UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. DAVID LEWICKI	)	
VLADIMIR SHKLOVSKY,	)	
Plaintiffs,	)	Civ. No. 24-2505 (ABJ)
v.	)	
FEDERAL ELECTION COMMISSION,	)	REPLY IN SUPPORT OF PARTIAL MOTION FOR SUMMARY JUDGMENT
Defendant.	)	

FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS PARTIAL MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes and Regulations

Rules

Other Authorities

INTRODUCTION

The Court should grant summary judgment to the Federal Election Commission ("FEC" or "Commission") on Counts I and III of plaintiffs Rev. David Lewicki and Vladimir Shklovsky's complaint challenging the dismissal of their administrative action. As the FEC demonstrated in its initial brief, the Controlling Commissioners' Statement of Reasons was contemporaneous with the closing of the administrative file. Moreover, the substantive reasoning set forth in the Statement of Reasons was not contrary to law.

In Count I of plaintiffs' complaint, they allege that the Commission did not timely release a Statement of Reasons after the Commission voted to close the administrative file. However, the Statement of Reasons was released nearly simultaneously with the effective date of the closure of the file, and therefore was contemporaneous. However, even if the applicable date is that of the vote, the release of the Statement of Reasons was still contemporaneous and captures the Controlling Commissioners' real-time thinking. Plaintiffs' response relies on a faulty framing of the Commission's deliberative process and distinguishable cases, and their arguments should be rejected.

In Count III of plaintiffs' complaint, they turn to the Controlling Commissioners' substantive analysis. They argue that the Commission acted contrary to law because the Controlling Commissioners' Statement of Reasons announced and applied new rules governing unlawful conduit schemes: (1) excluding reimbursement conduit schemes from the reach of 52 U.S.C. § 30122; and (2) requiring that a conduit in an unlawful scheme be "wholly controlled" by a true contributor. Perhaps recognizing that the Statement of Reasons itself announced no new rules, plaintiffs now argue that the existence of these unwritten rules was nevertheless demonstrated in the Controlling Commissioners' analysis. In their administrative complaint, plaintiffs alleged neither a reimbursement scheme nor a scheme in which the participants were independent entities. Because the Commission was not required to analyze arguments not presented to it, the fact that the Controlling Commissioners did not perform plaintiffs' desired analysis does not demonstrate that they applied any new rules.

The Commission did not act contrary to law. Accordingly, the Court should grant summary judgment in favor of the Commission on Counts I and III and deny plaintiffs' motion.

ARGUMENT

I. THE CONTROLLING COMMISSIONERS' STATEMENT OF REASONS WAS CONTEMPORANEOUS

The Controlling Commissioners issued their Statement of Reasons in MUR 8110 nearly simultaneously with the effective date of the dismissal of plaintiffs' administrative complaint (*i.e.*, thirty days after the certification of the vote to close the file, pursuant to the Commission's Case Closure Procedures), and therefore the Commission provided a contemporaneous explanation for its action. *See End Citizens United Pac v. FEC*, 69 F.4th 916, 921 (D.C. Cir. 2023) ("*ECU*") (citing *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) ("*Common Cause*")); *see also* Federal Election Commission, *FEC implements new enforcement case closure procedures* (Apr. 3, 2024) ("Case Closure Procedures"), https://www.fec.gov/updates/fec-implements-new-enforcement-case-closure-procedures/. But even if the date of the vote to close is the date by which contemporaneity is calculated, the time that elapsed between that vote and the release of the Controlling Commissioners' Statement of Reasons was still "within the realm of reason." *See Campaign Legal Ctr. v. FEC*, No. 1:19-cv-02336, 2025 WL 315143 (D.D.C. Jan. 28, 2025) ("*CLC*"). Because the Statement of Reasons satisfies the "important statutory policies" of 52 U.S.C. § 30109 undergirding *ECU*, it is contemporaneous. *See ECU*, 69 F.4th at 920-21 (internal quotations marks and citations omitted).

A. The Controlling Commissioners' Statement of Reasons Was Contemporaneous Because It Issued Before the Reason to Believe Vote Resulted In Dismissal

Because the Controlling Commissioners issued their Statement of Reasons in MUR 8110 "at the time when [the] deadlock vote *result[ed] in* an order of dismissal," the Commission provided a contemporaneous explanation for its action. *See ECU*, 69 F.4th at 921 (quoting *Common Cause*, 842 F.2d at 449 (emphasis added)). The vote to close the file became effective on August 2, 2024: the same day that the Statement of Reasons became public on the FEC website, and four days after the Controlling Commissioners issued it, on July 29, 2024. The vote to close the file did not *result in* an order of dismissal until the closure of the file was effective, and thus the Statement of Reasons was contemporaneous. (*See* AR00343-51.) Plaintiffs argue that the day Commissioners voted to close the file should be the Court's focus for evaluating the contemporaneity of the Statement of Reasons because the vote to close constituted final agency action. (*See* Pls.' Combined Reply in Supp. of Their Mot. for Partial Summ. J. and Opp'n to the FEC's Mot. for Partial Summ. J. ("Opp") at 4-10 (ECF No. 20).) This argument is unavailing.

Final agency action "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks and citations omitted). In determining whether an agency action is final, courts consider "'in a pragmatic way,'" *inter alia*, whether it has a "'direct and immediate . . . effect on the day-to-day business' of the complaining parties," carries "'the status of law,'" or requires "'immediate compliance'" with its terms. *See F.T.C. v. Standard Oil Co. of Calif.*, 449 U.S. 232, 239-40 (1980) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149, 151, 152 (1967)).

