, shape, or form voted to dismiss the allegations in MUR 002. The FEC's final vote on this matter stated: "The Federal Election Commission has reviewed the matter concerning [respondent] and has concluded that it should be closed on the basis of the Conciliation Agreement dated March 22, 1976. The Federal Election Commission has accordingly voted, [redacted], to close the file." *Id.* (*see* p. 21). The FEC did not vote to dismiss that matter, and thereby take no action against the respondent, when it voted to "to close the file." Rather, it took enforcement action against the respondent, entered into a

conciliation agreement with the respondent to cure certain reporting deficiencies, and then indicated that the agency had "close[d] the file" after its substantive, legal consideration of the matter concluded. *Id.*

In MUR 003, also cited by Plaintiff, the FEC's General Counsel informed the complainant that "the Commission voted 6-0, to terminate its investigation in the matter of James A. Lemon. Accordingly, the Commission intends to close its files in this matter." Commission Action, MUR 003 (Lemon) (Mar. 22, 1976), https://www.fec.gov/files/legal/murs/3.pdf (*see* p. 7). The "Commission Action" in that matter indicated that the FEC "reviewed the complaint filed against [the respondent] and ha[d] concluded that it d[id] not establish any violation of the [FECA]. The [FEC] accordingly voted, 6-0, to close the file in [that] action." *Id.* (*see* p. 10). Thus, once again, the FEC made a substantive decision and *then* closed the file. These early examples indicate that the agency did not deem the phrase "close the file" to be a substitute for dismissal and instead regarded it a ministerial action that followed the FEC's substantive decision.[7]

Plaintiff is incorrect to assert that the FEC's vote to "close the file" is synonymous with a vote to dismiss. Historically, as demonstrated by the matters discussed *supra*, the Commission has *not* "vote[d] to dismiss a matter by closing the file." ECF 39 at 17. Closing the file is simply an informal agency practice. There is no evidence suggesting that any FEC Commissioner *ever* believed or contended that a vote to close the file following a deadlock was a legal *requirement* necessary to formally dismiss an enforcement matter—until very recently when the "Weintraub Scheme" began.

[7] In fact, in the FEC's very first enforcement matter, MUR 001, it "investigated the complaint," "concluded that the investigation [did] not establish any violation" of the FECA, and "voted, 6-0, to terminate its investigation." Investigative Decision, MUR 001, (Jan. 29, 1976), https://www.fec.gov/files/legal/murs/1.pdf (*see* p. 11). The FEC did not "close the file" at all in MUR 001.

Since 1976 and until very recently, the FEC simply "closed the file" when its consideration of a matter was complete. Generally, an instruction to "close the file," or a statement that a file was closed, has been included with the Commission's substantive votes.[8] Until recently, Commissioners of both parties had always either assumed or agreed—consistent with the FECA and D.C. Circuit precedent—that a matter was complete if upon deadlock, resulting in the file being closed.[9] Only in the past few years have certain Commissioners upended longstanding agency practice by purporting to exercise the power to refuse to end consideration of enforcement matters when they disagree with the outcome. This very recent change in view by certain Commissioners regarding the nature of the vote to close the file is a break with longstanding FEC precedent and the *status quo*, and is not consistent or compatible with D.C. Circuit precedent.

3. The FEC's 2021 Policy Debate Makes Clear that Closing The File Is Not Legally Significant.

The FEC's existing *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process* does not mention voting to close the file, does not state that the FEC must vote to close the file after it deadlocks in an enforcement matter, and instead reflects the longstanding consensus view that "the Commission will dismiss a matter . . . when the

[8] *See, e.g.*, MUR 94, Certification ("[t]he Commission adopted the recommendation of the General Counsel that it finds no reason to believe that a violation of the [FECA] has been committed in the above-captioned matter. Accordingly, the file in this case has been closed."); *Doe v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019) ("[T]he Commission ended its investigation *and* closed the file" in a matter) (emphasis added). *See also* MUR 1248 (FEC voted 6-0 to find no reason to believe that respondents committed a violation, instructed staff to send notification letters to the participants, and "close the file and take no further action"); MUR 1500 (FEC voted 6-0 to find no reason to believe a violation occurred and to "close the file"); MUR 1072 (The FEC voted 4-1 to find no probable cause to believe the respondent committed violations and to "close the file").

[9] A 2009 Congressional Research Service report noted that "[d]espite deadlocks on previous issues, votes to close the file typically include at least a four-vote majority." R. Sam Garrett, Cong. Rsch. Serv., R40779, *Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress* 5 n.22 (2009).

Commission lacks majority support for proceeding with a matter for other reasons." 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007).

