IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER and CATHERINE HINCKLEY KELLEY, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, HILLARY FOR AMERICA and CORRECT THE RECORD, Defendant-Intervenors.	Civil Action No. 1:19-cv-02336-JEB

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR AN ORDER DECLARING THAT DEFENDANT HAS FAILED TO CONFORM

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INTRODUCTION

Defendant Federal Election Commission ("FEC") failed to conform with this Court's September 12, 2024 order remanding this case and directing the agency to conform with the opinion of the D.C. Circuit, *see* Op., *CLC v. FEC*, No. 22-5336 (D.C. Cir. July 9, 2024). Instead, the Commission dismissed plaintiffs' administrative complaint against respondents Correct the Record ("CTR") and Hillary for American ("HFA")—for a *third* time—without timely explanation.

The main counterargument asserted by the FEC and intervenors CTR and HFA (collectively, "defendants") is that well after the thirty-day conformance period expired—and after plaintiffs filed the instant motion—a majority of Commissioners issued a *post hoc* statement explaining that their vote to dismiss was an exercise of prosecutorial discretion. The Commissioners expressly declined to interpret the scope of internet exemption or reconsider the evidentiary record of coordination—although these two issues were precisely what the D.C. Circuit and this Court directed them to consider. Nevertheless, defendants argue this statement brings the FEC into conformance, and is unreviewable under *Citizens for Resp. & Ethics in Wash. (CREW) v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*Commission on Hope*"), to boot. As an alternative ground for conformance, defendants point to the Commissioners' decision to take steps towards issuing a notice of proposed rulemaking ("NPRM") to consider revisions to the Commission's regulations—although of course, any such rulemaking would have no impact in these proceedings and would be purely prospective, if indeed it happened at all.

These arguments are tantamount to claiming that almost *any action* by the FEC on remand constitutes conformance, however untethered it is to the actual remand order or the relief that plaintiffs seek in this action. These arguments are risible and unprecedented. Campaign Legal

Center ("CLC") is aware of no other instance in the FEC's over 40-year history where the Commission has attempted to make either claim in this context.

First, the statements and rulemaking do not conform because they are untimely. The FEC makes no mention—and certainly no excuse—for failing to undertake these activities in the 30-day conformance period under the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30109(a)(8)(C). The Commission did not even notice the Court or plaintiffs that these actions were forthcoming, forcing plaintiffs to address these developments only first in this reply memorandum.

More fundamentally, defendants' arguments fail because they misapprehend the current posture of this case. The parties are not litigating whether FEC's dismissal of CLC's administrative complaint is "contrary to law" in the first instance—that inquiry concluded with this Court's December 8, 2022 judgment and first remand order. Mem. Op. at 20, ECF No. 68. CLC duly filed a private action under 52 U.S.C. § 30109(a)(8)(C) on this basis. As the D.C. Circuit explained, plaintiffs can "maintain" this action if the Court of Appeals "affirm[s] that the Commission's dismissal was 'contrary to law,'" and the "Commission fails to conform with such declaration on remand." Op. at 24, No. 22-5336. With the first bar cleared, the question now before this Court is whether the FEC *conformed to the remand order*—not, as the FEC apparently believes, whether the discretionary rationale for its most recent dismissal, on its own terms, was reasonable or unreasonable, or reviewable at all. It is clear that the majority statement of reasons is non-responsive to the remand order. Indeed, to their credit, the Commissioners were open about both their decision not to develop any "binding interpretation[s]" of the legal questions identified by this Court and the D.C. Circuit for their consideration, as well as their reluctance to take any action against respondents in the administrative proceedings. Statement of Reasons of Commissioners

Broussard, Dickerson, Lindenbaum, and Trainor at 5 (Nov. 5, 2024), https://www.fec.gov/files/legal/murs/7146R/7146R_21.pdf ("Majority SOR").