Here, it is the effective date that bears the "hallmarks of [administrative] finality." *Cf. Sackett v. EPA*, 566 U.S. 120, 126 (2012) (evaluating finality under the Administrative

Procedure Act ("APA")). For example, in *Sackett v. EPA*, homebuilders were issued a compliance order from the Environmental Protection Agency ("EPA"), which contained conclusions that the homebuilders violated the law while building their house and directed them to "immediately" restore the property. *See id.* at 124-25. They sued pursuant to the APA, and the government moved to dismiss on the grounds that, *inter alia*, the compliance order was "a step in the deliberative process" and so the action was not final. *See id.* at 129. Finding for the homebuilders, the Supreme Court concluded that the compliance order "'determined'" "'rights or obligations'" and "legal consequences . . . flow[ed] because the homebuilders were legally obligated to "restore" their property and give the EPA access and were subjected to "severe[] limits" on their ability to obtain a permit for their fill from the Army Corp of Engineers based on Corps' regulations. *See id.* at 126 (quoting *Bennett*, 520 U.S. at 178). The compliance order, therefore, marked the "'consummation'" of the agency's decisionmaking process because the homebuilders were subject to a binding order that was not subject to further [a]gency review." *See id.* at 127. In contrast, in this case, prior to the effective date that marked the "consummation" of the adjudication, Commissioners were free to break the deadlock, if possible, correct errors, or change course. *See Sackett*, 566 U.S. at 127. [1]

In the instant case, the effective date of the closing of the administrative file, like the issuance of the compliance order in *Sackett*, also bears many of "the hallmarks" of final action. *See id.* at 126. It was on the effective date, and not before, that plaintiffs' "rights" were

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[1] Prior to a dismissal, Commissioners are empowered to revise their decision pursuant to basic parliamentary law. *Contra* Opp. at 8 n.5 (characterizing as "the convenient litigating position of counsel" the Commission's ability to reverse course); *see* 52 U.S.C. § 30106(e) ("The Commission shall prepare written rules for the conduct of its activities . . . ."); Rules of Procedure, 73 Fed. Reg. 5568 (Jan. 30, 2008) (detailing the agency's rules of conduct); Robert's Rules of Order, Newly Revised (12th ed. 2020) § 35 (permitting a "Motion to Rescind," which is "the motion by which a previous action or order can be canceled or countermanded").

"determined" and "legal consequences . . . flow[ed]" because only then did the 60-day period during which plaintiffs could seek judicial review begin to run. *See id.* (quoting *Bennett,* 520 U.S. at 178); 52 U.S.C. § 30109(a)(8)(B) (providing that challenges to dismissals must be filed "within 60 days after the date of the dismissal"); *see also* Case Closure Procedures (explaining that administrative complainants will have "a full 60 days" from the day the action becomes effective "to determine whether to seek judicial review of the Commission's actions").

Plaintiffs nevertheless charge that the day Commissioners voted to close the file should be considered final agency action because "the possibility of future revision" does not render an action not final. (*See* Opp. at 8.) In support, plaintiffs reference case law stating that "[a]n agency action may be final even if the agency's position is 'subject to change' in the future," *see id.* at 7-8 (quoting *Nat'l Env't Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014)), and holding that interim decisions may be final and subject to challenge "as long as the interim decision is not itself subject to further consideration by the agency." *See id.* at 8 (quoting *N.R.D.C. v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020)).

But even considering, *arguendo*, that the vote to close the file could be deemed an interim decision, a "pragmatic" evaluation distinguishes the vote to close from interim rules and decisions courts have found to constitute final action. *See Standard Oil Co.*, 449 U.S. at 239 (internal quotation marks and citations omitted). Importantly, courts treat agency actions that are labeled "interim" as final when they have an "immediate" effect on the challenging party or regulated community. *See Sackett*, 566 U.S. at 122 (explaining that the compliance order required homebuilders to *immediately* comply); *Nat'l Env't Dev. Assoc.'s Clean Air Project*, 752 F.3d at 1007 (explaining that "[i]f an agency action announces a binding change in its enforcement policy which *immediately* affects the rights and obligations of regulated parties," the action is likely final and noting that the EPA directive at issue had been relied on in making a permitting decision) (emphasis added); *Wheeler*, 955 F.3d at 81 (explaining that an interim rule vacating an earlier rule "has the effect of suspending regulatory requirements, which qualifies as determining legal rights or obligations and carrying legal consequences" for regulated parties). Unlike the "immediate" effect on parties and regulated communities in such cases, the vote to close the administrative file had no immediate effect on plaintiffs before it became effective. *Cf. Sackett*, 566 U.S. at 122 (concluding that an order was final when it charged homebuilders to *immediately* restore their property).