In 2021, three Commissioners proposed a clarification of the 2007 Statement of Policy to specifically address the issue of closing the file in deadlock cases. This proposal would have codified the agency's pre-2018 approach, which derived from the D.C. Circuit's decisions in *DCCC*, *Common Cause*, and *NRSC* (and is also consistent with the more recent *CREW 2021* decision). Plaintiff contends, however, that the FEC "*rejected* a proposed Statement of Policy that would have implemented the very automatic dismissals that Defendants claim are already law." ECF 39 at 46. First, Defendant's contention that "automatic dismissals . . . are already law" is correct, as the D.C. Circuit held in *CREW 2021*. Second, the proposed policy would have codified the approach maintained for over four decades by making clear that "[c]losing the file is a ministerial action signifying that the Commission has completed its consideration of the matter at the initial stage of the enforcement process (by voting on the matter but lacking four affirmative votes to find reason to believe or otherwise dispose of the matter)."[10] Supporting the proposal, Commissioner Cooksey explained:

> It's important because it acknowledges the reality of the action of closing the file, which is that it is a ministerial act. It is separate and apart from the Commission's conclusion on the merits of an underlying matter. It's just an acknowledgement of our deliberation on the matter. Congress said that we need four votes to proceed to make a substantive action on a case. If we fail to get four votes that means we failed to proceed. We should acknowledge that the case is over, and let the public, and more importantly the respondents and the complainant know that. I think this proposal would thereby remove the perverse incentive to deceive, mislead, and hide information from the parties and subsequently from federal courts.

[10] Fed. Election Comm'n, *Draft Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process* 2 (Apr. 1, 2021), Agenda Document No. 21-21-A, https://www.fec.gov/resources/cms-content/documents/mtgdoc-21-21-A.pdf.

FECTube: FECConnect OnDemand, *supra* at 22:03 – 22:52. Under the proposal, in the absence of four votes to take action against a respondent or dismiss a matter outright, "the file will be closed *unless the Commission votes to keep the file open*."[11]

Plaintiff selectively quotes a passage from Commissioner Weintraub's statements during public consideration of the proposal to suggest that the current practice of three Commissioners refusing to vote to close the file in enforcement matters is rooted in a genuine concern "to achieve bipartisan compromise." ECF 39 at 52. Commissioner Trainor noted, however, that the Commissioners who have refused to close the file on enforcement cases have *never* sought compromise: "In my time on the Commission . . . I have yet to once have anyone reach out to change my mind with regard to a position I have taken where we've had a 3-3 split in a particular case." FECTube: FECConnect OnDemand, *supra* at 38:25 – 38:51. The portion of Commissioner Weintraub's statement that Plaintiff quoted is pretextual and the portions of her remarks that Plaintiff omitted are far more revealing. Commissioner Weintraub's starkly partisan and flippant explanation of her newfound opposition to the FEC's decades-long practice reveals that her current position has nothing to do with "bipartisan compromise" and is instead about wielding partisan power over her colleagues:

> I think this policy would be bad for enforcement and it would diminish the role of the Democratic and independent Commissioners who are the stronger interest apparently in enforcing the law. And I don't know why I would agree to such a policy. It was ironically announced on April 1st, April Fools Day, and I think I would be a fool to support this policy because *I would be giving up the authority and the power that I have under the statute to my Republican colleagues* and leave them solely in charge of when cases get dismissed.

FECTube: FECConnect OnDemand, *supra* at 16:30 - 17:11.

Plaintiff's rationale, and that undergirding the "Weintraub Scheme," runs directly contrary

[11] Fed. Election Comm'n, *supra* n.10 at 2 (emphasis added).

to the D.C. Circuit's understanding of Congress's intent for the agency:

> Congress uniquely structured the FEC toward maintaining the status quo, increasing the appropriateness of recognizing deadlocks as agency action in that specific context. . . . The voting and membership requirements mean that, unlike other agencies—where deadlocks are rather atypical—FEC will regularly deadlock as part of its *modus operandi*. Taken together, FEC's structural design and FECA's legal requirement to dismiss complaints in deadlock situations mark FECA as an exception to the rule.

Public Citizen, Inc., 839 F.3d at 1171.

Plaintiff argues that Defendant advances a "heads I win, tails you lose" approach, ECF 39 at 51, but this is how the D.C. Circuit has construed the statute. When the FEC divides 3-3 in an enforcement matter, the matter is dismissed and the views of the three Commissioners who voted against enforcement *are unmistakably favored* and given legal significance. The views of the other three Commissioners are not given legal significance. Three Commissioners may act to dismiss a case, but three Commissioners may *not* act to pursue enforcement. That is how the FECA works, and the current efforts to revise its normal operation must fail unless Congress changes the law.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court grant its Motion to Dismiss.

Respectfully submitted March 4, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on March 4, 2022.

/s/ Jason Torchinsky