But, contrary to defendants' claims, CLC is not suggesting that the FEC, as a general matter, lacks the *power* to dismiss on discretionary grounds on remand after a contrary-to-law judgment. *Cf.* Intervenor Br. at 9, ECF No. 95. The Commission may always choose to "exercis[e] its discretionary powers" on remand and dismiss as it did here. *FEC v. Akins*, 524 U.S. 11, 25 (1998). But the mere power to make that choice does not mean that choice "conforms"—especially here, where the FEC essentially ignored the remand order's substantive directions. Allowing the Commission to cut off a citizen suit by citing its own discretion *not* to enforce the law—while openly declining to conform with the remand order of this Court—would render FECA's provision for private actions a functional nullity and cannot be squared with the statute's text or purpose.

This Court should declare the FEC in non-conformance with its September 12 remand order. In the alternative, if this Court wishes to defer to the court presiding over CLC's private action on this question, it should affirm that the FEC's actions and statements on remand provide no basis to claw back the private action because they do not address, much less disturb, this Court's December 8, 2022 contrary-to-law judgment upon which the private action was premised.

BACKGROUND

I. Statutory and Regulatory Background

A. Complaint Process

Any person may file an administrative complaint with the Commission alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). After receiving a complaint, the FEC votes on whether there is "reason to believe that a person has committed, or is about to commit" a FECA violation. *Id.* § 30109(a)(2). If four or more Commissioners vote to find that there is reason to believe, the "Commission shall make an investigation of such alleged violation." *Id.*

The Commission may "dismiss a complaint" at any juncture by the vote of four or more Commissioners. *CLC v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024). To "allow meaningful judicial review" of a dismissal, the Commissioners who vote against the recommendation of the FEC's Office of General Counsel ("OGC") to move forward must issue statements of reasons explaining their votes. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). A statement of reasons must be issued contemporaneously with the vote it seeks to explain. *End Citizens United PAC v. FEC*, 69 F.4th 916, 921-22 (D.C. Cir. 2023) ("*ECU I*").

B. Judicial Review

Any administrative complainant "aggrieved by an order of the Commission dismissing a complaint" may seek review in the U.S. District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A); *see also id.* § 30109(a)(8)(B).

The courts have traditionally reviewed the controlling statement of reasons with "deference" following the test set forth in *Orloski v. FEC*. 795 F.2d 156, 161 (D.C. Cir. 1986) (reviewing whether FEC dismissal was (1) "a result of an impermissible interpretation of [FECA] . . . or (2) . . . arbitrary or capricious, or an abuse of discretion"). *But see Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) (reversing *Chevron* deference).

Historically, courts had reviewed whether Commission dismissals were contrary to law even when those dismissals invoked the agency's prosecutorial discretion. *See, e.g.*, *Akins v. FEC*, 66 F.3d 348, 355 (D.C. Cir. 1995) (rejecting plaintiffs' claim that "the Commission failed to investigate adequately the administrative complaint" under abuse of discretion standard), *rev'd on other grounds*, 101 F.3d 731 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998); *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) ("The Court finds that the FEC's

decision to dismiss . . . was not contrary to law, and represents a reasonable exercise of the agency's considerable prosecutorial discretion."), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013).

But in 2018, a divided panel of the D.C. Circuit reversed course, and held that a controlling statement of reasons that rests even in part on considerations of "prosecutorial discretion" is not reviewable by a court of law. *Commission on Hope*, 892 F.3d at 440-42; *see also CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"). This holding, however, is currently being reconsidered by the en banc D.C. Circuit Court of Appeals. *See End Citizens United PAC v. FEC*, 90 F.4th 1172 (D.C. Cir. 2024) ("*ECU II*"), *reh'g en banc granted, opinion vacated*, No. 22-5277, 2024 WL 4524248 (D.C. Cir. Oct. 15, 2024) (oral argument scheduled for Feb. 25, 2025).