Further, plaintiffs' insistence that the day of the vote to close is the operative "final action" requiring a contemporaneous explanation necessarily requires them to mischaracterize the nature and timing of their own alleged injury. (*See* Opp. at 8-9, 16.) Plaintiffs argue that whether and when they are "aggrieved" by the agency's decision is irrelevant. (*See id.* at 8.) But because the 60-day clock for judicial challenge pursuant to 52 U.S.C. § 30109(a)(8)(A) is keyed off when plaintiffs are "aggrieved," it is then that plaintiffs' rights have been "determined." *See Bennett*, 520 U.S. at 178; *CREW v. FEC*, No. 1:22-CV-3281, 2023 WL 6141887, at *7 (D.D.C. Sep. 20, 2023) (explaining that section 30109(a)(8)(A) "refers not to 'dismissal' in the abstract but to a party '*aggrieved* by an *order* of the Commission dismissing a complaint.'") (citing 52 U.S.C. § 30109(a)(8)(A) (emphasis in original)); *id.* (An "'order,' in common parlance, is a 'command, direction, or instruction' that 'generally embraces final decrees' or 'interlocutory directions or commands.'") (quoting Black's Law Dictionary (11th ed. 2019)); *cf.* Fed. R. Civ. P. 54(a) (explaining that, in the courts, a judgment is an "order from which an appeal lies"). Plaintiffs point to *Jordan v. FEC*, 68 F.3d 518, 519 (D.C. Cir. 1995) to argue that the 60-day clock runs from the day of the vote rather than the date plaintiffs received "notice" of the vote.

(Opp. at 9 (citing *Jordan*, 68 F.3d at 519).) However, that case was decided prior to the implementation of the Case Closure Procedures, which clarify when the clock runs. *See generally* Case Closure Procedures. In any event, the question here is not notice, but when the dismissal became effective for purposes of a judicial challenge. *See id.* (explaining when dismissals become effective); *cf. Jordan*, 68 F.3d at 519.

Lastly, plaintiffs' reliance on *Department of Homeland Security v. Regents of University of California*, 591 U.S. 1 (2020), is unavailing. (*See* Opp. at 9-10 (citing *Regents*, 591 U.S. at 21, 23).) *Regents* stands for the uncontroversial proposition that *post hoc* rationalizations are impermissible. *See* 591 U.S. at 22. There, a set of reasons for the rescission of an immigration program "bear[ing] little relationship" to the original explanation for the action provided nine months previously could not support a decision to rescind the program. *See id.* at 21-22. The Court did not discuss the effective date of the rescission, which, in any event, absent numerous injunctions, would have had an immediate effect on the affected immigrants and thus been final—circumstances distinguishable from those here.[2] *See id.* at 14; *Nat'l Env't Dev. Assoc.'s Clean Air Project*, 752 F.3d at 1007 ("If an agency action announces a binding change in its enforcement policy which immediately affects the rights and obligations of regulated parties," it is likely final).

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[2] Plaintiffs' contention that *Regents* is determinative here is at odds with other arguments they raise. In *Regents*, the Supreme Court reviewed whether the explanation for the rescission provided *after the district court remanded the case for further proceedings* was contemporaneous with agency action. *See* 591 U.S. at 21. Plaintiffs go to great lengths to distinguish *CLC*, 2025 WL 315143, and *CREW v. FEC*, 1:22-cv-00035-CRC (D.D.C. Nov. 10, 2025) (Op. and Order, (ECF No. 53)). from the instant case on the grounds that, like *Regents* decision, they address explanations provided on remand. (*See* Opp. at 19-21.) This internal inconsistency highlights the weaknesses in both arguments.

B. The Length of Time Between the Vote to Close the File and the Issuance of the Statement of Reasons Was Reasonable

Even assuming that the vote to close, rather than its effective date, constituted final agency action, the 26 days elapsing between the July 3, 2024, vote to close the file and the July 29, 2024, Statement of Reasons falls within a reasonable period when considering "just how 'contemporaneous' a 'contemporaneous' statement must be."[3] *See CREW*, 2023 WL 6141887, at *12.

1. The Plaintiffs' Proposed Bright Line Rule Misunderstands the Object of the Court's Review

As a preliminary matter, the Court should reject the conceptually unsound bright line test proposed by plaintiffs requiring that, when voting to close a file following a split vote, the full slate of Commissioners must have before it the statement of reasons explaining the split vote, which itself should be considered the basis for the vote to close the file. (*See* Opp. at 10-15.) This test, which has no support in case law, misunderstands what materials the Commission considers and invites the Court to undertake a new type of judicial review focusing on the reasoning behind *votes to close* rather than the statements of reasons explaining the *failed vote to find reason to believe*. Importantly, a statement of reasons provides the *explanation* for the Commissioners' vote on reason to believe. Here, plaintiffs' approach is both analytically flawed and contrary to circuit precedent, and therefore should be rejected. *See, e.g.*, *ECU*, 69 F.4th at 922 (noting that the statement of reasons explains the Controlling Commissioners' decision).

By plaintiffs' account, if a statement of reasons explaining a split reason to believe vote is released one day after the vote to close the file, it is *post hoc* because that statement of reasons

[3] Though the court in *CREW*, 2023 WL 6141887, left unanswered that question, its recognition that "contemporaneous" cannot automatically be taken to mean an instantaneous explanation is instructive. *See id.* at *13.

was not "before the [decisionmaker] at the time [they] made [their] decision." (*See* Opp. at 10-11 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).) But, where the Commission has split on the reason to believe vote, the court may presume that the dismissal is "due to [the] deadlock," *see Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987), and thus the explanation courts review when determining whether a dismissal was contrary-to-law is that which explains the split vote itself. *See, e.g.*, *CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018) ("[F]or purposes of judicial review, the statement or statements of those naysayers—the so-called 'controlling Commissioners'—will be treated as if they were expressing the Commission's rationale for dismissal.").

