UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, AMERICAN ACTION NETWORK, Intervenor-Defendant.	Civil Action No. 1:22-cv-03281 (CRC)

AMERICAN ACTION NETWORK'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12, defendant American Action Network respectfully moves to dismiss with prejudice plaintiff Citizens for Responsibility and Ethics in Washington's Complaint filed on October 27, 2022 (Dkt. No. 1). A Memorandum of Points and Authorities and Proposed Order accompany this Motion.

Respectfully submitted,

By: s/ Stephen J. Obermeier
Stephen J. Obermeier (D.C. Bar No. 979667)
Caleb P. Burns (D.C. Bar No. 474923)
Jeremy J. Broggi (D.C. Bar No. 1191522)
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000
sobermeier@wiley.law

Dated: January 6, 2023

Counsel for American Action Network

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant, AMERICAN ACTION NETWORK, Intervenor-Defendant.	Civil Action No. 1:22-cv-03281 (CRC)

AMERICAN ACTION NETWORK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

TABLE OF CONTENTS

GLOSSARY

AAN	American Action Network
CREW	Citizens for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

TABLE OF AUTHORITIES

Cases **Page(s)**

Authorities upon which we chiefly rely are marked with asterisks.

Statutes, Rules, and Related Materials

FEC Statements of Reasons

INTRODUCTION

For more than a decade, Citizens for Responsibility and Ethics in Washington has repeatedly sought to force an ideological opponent, the American Action Network, to "disclose the identity of its donors" as the Federal Election Campaign Act requires of a "political committee." Compl. ¶¶ 57, 63. But AAN is not, and never has been, a "political committee." Therefore, its donor information is secured by the "privacy of association and belief guaranteed by the First Amendment." *AFL-CIO v. FEC*, 333 F.3d 168, 177 (D.C. Cir. 2003) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)); *see Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2381 (2021) (protecting under First Amendment "confidentiality of donors' information"). CREW is not entitled to obtain it.

This suit—CREW's fourth seeking AAN's donor information—is a shameless collateral attack on this Court's order in *CREW v. AAN*, 590 F. Supp. 3d 164 (D.D.C. 2022) ("*AAN III*"). There, the Court dismissed CREW's lawsuit because the Federal Election Commission had already declined to pursue CREW's allegations through an exercise of its unreviewable prosecutorial discretion. As the Court explained, the D.C. Circuit in *New Models* unequivocally "held that an FEC dismissal of an administrative complaint 'that rests even in part on prosecutorial discretion cannot be subject to judicial review.'" *Id.* at 173; *see CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) ("*New Models*"), *en banc reh'g denied*, 55 F.4th 918 (D.C. Cir. 2022). And because the FEC's initial 2014 dismissal of CREW's complaint invoked its prosecutorial discretion and hence should never have been subject to judicial review, CREW's subsequent suit arising out of a second dismissal produced by a remand to the agency that never should have happened "must" be "dismiss[ed]." *AAN III*, 590 F. Supp. 3d at 175.

Rather than pursue its appeal from the Court's decision immediately, CREW put it on ice while it tried unsuccessfully to overturn *New Models*. Although CREW's effort failed and its

original appeal remains pending, CREW filed this additional action again seeking AAN's confidential donor information based on the same allegations the FEC already declined to pursue. But the jurisdictional hurdles that blocked CREW's third suit are even higher than before and block this fourth suit as well.

First, CREW lacks standing. As before, CREW asserts it is injured because FECA supposedly requires AAN to disclose information that AAN has not disclosed. Compl. ¶¶ 10–12. But the Supreme Court has now clarified that "[a]n 'asserted informational injury that causes no adverse effects cannot satisfy Article III,'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020) (Katsas, J., sitting by designation)), and CREW's conclusory allegations fail to plead factual content explaining how the absence of AAN's more-than-a-decade-old donor information supposedly hindered CREW's activities. Under the Supreme Court's most recent teaching, CREW's failure to allege how the supposed information deficit hindered its activities is fatal to its claim.