Following review under § 30109(a)(8)(A), if the district court declares that a dismissal is contrary to law, it "may direct the Commission to conform with [that] declaration within 30 days." 52 U.S.C. § 30109(a)(8)(C). If the FEC fails to conform, the complainant may file a private action, *i.e.*, "a civil action to remedy the violation involved in the original complaint." *Id. See also 45Committee, Inc*., 118 F.4th at 386-88. Thus, "[i]f the agency is still opposed to or unable to bring an enforcement action, no court will force it to do so; all that happens is that the private complainant is authorized to bring a lawsuit in its own name under the Act." *CREW v. FEC*, 55 F.4th 918, 929 (D.C. Cir. 2022) ("*New Models II*") (Millett, J., dissenting).

If, as here, the FEC chooses to appeal the district court's "contrary to law" judgment while a duly-filed private action is pending, the complainant can "maintain its private suit" following the appeal provided that (1) the Court of Appeals "affirm[s] that the Commission's dismissal was 'contrary to law,'" and (2) "the Commission fails to conform with such declaration on remand." Op. at 24, No. 22-5336.

II. Recent Proceedings

As set forth in plaintiffs' motion in greater detail, *see* Sealed Mot. for Declr'n of Nonconformance at 2-3, ECF No. 82, the D.C. Circuit affirmed this Court's December 2022 "contrary-to-law" judgment, and directed this Court to "remand the case back" and order the Commission to conform with the D.C. Circuit's opinion. Op. at 36. This Court then issued a remand order, dated September 20, 2024, directing the FEC to conform with the opinion of the D.C. Circuit. Minute Order (Sept. 12, 2024). The period for conformance expired on October 20, 2024.

The FEC filed a notice under seal on October 11 informing the court of the Commission's actions with respect to the remanded case. Notice, ECF No. 86. According to the notice, the FEC had undertaken a series of failed 2-4 votes to find "reason to believe" that respondents had violated FECA, and ultimately voted 5-1 to dismiss the matter. The Notice did not describe or append any statement of reasons for the votes, nor indicate that any such statements were forthcoming. As of October 20, 2024, the Commission had taken no other action in the remanded proceedings.

On October 30, 2024, ten days after the conformance period expired, plaintiffs filed this motion for a declaration of non-conformance. On the same day, the FEC filed an additional notice with the court stating that the Commission had voted to approve, after the conformance period expired, a memorandum directing its OGC to draft a notice of proposed rulemaking concerning possible revisions to the Commission's regulation at 11 C.F.R. § 100.26. *See* Notice, ECF No. 88 (Oct. 30, 2024) (stating that the FEC voted on October 23, 2024 to direct the drafting of a NPRM).

On November 14, 2024, plaintiffs became aware that the Commission had made public the case file on remand. *See* Matter Under Review ("MUR") #7146R,

https://www.fec.gov/data/legal/matter-under-review/7146R/ (last visited Dec. 12, 2024). The now-public vote certification indicates that Commissioners Cooksey, Dickerson, Lindenbaum, and Trainor voted against finding "reason to believe" respondents CTR and HFA had violated FECA by either making or accepting excessive and impermissible unreported in-kind contributions. Certification MUR 7146R (Oct. 11, 2024), https://www.fec.gov/files/legal/murs/7146R/7146R_18.pdf. According to the certification, five Commissioners then voted to dismiss plaintiffs' administrative complaint: the four no-voting Commissioners, as well as Commissioner Broussard. *Id*.

The public file also indicated that three of the no-voting Commissioners, joined by Commissioner Broussard, had issued a statement of reasons ("SOR") on November 5 for their earlier vote to dismiss, almost a month after the vote took place. In their SOR, these four Commissioners did not analyze whether there was reason to believe that respondents had committed the FECA violations alleged in the administrative complaint, but instead "dismiss[ed] this matter in an exercise of . . . prosecutorial discretion." Majority SOR at 5. The majority acknowledged that the D.C. Circuit had held that the controlling rationale for the FEC's original dismissal of CLC's administrative complaint had "interpreted the internet exemption too broadly," *id*. at 4; they further acceded that the Court of Appeals had directed the Commission to "sketch the bounds of the internet exemption and . . . more fully analyze the facts before it." *Id.* (quotations omitted). But although the majority acknowledged this instruction, they defied it, and instead concluded it was not "appropriate for the Commission to develop a binding interpretation of the internet exemption in the context of this enforcement matter under the gun of a thirty-day remand." *Id*. at 5.