In voting on whether to find reason to believe in an administrative proceeding, the materials "before the [controlling Commissioners] at the time [they] ma[ke] [their] decision," *see Overton Park*, 401 U.S. at 420, include, *e.g.*, the administrative complaint, the response(s), the First General Counsel's Report ("FGCR"), a draft Factual and Legal Analysis, as well as all sources cited in the FGCR. *See, e.g.*, 11 C.F.R. § 2.2(d)(1) (explaining that "[m]eeting means the deliberation of at least four voting members . . . where such deliberations determine or result in the joint conduct or disposition of official Commission business"). In turn, it is these materials that the Court uses to evaluate whether a statement of reasons was contrary to law. *See Free Speech for People v. FEC*, No. 22-cv-666, 2024 WL 3617481, at *1 (D.D.C. Aug. 1, 2024) (footnote omitted) (considering the "briefing, the relevant legal authorities, and the administrative record" in dismissing plaintiffs' complaint); *Nader v. FEC*, 823 F. Supp. 2d 53, 59-60 (D.D.C. 2011) ("The Court finds that the administrative record and the FEC's reasoning (in general) support its decision."). Unlike the materials before the Commission when the vote takes place, the statement of reasons is not the basis for the vote to *close the file*, it is the explanation of the Controlling Commissioners' vote *not to find reason to believe* (or, at a later stage, not to go forward with the case).[4] Consequently, the Court should reject the unworkable "bright line" test of plaintiffs' creation and instead follow the analytical pathways set forth in *Common Cause* and *ECU*. That analysis demonstrates that the Commission did not act contrary to law here.

2. The Statement of Reasons Issued 26 Days After the Vote to Close the File Was Contemporaneous and Complies with *ECU*

The 26-day interlude between the vote and the issuance of the Statement of Reasons was "within the realm of reason" to be considered a contemporaneous explanation for agency action in accordance with *ECU*. *See CLC*, 2025 WL 315143, at *7. Indeed, the Statement of Reasons serves the "'important statutory policies'" of 52 U.S.C. § 30109 that drove the *ECU* court's decision. *See ECU*, 69 F.4th at 920 (quoting *Common Cause*, 842 F.2d at 449); *contra.* Opp. at 17 ("The FEC attempts to cabin ECU's impact to post-litigation statements[.]"). As explained in detail in the FEC's initial brief, the Commission's procedures in issuing the Statement of Reasons are designed to guard against the issues that concerned the *ECU* court. Specifically, (1) failure to explain the Commission's real-time thinking; (2) evading "meaningful judicial review" by forcing litigants to "chase a moving target;" and (3) threatening agency accountability and diminishing predictability. *See id.* at 921-23; *see also* FEC's Mem. of P. & A. in Supp. of its Partial Mot. for Summ. J. and Opp'n to Pls' Mot. for Summ. J. ("Mot.") at 20-32 (ECF No. 19).

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[4] Plaintiffs express concern that Controlling Commissioners may include in their statements of reasons *post hoc* rationales never articulated at the Commission table, but there is no evidence that occurred here. Furthermore, plaintiffs acknowledge that Commissioners who voted differently may release their own statements. (*See* Opp. at 13 (citing Statement of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub, *In the Matter of End Citizens United PAC v. FEC*, No. 21-cv-2128 (RJL) (Oct. 15, 2021), https://perma.cc/86YZ-VFXP).)

First, the Statement of Reasons allows "meaningful judicial review of the Commission's decision not to proceed" because there is evidence it reflects the Controlling Commissioners' contemporaneous thinking. *See ECU*, 69 F.4th at 920 (quoting *Common Cause*, 842 F.2d at 449). Second, permitting some time to pass between the deadlocked reason to believe vote and the Statement of Reasons contributes to reasoned decisionmaking. *ECU*, 69 F. 4th at 920. Requiring Commissioners to come to the deliberating table with draft statements of reasons may harm the quality of Commission decisionmaking by turning deliberation and debate *in collegia* into *pro forma* sessions in which votes simply rubber stamp predetermined positions. Furthermore, a reasonable gap between the vote to close the file and its effective date provides a chance for Commissioners to work to break the deadlock, if possible, correct errors, or change course. *See Common Cause*, 842 F.2d at 436. A Statement of Reasons drafted reasonably soon after deliberation, and taking of the reason to believe vote, permits the Controlling Commissioners to grapple with contrary arguments raised by Commissioners of an opposing view. Third, this Statement of Reasons issued shortly after the vote does not come so late as "to diminish 'predictability . . . for future litigants.'" *See ECU*, 69 F.4th at 923 (quoting *Common Cause*, 842 F.2d at 449).

Though plaintiffs fail to respond to the FEC's central argument that the Statement of Reasons issued merely 26 days after the vote to close serves the "important statutory policies" that motivated the *ECU* court, plaintiffs make a collection of other objections, each of which fail. (*See* Opp. at 10-19.) Plaintiffs again offer their flawed bright-line test to frame the Court's analysis. (*See id.* at 11-15.) They argue that any amount of time passing between a vote to close and the issuance of a statement of reasons violates *ECU* because the statement of reasons must be "before the [decisionmaker] at the time [they] made [their] decision." (*See id.* at 14 (quoting

Overton Park, 401 U.S. at 420).) However, as explained *infra*, the Court should not pry loose from *ECU* a new requirement for an explanation for the vote to close separate from the reason to believe vote. *See infra* pp. 8-10. In support of this convoluted position, plaintiffs repeatedly insist that a statement of reasons issued even one day after the vote to close is in danger of being merely a "convenient litigating position." (*See* Opp. at 12, 13, 14, 16.) The temptation to take a "convenient litigating position[]" was one of (but not the only) concerns motivating *ECU*'s contemporaneity requirement. *See ECU*, 69 F.4th at 923. But it is difficult to conceive how issuing a statement of reasons shortly after a vote, before the vote becomes effective, and absent any inbound lawsuits challenging the dismissal, could be fairly characterized as staking out a "convenient litigating position[]." *See id*. Thus, plaintiffs' concerns on that point may be put to rest.