Second, this action is untimely. FECA demands suit on an FEC dismissal "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(A), (B); *see Nat'l Rifle Ass'n of Am. v. FEC*, 854 F.2d 1330, 1334 (D.C. Cir. 1988) ("This limitations period is 'jurisdictional and unalterable.'"). Here, the dismissals were years ago. The Complaint tries to solve this problem by asserting that the FEC's recent vote to close its investigative file was a "dismissal." Compl. ¶¶ 1, 62; *see* Compl. ¶ 53. But the Complaint cites no legal support for that novel position, and there is none. Even the lone Commissioner that supports CREW's lawsuit appears to acknowledge that treating a file closure as a dismissal would contradict "[t]he D.C. Circuit's jurisprudence regarding the dismissal of Commission enforcement complaints." Compl. Ex. 5 (Statement of

Reasons of Commissioner Ellen L. Weintraub, MUR No. 6589R, at 2 (Sept. 30, 2022)). The Commissioner believes that D.C. Circuit precedent is wrong. But her opinion has no bearing on whether that precedent binds this Court, which it obviously does. Furthermore, the text of FECA and the history of the Commission's non-statutory file closure procedure confirm that the D.C. Circuit's jurisprudence is correct.

Third, even if there had been yet another dismissal, this action would be unreviewable for the same reasons as CREW's last one: It is merely CREW's latest effort to pursue allegations the FEC dismissed in an exercise of its unreviewable prosecutorial discretion years ago, as this Court held in *AAN III*. There, this Court recognized that the FEC's initial dismissal decision "preclude[d] judicial review" of CREW's citizen suit notwithstanding CREW's allegation that a subsequent FEC dismissal decision "did not mention prosecutorial discretion at all," *AAN III*, 590 F. Supp. 3d at 173, 174 n.7, as the agency never should have been forced to engage in any additional proceedings on this matter after it invoked prosecutorial discretion back in 2014. For similar reasons, the FEC's initial dismissal would preclude judicial review here even if, as the Complaint wrongly alleges, the FEC's file closure was a "new" dismissal for reasons somehow controlled by the opinion of a single commissioner that garnered no support from her fellow commissioners.

For all these reasons, the Court should dismiss the Complaint.[1]

BACKGROUND

I. THE FEC ENFORCEMENT PROCESS

The Federal Election Commission is a six-member body charged with enforcing the Federal Election Campaign Act. By law, "[n]o more than 3 members of the Commission . . . may

[1] CREW's suit also fails on the merits because AAN is not, and never has been, a "political committee." Furthermore, AAN expressly reserves its right to seek dismissal for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6), 12(h)(2).

be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). In addition, "the affirmative vote of 4 members of the Commission shall be required," 52 U.S.C. § 30106(c), for the Commission "to initiate," "defend," "or appeal any civil action," 52 U.S.C. § 30107(a)(6), or "to conduct investigations," 52 U.S.C. § 30107(a)(9).

The bipartisan structure of the Commission reflects its sensitive role. "Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *AFL-CIO*, 333 F.3d at 170 (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)). Wary of enabling partisan and ideological actors to chill political speech and association they oppose, the authors of FECA sought to guarantee at least a minimal level of bipartisanship before allowing the government to intrude into protected First Amendment activities. Without at least one vote by a Commissioner from the other party, there is no enforcement action.

As relevant here, enforcement may begin when a person who believes a FECA violation has occurred files an administrative complaint. 52 U.S.C. § 30109(a)(1). "If the Commission, upon receiving a complaint . . . determines, by an affirmative vote of 4 of its members, that it has reason to believe" a violation has been or will be committed, then "[t]he Commission shall make an investigation of such alleged violation." 52 U.S.C. § 30109(a)(2). Because FECA requires four votes to initiate enforcement, a complaint that fails to garner four votes—including as a result of an evenly divided or "deadlocked" Commission—must be dismissed. *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (per R.B. Ginsburg, J.) (recognizing the possibility of "dismissal by deadlock"); *see Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (same).

The FEC often issues a statement of reasons after it votes. When the agency dismisses, the statement may indicate the dismissal is based on legal reasons or that "[t]he Commission has exercised its prosecutorial discretion." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545–46 (FEC, Mar. 16, 2007). Where the dismissal results from a divided vote, the D.C. Circuit requires "a statement of reasons by the declining-to-go-ahead Commissioners at the time when [the] deadlock vote results in an order of dismissal." *Common Cause*, 842 F.2d at 449. "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." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

FECA authorizes a complainant "aggrieved" by a Commission dismissal to file a petition in federal district court and empowers the reviewing court to "declare that the dismissal of the complaint . . . is contrary to law." 52 U.S.C. § 30109(a)(8)(A), (C). "FECA's 'contrary to law' formulation," the D.C. Circuit has explained, "reflects [Administrative Procedure Act] § 706(2)(A), which requires the court to 'hold unlawful and set aside agency action' that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *CREW v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2018) ("*CHGO*") (citations omitted). If the Commission fails to conform with a judicial declaration that a dismissal is contrary to law, FECA authorizes the complainant to bring "a civil action to remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C).