In addition to the Majority SOR, one of the Commissioners who voted to dismiss, Chairman Sean J. Cooksey, issued a separate statement. Cooksey SOR (Nov. 6, 2024), https://www.fec.gov/files/legal/murs/7146R/7146R_22.pdf. It discussed the D.C. Circuit's opinion in more detail, but concluded that even as to any "violations that did occur," the "facts and circumstances of the case at this stage warrant the exercise of prosecutorial discretion." *Id.* at 12.

Finally, one of the Commissioners who voted to find reason to believe, Vice Chair Ellen Weintraub, issued her own statement to express her disapproval of the Commission's approach throughout the entirety of the proceedings:

> The Commission should not have dismissed this matter the first time, should not have appealed when that dismissal was overturned, and should not have dismissed the matter the second time, in the process giving respondents an unreviewable free pass. This result incentivizes intransigence.

Weintraub SOR at 4 (Nov. 7, 2024), https://www.fec.gov/files/legal/murs/7146R/7146R_23.pdf.

ARGUMENT

I. The FEC Failed to Conform with this Court's Remand Order.

Despite this Court's clear instruction to the FEC to take action with respect to CLC's administrative complaint in "in accordance with the opinion of the D.C. Circuit," the FEC failed to do so.

The D.C. Circuit opinion "direct[ed]" this Court to "remand [the case] to the expert Commission" to (1) "sketch the bounds of the internet exemption" and (2) "more fully analyze the facts before it.'" Op. at 36 (internal quotations omitted). Otherwise put, the Court of Appeals made clear that the FEC was meant to address a legal question, i.e., where "to draw [the] line" around "precisely which expenses can be exempt from regulation as inputs to unpaid internet communications," Op. at 30, and an evidentiary one, i.e., whether "the blocking commissioners'

analysis of non-internet-related expenditures," had adequately assessed the factual record, *id*. at 33.

Thus, the task of the Commission on remand was to address both of these merits questions in a manner that conformed with the D.C. Circuit's opinion—and this Court's December 8, 2022 ruling—and to take action consistent with this new analysis in the remanded proceeding. But the majority "declined" to either (1) "interpret[] . . . the internet exemption in the context of this enforcement matter," Majority SOR at 5, or (2) "analyze the facts before it," *see* Weintraub SOR at 1.[1] Instead, the FEC voted to dismiss the remanded matter without contemporaneous explanation, much less an analysis of the legal and factual issues flagged by the courts.

II. The Untimely Statement of Reasons Does Not Belatedly Bring the Commission Into Conformance with the Remand Order.

The controlling statement of reasons—i.e., the majority statement[2]—does not conform procedurally because it is untimely; and it does not conform substantively because the Commissioners did not in any manner consider the remanded case in "accordance with the opinion of the D.C. Circuit" as this Court's order directed.

A. Post hoc statement of reasons are not a valid rationale for agency action.

Although the FEC noticed this Court of several votes it undertook in the remanded administrative matter within the 30-day conformance period, it made no attempt to issue any

[1] Although intervenors assert, in conclusory fashion, that the Commission *did* "consider[] the facts alleged in the administrative complaint" and "sketch[] the bounds of the internet exemption," they provide no basis for these claims. Intervenor Br. at 7. According to intervenors, the majority conducted the former inquiry by describing the "history of this action and the legal conclusions reached by the D.C. Circuit"—which on its face is not a re-evaluation of the factual allegations *in the administrative complaint*. And the commissioners addressed the latter inquiry, according to intervenors, by voting to direct OGC to prepare a NPRM, which by definition is not action in *this matter*. Intervenor Br. at 8-9.

[2] The "controlling" rationale for the purpose of review is the statement issued by the commissioners who constituted the majority in the vote to dismiss the case. 52 U.S.C. § 30106(c).

explanation for these votes before this period expired. The three statements of reason relating to this matter were issued between November 5 and 7, nearly three weeks after the remand period expired on October 20. The FEC made no request for more time to conform—nor even timely noticed the Court or plaintiffs that these statements might be forthcoming. It makes no attempt to excuse its delay now.