Next, plaintiffs try to discount the feasibility of releasing a statement of reasons at the instant the Commission votes to close and posit several alternative approaches to meet their favored interpretation of contemporaneity. (*See* Opp. at 15-17.) Each of plaintiffs' proposals suffers from the infirmities attendant to the bright line test they propose. *See infra* pp. 8-10 (discussing "bright line rule"). Furthermore, a party cannot compel a federal agency to adopt its preferred procedures, particularly in the realm of enforcement. *Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."); *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986) ("It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted."). And, despite claims to the contrary, each of plaintiffs' proposed procedural changes impose further burdens on the agency.

Plaintiffs first propose that the Commission hold multiple meetings to deliberate and then vote, presumably, on a statement of reasons. (*See* Opp. at 15.) But, again, as explained *infra*, a statement of reasons is the *explanation* for the vote, not the *evidence* the agency must consider. *See infra* 8-10. Commissioners of course may—and often do—hold multiple meetings and multiple votes to deliberate the on certain Enforcement matters. *See, e.g.*, *Campaign Legal Ctr. v. 45Committee, Inc.*, 666 F. Supp. 3d 1, 4 (D.D.C. 2023), *aff'd on other grounds*, 118 F.4th 378 (D.C. Cir. 2024) (detailing a series of reason to believe votes). Requiring the Commission to do so every time a deadlock occurs, however, inappropriately "direct[s] where limited agency resources will be devoted." *See Rose*, 806 F.2d at 1091.

Second, plaintiffs propose that the Commission issue first a "curt" statement, followed at some later date a more fulsome explanation. (*See* Opp. at 16 (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973).) This course of action is also unworkable. Again, it undercuts the regulatory framework envisioning deliberation prior to the Commissioners coming to a decision and provides no room for responding to arguments made by Commissioners who are approaching the issue from the opposite perspective. *See* 11 C.F.R. § 2.2(d)(1) ("Meeting means . . . deliberation[.]"). Moreover, there are frequently many reasons given by a controlling group for dismissal, which would make issuing a "curt" explanation unfeasible in many circumstances. And framing the drafting of two separate explanations as "hardly a significant burden" is impractical in the context of a bipartisan agency with an even number of Commissioners and very limited resources, including time.[5] (*See* Opp. at 16.)

[5] Notably, plaintiffs' proposed solutions to their alleged problems could add significant time from the commencement of an administrative action until its closing, thus exposing the agency to the risk that its delay will be beyond what a court considers reasonable. *See* 52 U.S.C. § 30109(a)(8) (providing a cause of action when the agency fails to act within a reasonable time).

In sum, the Statement of Reasons, signed 26 days after the vote to close, served the "important statutory policies" undergirding the *ECU* decision, and was sufficiently contemporaneous. *See ECU*, 69 F.4th at 920, 923.

C. Two Courts Addressing an Analogous Question Confirmed the Commission Acted Contemporaneously

In a final bid to paint the Statement of Reasons as a *post hoc* explanation, plaintiffs again argue that the two decisions in this district that have addressed contemporaneity concerns in FEC decisions are "[n]ot [i]nformative." (*See* Opp. at 19-21.) In *CLC*, 2025 WL 315143, and *CREW v. FEC*, No. 1:22-cv-00035-CRC (D.D.C. Nov. 10, 2025) ("*CREW*"), the courts examined the timeliness of the agency's statement of reasons after a vote to close the file following a split vote on whether to find reason to believe FECA had been violated. *See CLC*, 2025 WL 315143, at *2 (statement of reasons issued 26 days after vote to close the file); *CREW*, No. 1:22-cv-00035-CRC, at 4 (ECF No. 53) (statement of reasons issued 18 days after vote to close the file). Though both courts recognized that conformance review may differ from a substantive evaluation of whether the agency acted contrary to law, they each found *ECU* persuasive in evaluating the timeliness of the statements of reasons issued to explain a split vote. *See CLC*, 2025 WL 315143, at *6 ("resolving [the] dispute based on [the court's] reading of *ECU* and the agency's conduct in this matter"); *CREW*, No. 1:22-cv-00035-CRC, at 5 (ECF No. 53) ("*ECU* clearly bears on the Court's analysis and reinforces the critical importance of timely agency explanations . . . ."). Although the courts' central decision was whether the agency conformed with the remand, plaintiffs' argument that timeliness considerations were irrelevant is mistaken. In each case, the court squarely rejected arguments raised by plaintiffs that the FEC had not conformed because the Controlling Commissioners' statements of reasons were not contemporaneous.[6] *See CLC*, 2025 WL 315143, at *3 (explaining that plaintiffs' position was that "even if the Commission's actions technically conformed, they were untimely"); *CREW*, No. 1:22-cv-00035-CRC, at *4 (ECF No. 53) ("CREW's motion boils down to a single question: Does the FEC's explanation for its non-enforcement vote— issued shortly after the vote took place, but on the same day that the vote became 'effective' and before the complainant's 60-day window to file a petition for review started to run—conform to this Court's instruction to provide an 'adequate, contemporaneous explanation' for dismissal?"). Both cases are highly "informative" in concluding that the FEC acted contemporaneously here. (*Contra* Opp. at 19.)