Consistent with the Administrative Procedure Act and settled principles of administrative law, FECA does not authorize judicial review of dismissals based on enforcement discretion. "The Supreme Court has recognized that federal administrative agencies in general, and the Federal

Election Commission in particular, have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." *CHGO*, 892 F.3d at 438 (citations omitted); *see Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *FEC v. Akins*, 524 U.S. 11, 25 (1998). Accordingly, the D.C. Circuit has confirmed that a Commission dismissal "that rests even in part on prosecutorial discretion cannot be subject to judicial review." *New Models*, 993 F.3d at 884.

II. THE FEC DISMISSES CREW'S ADMINISTRATIVE COMPLAINT

In 2012, CREW filed an administrative complaint with the FEC alleging that AAN should have registered as a political committee and disclosed its donors from mid-2009 to mid-2011. CREW sought an FEC "investigation into these allegations," a declaration that AAN "violated the FECA and applicable FEC regulations," and "sanctions appropriate to these violations." Original Admin. Compl. at 8, *In re Am. Action Network*, MUR No. 6589 (filed June 7, 2012), https://www.fec.gov/files/legal/murs/6589/14044361739.pdf.[2]

The FEC deadlocked. Three Commissioners found no reason to believe that AAN violated FECA and voted to dismiss CREW's administrative complaint; three Commissioners voted to commence an investigation. Without the requisite affirmative vote of four Commissioners to proceed, *see* 52 U.S.C. § 30109(a)(2), the Commissioners voting to dismiss controlled the outcome, and their statement of reasons served as the basis for the agency's dismissal of CREW's administrative complaint.

[2] According to the Complaint, "[o]n April 11, 2018, CREW filed an amended complaint with the FEC substituting complainant Melanie Sloan with complainant Noah Bookbinder and substituting new allegations specific to Mr. Bookbinder, but otherwise repeating the allegations in CREW's original 2012 complaint." Compl. ¶ 50; *see* Compl. Ex. 1. It does not appear that the FEC docketed that filing, *see* FEC, MUR No. 6589R, https://www.fec.gov/data/legal/matter-under-review/6589R/, and this Court has treated the 2012 complaint as operative even after the date of the supposed amendment, *e.g.*, *AAN III*, 590 F. Supp. 3d at 166.

Under their reasoning, the Commission concluded AAN was not a "political committee" as that term is used in FECA because AAN did not have as its "major purpose" the nomination or election of federal candidates. *See* Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 27, MUR No. 6589 (July 30, 2014), https://www.fec.gov/files/legal/murs/6589/14044362004.pdf. The Commission also determined that it would dismiss CREW's allegations "in exercise of [its] prosecutorial discretion." *Id.*

III. CREW SUES THE FEC

CREW sought review of the FEC's dismissal in this Court. The Commission argued, among other things, that its dismissal was "justified by the Commission's broad prosecutorial discretion" and was not judicially reviewable. FEC Mem. Supp. Summ. J. at 49, *CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) (No. 14-cv-01419), Dkt. No. 36; *see id.* at 50 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

This Court held the FEC's dismissal "contrary to law." *CREW v. FEC*, 209 F. Supp. 3d 77, 95 (D.D.C. 2016) ("*CREW I*"), *appeal dismissed*, Nos. 16-5300, 16-5343, 2017 WL 4957233 (D.C. Cir. Apr. 4, 2017). The Court remanded with instructions for the FEC to conduct, within 30 days, a more particularized review of AAN's advertisements, namely, those that qualified as electioneering communications as defined by FECA. *See ibid.* AAN appealed, but the D.C. Circuit dismissed the appeal because "[t]he district court order remanding the case to the Federal Election Commission [was] not a final, appealable order." 2017 WL 4957233, at *1.