This is no mere technical failure. The FEC did not exceed the deadline by a couple days. *See* n.3 *infra*. Nor did the Commission claim difficulty with timely analyzing the legal issues flagged by the D.C. Circuit to conform with the remand order. Majority Op. at 5. The majority SOR engages in no substantial analysis of either the relevant law or the evidentiary record—and instead simply invokes considerations of prosecutorial discretion. There is no reason to grant the FEC a grace period—one it did not even request—just so that it can belatedly issue a statement that is entirely non-responsive to the remand order in an attempt to defeat judicial review.

But even if this statement had met the 30-day conformance period deadline, it would still be untimely and invalid because it was not released at the time of the vote it seeks to explain. The D.C. Circuit recently clarified that the Commission must issue a "contemporaneous statement" with its vote to dismiss, not a "post hoc rationalization." *ECU I*, 69 F.4th at 921–22.[3] This ensures that the statement reflects the actual reasoning of all of the Commissioners voting to dismiss at the

[3] Intervenors dispute whether "contemporaneous" actually means "contemporaneous," stating that there is no authority suggesting an SOR "must be issued on the very same day that the Commission votes." Intervenor Br. at 11. Even putting aside the fact that the Commission here did not overshoot the dismissal date by merely a day or two, this is exactly what *ECU I* suggests. *See, e.g.,* 69 F.4th at 921 (holding that "controlling Commissioners . . . were obligated to issue a *contemporaneous* statement explaining their votes," which the court would "treat as the Commission's reason for the dismissal") (emphasis added) (internal quotation marks omitted); *id*. (noting that "the controlling Commissioners' explanation" must be issued "at the time when a deadlock vote results in an order of dismissal"); *id*. at 922 (approving the principle that "considering only contemporaneous explanations for agency action . . . promotes agency accountability") (internal quotation marks omitted).

time of the vote, *id*. at 921, and, importantly, is part of the record "before the agency at the time the decision was made," *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

The FEC suggests that it can countermand *ECU I* by issuing new internal guidance that provides that a vote to dismiss goes into effect after thirty days; it further claims that postdating the effective date of the dismissal enables the Commissioners to issue "contemporaneous" statements of reasons up to 30 days *after* the operative vote.[4] FEC Br. at 9 n.6; *see also FEC Implements New Enforcement Case Closure, Procedures*, (Apr. 3, 2024), https://www.fec.gov/updates/fecimplements-new-enforcement-case-closure-procedures/.

This is a transparent end run around *ECU I*'s requirement of real-time explanations for agency action to ensure reasoned decision-making. 69 F.4th at 921 (noting "the foundational principal of administrative law" is that "judicial review of agency action is limited to the grounds that the agency invoked when it took the action") (internal quotation marks omitted).

The FEC attempts to justify this work-around by suggesting that *ECU I* turned on the court's concern that the controlling Commissioners' statement there was so untimely that the *ECU I* plaintiffs had already commenced their suit challenging the FEC's dismissal of their administrative complaint. FEC Br. at 9 n.6. But even if this were a fair interpretation of *ECU I*'s broad holding—which it is not—the FEC's delay here similarly prejudices plaintiffs' prosecution of this litigation. The majority SOR was issued almost a month after the conformance period elapsed and over a week after the instant motion was filed. Plaintiffs are forced to address these

[4] Intervenors suggest that the FEC's internal guidance not only overrules *ECU I*'s "contemporaneity" requirement but also somehow implicitly tolls the conformance deadline as well (a position the FEC does not even take). Then, on these grounds, intervenors attempt to fault *plaintiffs* for the FEC's untimeliness, suggesting that the real problem is that the instant motion was "premature," *see* Intervenor Br. at 1, even though it was filed well *after* the 30-day conformance period that the FEC allowed to expire.

recent developments—including the FEC's new claim that its actions are unreviewable—only now in their reply memorandum. This is precisely the type of *post hoc* agency rationale—one made in response to, or at least awareness of, active litigation—that *ECU I* aimed to prevent. 69 F.4th at 921. That the Commission now seeks to entirely shut off judicial review is all the more reason to question the validity of this untimely statement. *Id.* at 922-23 (noting that Commission's belated "invo[cation of] prosecutorial discretion when its silence is challenged" hardly "instills confidence that the reasons given are not simply convenient litigating positions") (internal quotation marks omitted).