II. THE CONTROLLING COMMISSIONERS' STATEMENT OF REASONS WAS NOT CONTRARY TO LAW

The Controlling Commissioners' Statement of Reasons was not contrary to law because it neither announced nor applied new rules: (1) excluding from the reach of 52 U.S.C. § 30122 conduit schemes in which contributors reimburse conduits; and (2) requiring that conduits be "wholly controlled" in order for a scheme to have been perpetrated.[7] Apart from the fact that the language Controlling Commissioners used to articulate the relevant legal standards was not

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[6] Plaintiffs protest that there was not sufficient briefing in *CLC* for that opinion to inform the Court's decision here. (*See* Opp. at 20 n.9.) But plaintiffs' counsel here extensively briefed contemporaneity in the *CREW* case, which provided that court with the opportunity to address any infirmities in Judge Boasberg's opinion: it declined to do so. *CREW*, No. 1:22-cv-00035, at *7 (ECF No. 53) ("[T]he Court finds Chief Judge Boasberg's opinion persuasive and follows its lead.")

[7] As all parties agree, the governing standard in this case is set forth in *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Plaintiffs belabor the standard to an uncertain end. (*See* Opp. at 2-4.) The Commission's position, which it stakes out without resort to a request for deference, is that the Controlling Commissioners did not act contrary to law in their analysis of the alleged unlawful conduit contributions. (*See* Mot. at 32-39; *id.* at 16 n.2.) Thus, the Court need not accept plaintiffs' invitation to make unnecessary excursions into the effect of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) here.

contrary to law, their analysis also did not demonstrate that they applied any such rules, particularly because they were not called to do so.

A. The Controlling Commissioners Did Not Impose a Rule Limiting the Bar on Conduit Contributions to When the True Contributor Advances Money to a Conduit that Immediately Makes a Contribution

When analyzing plaintiffs' administrative complaint, the Controlling Commissioners did not act contrary to law in either their articulation of the standard or its application. First, nowhere do the Controlling Commissioners make the categorical claim that reimbursements are "beyond the reach" of the statutory prohibition against making contributions in the name of another. (*Contra* Opp at 31.) Second, the Controlling Commissioners analyzed plaintiffs' allegations based on the theory plaintiffs appear to have advanced: that there was reason to believe that administrative respondents executed a passthrough scheme involving advancing money for contributions. (*See, e.g.*, AR00142 ¶ 57.) The Controlling Commissioners were not required to weigh in on a hypothetical reimbursement scheme, and that they did not do so is not contrary to law. *See Charlton v. Donley*, 846 F. Supp. 2d 76, 84-85 (D.D.C. 2012) (explaining that administrative agencies need not consider arguments not before them).

First, plaintiffs apply a rigid reading to the Statement of Reasons to conclude that the Controlling Commissioners announced a new rule excluding conduit schemes that rely on reimbursement from the ambit of 52 U.S.C. § 30122. (*See* Opp. at 31-32.) Specifically, they point to a footnote in which Commissioners provide an example of prohibited activity: "where *A* gives a contribution to *B* with the intention that *B* immediately transfer those funds to *C*, but *C*, whether unknowingly or corruptly, reports the donation as coming from *B*, rather than *A*." (*See* Opp. at 31 (quoting AR00347 n.20).) But as the FEC explained, that example was not intended to be the sum of the standard. (*See* Mot. at 34-35.) That exemplar was drawn from another statement of reasons issued less than a year earlier by the same Commissioners, which recited the standard in full and explicitly stated that reimbursements could support an unlawful conduit scheme. *See* Statement of Reasons of Vice Chairman Cooksey and Commissioners Dickerson and Trainor, MUR 7464 at 3, July 7, 2023, https://www.fec.gov/files/legal/murs/7464/7464_90.pdf (explaining a person makes a contribution in the name of another if he or she "either advances the contributed funds or promises to—and does—reimburse the contribution"). Plaintiffs argue this MUR is irrelevant because there, the Controlling Commissioners had "no opportunity . . . to consider the statute's application to reimbursements." (*See* Opp. at 31-32.) But neither did they here.

Second, not only does the analysis in the Statement of Reasons not announce a new rule, excluding reimbursements from unlawful conduit schemes, it does not apply such a rule, either. To the extent plaintiffs' administrative complaint advanced a theory, it was predicated on a series of advances—not reimbursements. The Statement of Reasons, then, explained the votes of the Controlling Commissioners on the basis of this theory.

Agencies are "not required to address arguments that have not been asserted" by the complaining party. *See Charlton*, 846 F. Supp. 2d at 84–85; *cf. Buckingham v. Mabus*, 772 F. Supp. 2d 295, 300 (D.D.C. 2011) ("[A]n agency generally is not required by the APA to address arguments that have not been asserted by the parties to a proceeding."); *Coburn v. McHugh*, 679 F.3d 924, 931 (D.C. Cir. 2012), *aff'd*, 827 F.3d 1122 (D.C. Cir. 2016) (explaining that the relevant question for administrative exhaustion is whether the agency had "an opportunity to consider the matter, make its ruling, and state the reasons for its action"). Particularly in adversarial proceedings, "claimants bear the responsibility to develop issues for [the agencies'] consideration." *Pharm. Coal. for Patient Access v. United States*, No. 3:22-cv-714 (RCY), 2024

WL 187707, at *16 (E.D. Va. Jan. 17, 2024), *aff'd*, 126 F.4th 947 (4th Cir. 2025) (quoting *Carr v. Saul*, 593 U.S. 83, 89 (2021)).