On remand, the FEC deadlocked and dismissed for a second time. Consistent with the Court's decision, the three controlling Commissioners did not "categorically exclude AAN's electioneering communications from its major-purpose calculation." *CREW v. FEC*, 299 F. Supp. 3d 83, 90 (D.D.C. 2018) ("*CREW II*"), *appeal dismissed*, No. 18-5136, 2018 WL 5115542 (D.C. Cir. Sept. 19, 2018). Instead, they followed the Court's command and conducted a fact-specific

review of the twenty disputed AAN electioneering communications in an analysis that used the Court's standard, weighed various factors, and recharacterized four electioneering communications as indicative of a major purpose to nominate or elect candidates. Nevertheless, the Court again found that the FEC's dismissal was "contrary to law," and remanded with instructions for the FEC to conform within 30 days to the Court's new standard. *Id.* at 101. The Court also authorized a citizen suit, stating that "[i]f the FEC does not timely conform with the Court's declaration, CREW may bring 'a civil action to remedy the violation involved in the original complaint.'" *Id.* (citing 52 U.S.C. § 30109(a)(8)(C)). AAN noticed its appeal.

Soon after AAN noticed its appeal, the D.C. Circuit issued its decision in *CHGO*, another case arising from an FEC deadlock on an administrative complaint filed by CREW alleging that a nonprofit organization should have registered as a political committee. There, the D.C. Circuit held that the FEC's dismissal of CREW's administrative complaint was an unreviewable exercise of prosecutorial discretion and, further, that "[n]othing in [FECA] overcomes the presumption against judicial review" articulated in *Heckler v. Chaney*, 470 U.S. 821 (1985). *CHGO*, 892 F.3d at 439. The D.C. Circuit explained that it made no difference whether the controlling Commissioners had paired their exercise of enforcement discretion with substantive legal reasoning because "[t]he law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'" *Id.* at 441–42 (citations omitted). The D.C. Circuit also held that a "court may not authorize a citizen suit" when "the Commission exercises its prosecutorial discretion to decline an enforcement action" because such authorization "necessarily" would require the court to "subject the Commission's exercise of discretion to judicial review, which it cannot do." *Id.* at 439–40.

AAN moved the D.C. Circuit for summary reversal based on *CHGO*. AAN argued that the D.C. Circuit's determination that "[n]othing in [FECA] overcomes the presumption against judicial review," *id.* at 439, required reversal of this Court's contrary conclusion that "FECA's express provision for the judicial review of the FEC's dismissal decisions . . . is just such a rebuttal," *CREW I*, 209 F. Supp. 3d at 88 n.7. *See* AAN Mot. Summ. Rev. at 1–2, *CREW v. FEC*, No. 18-5136 (D.C. Cir. June 25, 2018), Doc. No. 1737659. In addition, AAN argued that this Court's preemptive authorization of a citizen suit was contrary to *CHGO*'s holding that a district court "may not authorize a citizen suit" when the FEC declines enforcement based on prosecutorial discretion. *CHGO*, 892 F.3d at 440; *see also* AAN Mot. Summ. Rev. at 9, 13. The D.C. Circuit dismissed the appeal without reaching the merits because "[t]he district court orders remanding the action to the Federal Election Commission [were] not final, appealable orders." 2018 WL 5115542, at *1.

Meanwhile, the FEC did not act within 30 days following the Court's remand. In a public statement, then-FEC Vice Chair Ellen L. Weintraub—one of the non-controlling Commissioners who opposed dismissal in the FEC's prior deadlocked votes—announced she would "[b]reak glass" and deprive the FEC of the quorum necessary to take any action conforming with this Court's order. Compl. Ex. 2 (Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & AAN* (Apr. 19, 2018)). The intentional effect was to enable CREW to bring a citizen suit pursuant to 52 U.S.C. § 30109(a)(8)(C). *Ibid.* Ordinarily, a single Commissioner's non-participation would not defeat a quorum, but in this case, that was possible because the FEC had only four seated Commissioners, the bare statutory minimum needed for the FEC to act.

IV. CREW SUES AAN

CREW accepted Commissioner Weintraub's invitation and sued AAN directly. CREW improperly expanded its allegations beyond what it claimed in its original administrative

complaint, requesting a declaration that AAN became a political committee in 2009 or 2010 and remained one thereafter. Following a brief stay to determine the appealability of *CREW II*, AAN filed a motion to dismiss. AAN argued, among other things, that the FEC's dismissal decision was not reviewable in light of the D.C. Circuit's *CHGO* decision because it included an exercise of prosecutorial discretion, and that the Court lacked jurisdiction to consider conduct beyond that alleged in CREW's original administrative complaint under the plain language of 52 U.S.C. § 30109(a)(8)(C).