B. The statements make no attempt to conform with this Court's remand order.

Even if the majority statement was a contemporaneous rationale for the FEC's votes, it still fails more fundamentally because it makes no attempt to conform with the substantive directive of the D.C. Circuit and this Court on remand: to "sketch the bounds of the internet exemption" and "more fully analyze the facts before it' in the administrative proceeding. Op. at 36 (quotations omitted). *See supra* Part I. The invocation of "prosecutorial discretion" as a rationale for dismissal ignores the Courts' orders.

Defendants' arguments that this discretionary rationale "conforms" because it is "reasonable" or not reviewable at all thus misunderstand the current posture of this case. The parties are not litigating whether the FEC's dismissal of plaintiffs' administrative complaint is "contrary to law" in the first instance—this Court so held on December 8, 2022 and the D.C. Circuit affirmed this judgment. CLC duly filed a private action under § 30109(a)(8)(c) on this basis, three days after the first remand period elapsed. *See* Compl., *CLC v. CTR-HFA*, No. 23-00075 (Jan. 10, 2023).

As the D.C. Circuit explained, plaintiffs can "maintain" this already-active private action provided that the Court of Appeals "affirms that the Commission's dismissal was contrary to law,"

and the Commission "fails to conform with such declaration on remand." Op. 30 (internal quotation marks omitted). The parties are thus litigating whether the FEC *conformed to the remand order*—not whether the FEC could have dismissed on grounds of prosecutorial discretion in the first instance.

The analysis whether the FEC conformed on remand is thus distinct from a review of whether its dismissal is "contrary to law." A finding of non-conformance can rest, for instance, on a finding of agency default. *See*, *e.g.*, *CLC v. Iowa Values*, 691 F. Supp. 3d 94, 97 (D.D.C. 2023) (noting that court in § 30109(a)(8) suit found that FEC had failed to conform with remand order given "the FEC never entered an appearance in the case"), *motion to certify appeal denied*, 710 F. Supp. 3d 35 (D.D.C. 2024).

To be sure, had the FEC here issued a timely statement reconsidering its interpretation of the internet exemption and its earlier evidentiary findings, then determining conformance with the remand order might require an inquiry into whether this new legal analysis was "contrary to law." But the FEC undertook no such merits analysis. The majority statement exclusively discussed discretionary considerations, such as the agency's "budgetary constraints" and "resources." Majority SOR at 5. That is precisely why the Commission's belated rationale for dismissal fails to conform, and why its arguments about whether these reasons are reasonable or unreasonable, or reviewable at all, are beside the point.

To hold otherwise would do damage to the statutory scheme for enforcement. FECA provides that four Commissioners can dismiss a complaint at any stage of the complaint process, including on remand after a contrary-to-law ruling. A complainant like CLC cannot obtain a court order requiring the FEC to bring an enforcement action. Instead, a complainant's recourse if the Commission dismisses on remand without conforming is to bring a private action under 52 U.S.C.

§ 30109(a)(8)(C). *See*, *e.g.*, *New Models II*, 55 F.4th at 923 (Millett, J., dissenting) (explaining that FECA "never requires the agency to bring an enforcement action that it does not want to bring" but instead "just opens the door to private enforcement by an aggrieved party"). If, however, the agency can claim that *any* ruling it makes on remand "conforms"—however unrelated to the legal questions it was ordered to reconsider—it can both perpetuate its unlawful interpretation of FECA and its regulations, as well as nullify the complainant's only remaining option of relief under FECA, namely, a citizen suit.