In turn, it is a "'hard and fast rule of administrative law . . . that issues not raised before an agency are waived and will not be considered by a court on review.'" *Charlton*, 846 F. Supp. 2d at 85 (quoting *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004) (per curiam)). "[T]his rule holds special force where . . . an appeal follows adversarial administrative proceedings in which parties are expected to present issues material to their case. In that setting, the rationale of requiring issue exhaustion is at its greatest[.]" *Fritch v. U.S. Dep't of State*, 220 F. Supp. 3d 51, 62 (D.D.C. 2016). Indeed, the waiver analysis "centers on whether a party raised the 'specific argument' presented to the district court" before the agency and "'not merely the same general legal issue.'" *Id.* (quoting *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam).

Though somewhat imprecise, plaintiffs' apparent theory in their administrative complaint is that a conduit scheme laundering $5 million to three Super PACs was accomplished through a series of sequential transfers. Plaintiffs allege that, "[a]mong other things, the structuring of the transaction, with funds passing through a series of nonprofits, each devoting less than half of their annual expenditures to reportable super PAC contributions—the threshold that would unequivocally subject the groups to federal disclosure requirements—supports a conclusion the nonprofits are mere conduits." (AR00126 ¶ 11.) Moreover, in explaining the legal background in the administrative complaint, plaintiffs included a hypothetical that envisions a series of sequential transfers. (*See* AR00142 ¶ 57.) They explained that:

> A person could attempt to evade disclosure and still devote more than half of their contribution to influencing federal elections, however, by utilizing a number of entities to launder the contribution. A recipient entity could devote less than half of its

> annual spending to reportable electioneering and *then transfer* the remaining funds to a second entity. If the second entity is not a political committee, the transfer would appear on its face to be unrelated to influencing federal elections, and the first entity would be excused from reporting under the major purpose test. The second entity could *then* do the same, meaning more than 70% of the original contribution could be used to influence elections.

(AR00142 ¶ 57 (emphasis added).)

Additional allegations also underline plaintiffs' theory that contributions from PSAA and ACCP to RightOn Issues predate RightOn Issues's transfers to the three Super PACs. For example, when describing the alleged structured transfers from PSAA and ACCP to RightOn Issues, plaintiffs allege in Count II that "PSAA transferred nearly all of its *remaining* funds [from the transfer from unknown recipients], $1.5 million, to RightOn Issues, the same entity to which ACCCP gifted or deposited that same year[.] *In turn*, Right On Issues made contributions in September 2020 to three super PACs amounting to nearly the same amount it received from PSAA . . . ." (AR00162 ¶ 109 (emphasis added).) Significantly, nowhere in their 195-paragraph administrative complaint do plaintiffs state that the schemes alleged were affected, even in part, by reimbursements. *See generally* AR00123-88; *cf. Fritch*, 220 F. Supp. 3d at 62 (requiring that the party have raised a "specific argument" and "not merely the same general legal issue" in an exhaustion analysis (internal quotation marks and citations omitted)).

The Controlling Commissioners' analysis of the evidence of the sequencing of sequential transfers, then, was appropriate. (*See* AR00349-50; *contra* Opp. 32-33.) They were not obligated to consider, *sua sponte*, the alternate theory that RightOn Issues was reimbursed for its contributions to the three Super PACs, which plaintiffs raise here for the first time. *Cf. Buckingham*, 772 F. Supp. 2d at 300 ("[A]n agency generally is not required by the APA to address arguments that have not been asserted by the parties to a proceeding."). Nor does it show that the Controlling Commissioners applied a rule categorically excluding reimbursement schemes from the bar on unlawful conduit transfers. *See Charlton*, 846 F. Supp. 2d at 84-85.

B. The Controlling Commissioners Did Not Impose a Rule Requiring that a Conduit Be Wholly Controlled By a Contributor

The Controlling Commissioners imposed no requirement that a conduit be "wholly controlled" by the true contributor for an unlawful contribution in the name of another to have occurred.[8] (*See* Opp. at 23.)

First, plaintiffs' reading of the Statement of Reasons is restrictive. (*See* Opp. at 22-23.) Because the Controlling Commissioners did not exclude directives from conduits such as, *e.g.*, "suggestion[s]," from the category of directions that could support an unlawful conduit scheme, plaintiffs' arguments fall at the first hurdle. (*See id.* at 23 (quoting *United States v. Whittemore*, 776 F.3d 1074, 1079 (9th Cir. 2025)).)

The Controlling Commissioners explained that "in conduit contribution cases, there must be credible, evidence-based reasons—and not mere speculation—to believe that the relevant contributors all made their contributions at the direction of another." (AR00348 (internal quotation marks omitted).) The Statement of Reasons explained that "[w]e require *this evidence* of control to distinguish complaints brought on a concrete and plausible basis from conspiracy theories." (*See* AR00348-49 (emphasis added).) In other words, and consistent with precedent and legislative history, the Controlling Commissioners required evidence that contributions were

8 Plaintiffs do not specify what constitutes a "wholly controlled" entity and leave it ambiguous whether some lesser level of control or direction is acceptable. (*Compare* Opp. at 22-23 (arguing that the Controlling Commissioners wrongly required that RightOn Issues be "wholly controlled"), *with id.* at 22 (arguing that unlawful conduit schemes "include[] situations where a donor solicits an independent party to carry out the schemed," which "does not require control").)