The FEC's contrary view of remand under § 30109(a)(8) would, by contrast, undermine FECA enforcement. Under the statute, the FEC has a choice on remand: either to "conform" to the court's order; or, if it is unable or unwilling to conform, to allow the complainant to pursue its credible FECA claim by filing or maintaining a private action against the respondents. This structure grants the FEC a "right of first refusal on enforcement," while tasking courts with ensuring that the FEC's split-bipartisan structure does not frustrate FECA enforcement. *New Models II*, 55 F.4th at 929 (Millett, J, dissenting). *See also* 52 U.S.C. § 30107(e) (stating that the FEC's civil enforcement power is "exclusive," "[e]xcept" for the private right of action "in section 30109(a)(8)"). Insofar as FECA thus anticipates that the FEC will serve as a gatekeeper for private enforcement actions, the Act authorizes the FEC to sift out meritless or frivolous claims, not to block private enforcement of valid claims simply because the agency lacks the resources to pursue the claims itself. Interpreting the Act to hold that a dismissal based on discretionary considerations "conforms" on remand—and thereby eliminates the possibility of private enforcement—would turn FECA's entire enforcement structure on its head.

Indeed, the FEC's invocation of prosecutorial discretion on remand is reason to *bring* a private action, not to *bar* such an action. If the FEC dismisses on remand due to discretionary

concerns—e.g., a lack of resources—it makes sense that the complainant, with perhaps greater resources or different policy priorities, should take up the mantle and ensure that valid claims are pursued. *See Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001) ("If [the] failure to [enforce] results from the desire of the [Commissioners] to husband federal resources for more important cases, a citizen suit against the violator can still enforce compliance without federal expense.").

C. If this Court believes that the reviewability of the majority statement is relevant to declaring non-conformance, it should hold this motion in abeyance pending resolution of the en banc proceedings in *End Citizens United*.

Defendants argue that the majority SOR—which exclusively discusses discretionary concerns such as the duration of the proceedings and resource constraints—both brings the FEC into conformance with the remand order and is unreviewable by this Court. But plaintiffs are not requesting that this Corut "review" these discretionary reasons for whether they are contrary to law. Instead, as detailed in *supra* Part II.A and B, plaintiffs have moved for a declaration that this statement is untimely, as well as unresponsive to this Court's remand order and the D.C. Circuit's opinion, and as such, non-conforming.

While arguing at length that *Commission on Hope* and *New Models* shield its latest dismissal of plaintiffs' administrative complaint from review, the FEC all but elides that these decisions are currently being reconsidered by the en banc D.C. Circuit. FEC Br. at 9. The panel in *ECU II* ruled that the FEC's dismissal of a complaint against a super PAC and Senatorial candidate was "unreviewable" because the controlling Commissioners "expressly invoked their prosecutorial discretion" in their statement of reasons. *ECU II*, 90 F.4th at 1178–79. This holding,

and the precedents it relied upon, are the principal focus of the en banc proceedings. *ECU II*, No. 22-5277, 2024 WL 4524248 (directing parties to also brief applicability of *Orloski v. FEC*).[5]

Thus, if this Court were to hold that that the majority statement of reasons must undergo a "contrary-to-law" analysis before it can determine whether the Commission conformed with its September 12 remand order, plaintiffs respectfully request that this motion be held in abeyance until such time as the en banc proceedings in *ECU II* are resolved.

III. A Future Rulemaking Does Not Constitute Action—Conforming or Otherwise— in *This* Matter.

As an alternative—and unprecedented—ground for conformance, defendants highlight that the Commissioners ordered OGC to prepare documents for a proposed rulemaking to address the internet exemption. FEC Br. at 13-14. To state the obvious, any such rulemaking would apply only prospectively and would not constitute action *in the remanded matter*. The FEC cites no authority for the novel proposition that noticing a possible future rulemaking constitutes "conformance" on remand in an § 30109(a)(8) action challenging a FEC dismissal of an administrative complaint—because there is none.[6]

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[5] As the petitioners in *ECU II* have argued, the D.C. Circuit mandated the issuance of statements of reason to *enable* review of FEC dismissals in § 30109(a)(8) actions, *see*, *e.g.*, *FEC v. Nat'l Republican Sen. Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (explaining that statements of reasons "make judicial review a meaningful exercise"); it confounds the entire purpose of such statements if the invocation of prosecutorial discretion therein instead allows the Commission to *block* judicial review. *See*, *e.g.*, *New Models II*, 55 F.4th at 927 (Millett, J., dissenting) (criticizing precedents that "hand the agency and its members a Get Out of Judicial Review Free card even though Congress expressly mandated judicial review of dismissal orders."). This principle applies all the more powerfully to this case given its posture. Allowing the invocation of prosecutorial discretion to defeat judicial review here makes even less sense because the dismissal has already been found "contrary to law," and the inquiry instead is whether the FEC conformed to the remand order, which itself provides a substantive requirement that the agency must meet and a clear standard for the Court to apply.

[6] The FEC cites *Akins* for the proposition that it is appropriate to "[r]ely on a pending rulemaking to address the scope of the application of FECA," FEC Br. at 10 (citing 524 U.S. at 29), but this statement is so vague as to be meaningless. In any event, *Akins* remanded a question back to the

The public record in MUR 7146R also contravenes the Commission's argument here. The vote to authorize a possible NPRM *postdated* the October 10 vote to dismiss by almost two weeks. *See* Certification, Proposed NPRM on 11 C.F.R. § 100.26 (Oct. 23, 2024). The rulemaking vote also occurred after expiration of the conformance period. Further, the four Commissioners joining the majority SOR did not even purport to be taking action with respect to plaintiffs' administrative complaint, and instead acknowledged that they did not wish "to develop a binding interpretation of the internet exemption in the context of this enforcement matter." Majority SOR at 5.[7] The Commissioners themselves thus conceded that a rulemaking was not intended to provide relief in the actual "enforcement matter" underlying this case.

The future of this rulemaking is also entirely uncertain. Of course, even if the FEC could somehow *immediately* issue a final rule that addressed every concern raised in the D.C. Circuit's opinion, this rule would not address the violations alleged in CLC's administrative complaint, and therefore would not constitute a remedy in this case. But the FEC has *not* issued any rule—far from it—it has merely directed OGC to prepare a NPRM. The Commission is under no obligation to actually issue the notice, much less to adopt a revised or new regulation; and even if the FEC does take such steps in the future, there is no guarantee that this rulemaking will accord with the D.C. Circuit's opinion or render FEC regulations more consistent with FECA's coordination provisions.

Commission so that the agency could take into account an intervening D.C. Circuit decision and a new rule on "membership organizations" that the FEC had *adopted* in the course of the litigation. *See* 524 U.S. at 28-29. This holding in no way suggested that the FEC "conforms" on § 30109(a)(8) remand by voting to issue a possible NPRM.

[7] Finally, even insofar as a rulemaking would address the scope of the internet exemption in a prospective sense, this was only one of two issues flagged by the D.C. Circuit. As Commissioner Weintraub highlighted, the Commission "has declined" to take up the second issue, namely to properly "analyze the facts before it." Weintraub SOR at 1 (internal quotations marks omitted).

The right to judicial review under § 30109(a)(8) would be rendered a farce if, after a ruling that an FEC dismissal was contrary to law, the Commission on remand could "conform" by simply alleging that it was considering revising its regulations. And this argument, if accepted, would also nullify FECA's private action provision. According to the FEC, a mere pledge by the agency to consider future regulatory action on remand would defeat any possible finding of Commission non-conformance, and thus preclude either the initiation or maintenance of a private action. This effectively reads the right to a private action entirely out of the Act.

CONCLUSION

For these reasons, this Court should find that the FEC has failed to conform with its September 12, 2024 remand order; or in the alternative, if this Court wishes to abstain from answering this question, it should nevertheless affirm that the FEC's actions and statements on remand provide no basis to claw back CLC's private action.

Dated: December 13, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2024, I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the District of Columbia by using the CM/ECF system, which will notify all registered counsel.

/s/ *Tara Malloy*
Tara Malloy