"direct[ed]" by another; they did not require that, *e.g.*, the conduit be "wholly controlled."[9] *See* Mot. at 35-36; H.R. Rep. No. 93-1239 at 5 (1974) ("The bill prohibits contributions in the name of another and provides that, for the purposes of limitations and reporting requirements, any contribution by a person which is *earmarked or directed through an intermediary or conduit* to a candidate shall be treated as a contribution from such person." (emphasis added)); *Whittemore*, 776 F.3d at 1079-80 (finding that the true contributor's "*suggestion*" that conduits recipients make contributions was sufficient to show that "defendant *solicit[ed]* others to contribute to a candidate for federal office in their own names" (emphasis added)).

Because plaintiffs' theory regarding the kinds of behavior the Controlling Commissioners meant to exclude from the "direction" requirements is unsupported, many of plaintiffs' follow-on arguments are also hypothetical. For example, plaintiffs argue that the Controlling Commissioners' interpretation renders 11 C.F.R.§ 110.6(d)(1) a dead letter because that regulatory provision contemplates that some conduits will exercise "direction or control over the choice of the recipient candidate." *Id.* But that provision does not preclude a requirement that the true contributor provide direction to an intermediary in some way. Indeed, this element of direction inheres in the regulatory scheme: 11 C.F.R. § 110.6(c)(1)(iv)(B) specifies that conduit reports "shall contain . . . [t]he amount of each earmarked contribution, the date received by the conduit, and the intended recipient *as designated by the contributor*."[10] *See id.* §

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[9] Plaintiffs claim that the Controlling Commissioners concluded that an intermediary must be wholly controlled by the true contributor by way of rejecting the FGCR's statement that "§ 30122 is sufficiently broad to encompass situations involving something less than an explicit directive from the true source regarding the use of the contributed funds." (AR00266-67 n.145 (citing *Whittemore*, 776 F.3d at 1080).) But the Controlling Commissioners did not weigh in on that statement at all. (*See generally* AR00344-50.)

[10] Plaintiffs present a lengthy hypothetical to demonstrate why they believe the Controlling Commissioners' interpretation, as they characterize it, would fail to capture unlawful conduit

110.6(c)(1)(iv)(B) (emphasis added); *see also* 52 U.S.C. § 30116(a)(8) (requiring the "intermediary or conduit" to "report the original source and the intended recipient of such contribution").

Second, plaintiffs point to the Controlling Commissioners' analysis to show that they announced a strict requirement that a conduit be "wholly controlled" by a true contributor. (Opp. at 23-24.) This argument fails for the same reasons plaintiffs' indictment of the Controlling Commissioners' analysis of reimbursements fell short: the Controlling Commissioners were never called to consider it. *See infra* pp. 16-20; *see also Charlton*, 846 F. Supp. 2d at 84-85 (explaining that administrative agencies need not consider arguments not before them).

Plaintiffs' allegations paint RightOn Issues as little more than a shell company created for the purpose of serving as a conduit and then shut down. (*See, e.g.*, AR00126 ¶ 11.) In explaining the scheme, plaintiffs allege that "there is reason to believe Unknown Respondents *used* ACCP, PSAA, and RightOn Issues—*entities all created in 2020*—as conduits to direct $2.795 million in contributions to three federal super PACs to influence the United States Senate elections in Georgia in 2020." (*See id.* ¶ 11 (emphasis added).) After RightOn Issues "completed [its] *apparent purpose* of fulfilling this structured transaction," plaintiffs allege, it "fell out of use." (AR00125 ¶ 7 (emphasis added).) Far from describing an independent entity, the RightOn Issues described in plaintiffs' administrative complaint was a "mere conduit." (*See* AR00126 ¶ 11.) Indeed, plaintiffs' allegations specifically throw doubt on the independent entity theory they now argue the Controlling Commissioners should have considered:

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schemes. (*See* Opp. at 25-27.) Following plaintiffs down this elaborate path leads the Court astray from the instant case. *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (explaining that courts may not issue "opinion[s] advising what the law would be upon a hypothetical state of facts").

> RightOn Issues or PSAA's activities *were likely not a surprise to ACCP or the original sources*. None of the recipient organization had a history predating the transfers that might have misled a donor as to their purposes. The officers of all three organizations—overlapping and intertwined in critical aspects—were also well experienced in political spending.

(*See* AR00131 ¶ 24 (emphasis added).)

Because plaintiffs' theory that respondents violated FECA relied in part on allegations that RightOn Issues was a pawn, the extent of its operations as a "clearly-independent entity" was an appropriate focus for the Controlling Commissioners in evaluating the strength of plaintiffs' administrative complaint. (*See* AR00349-50.) And that the Controlling Commissioners evaluated the arguments presented to them, rather than hypothetical arguments, does not demonstrate that the Controlling Commissioners were announcing a new rule that an independent entity cannot be involved in an unlawful conduit scheme. *See Charlton*, 846 F. Supp. 2d at 84–85.

In sum, plaintiffs wrongly infer a rule that the Controlling Commissioners never announced—that a conduit must be "wholly controlled" for a conduit scheme to be unlawful—and distort the Controlling Commissioners' analysis to contend that such a rule was applied. Plaintiffs' arguments fail.

CONCLUSION

The Commission did not act contrary to law either in the timing of the issuance of the Statement of Reasons, or in the Controlling Commissioners' articulation and application of the law governing the bar on conduit contributions. The Court should grant the Commission's partial motion for summary judgment on Counts I and III and deny plaintiffs' motion.

Respectfully submitted,

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