The Court denied AAN's motion in large part, allowing CREW to proceed on all time periods alleged in CREW's original administrative complaint, *i.e.*, from mid-2009 to mid-2011. With respect to reviewability, the Court did "not read *CHGO* to preclude judicial review" because, in the Court's view, the controlling Commissioners' "two references to prosecutorial discretion [were] tethered to their legal reasoning." *CREW v. AAN*, 410 F. Supp. 3d 1, 15, 18 (D.D.C. 2019) ("*AAN I*"). In denying AAN's subsequent motion for certification of an interlocutory appeal, the Court reiterated its position that "[w]hen the FEC's invocation of prosecutorial discretion is based on legal analysis, [that invocation] does not preclude judicial review under *CHGO*." *CREW v. AAN*, 415 F. Supp. 3d 143, 146–47 (D.D.C. 2019) ("*AAN II*"). Following these decisions, the parties entered fact discovery. AAN produced, subject to the Court's protective order, thousands of confidential and highly confidential documents.

V. THE COURT DISMISSES CREW'S SUITS AS UNREVIEWABLE

While discovery was ongoing, the D.C. Circuit issued its decision in *New Models*, yet another case arising from an FEC deadlock on an administrative complaint filed by CREW alleging that a nonprofit organization should have registered as a political committee. In *New Models*, CREW made the exact same argument to the D.C. Circuit that it made to this Court: *CHGO* was not controlling "because the Commission's statement of reasons in this case featured

only a brief mention of prosecutorial discretion alongside a robust statutory analysis, whereas the statement of reasons in [*CHGO*] rested exclusively on prosecutorial discretion." *New Models*, 993 F.3d at 883.

The D.C. Circuit rejected CREW's argument. The court confirmed that a district court cannot review an FEC dismissal decision that is based even in part on prosecutorial discretion. *New Models*, 993 F.3d at 882 (citing *CHGO*, 892 F.3d 434). And the D.C. Circuit expressly held that it "matters[ ] not whether legal interpretation underlay the decision" to dismiss because any "Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review." *Id.* at 884, 886 n.4. Where that discretion is invoked, a court "cannot . . . review the legal analysis that accompanied the Commission's exercise of prosecutorial discretion" no matter how brief the invocation and "irrespective of the length of [the] legal analysis." *Id.* at 887. The D.C. Circuit also rejected the idea that FECA's provision authorizing review of whether agency action is "contrary to law" is somehow different from the Administrative Procedure Act's provision authorizing review of whether agency action is "not in accordance with law." *Id.* at 892.

Based on *New Models*, AAN sought reconsideration of the Court's order denying dismissal. The D.C. Circuit's decision expressly made clear that district courts cannot review FEC decisions that rest even in part on prosecutorial discretion, and "[t]his case," AAN argued, "is indistinguishable from *New Models*." AAN Mem. Supp. Recon. at 9, *AAN III* (No. 18-cv-00945), Dkt. 59-1.

The Court agreed, acknowledging that "AAN is correct that the [D.C. Circuit's] subsequent ruling in *New Models* precludes judicial review of that dismissal." *AAN III*, 590 F. Supp. 3d at 173. The Court further held that because the first dismissal was unreviewable, "the Court lacked the power to issue the remand order that resulted in the second [dismissal]," as well as CREW's

"citizen suit" filed thereafter. *Id.* at 167, 174 n.7. Because "CREW's challenge to the FEC's dismissal of its administrative complaint is not subject to judicial review," the Court "grant[ed] AAN's motion for reconsideration and dismiss[ed] th[e] suit." *Id.* at 175.

CREW appealed. At CREW's request, the appeal was held in abeyance while CREW sought en banc rehearing of *New Models*. Compl. ¶ 52. The D.C. Circuit denied rehearing, *CREW v. FEC*, 55 F.4th 918 (D.C. Cir. 2022) ("*New Models II*"), confirming *New Models* is the law of this Circuit.

VI. CREW AGAIN ASKS THE COURT TO REVIEW THE UNREVIEWABLE

On August 29, 2022, the FEC voted five-to-one to take the administrative step of closing the investigative file it first opened when CREW filed its administrative complaint in June 2012. Compl. Ex. 3 (Certification, MUR No. 6589R (Aug. 29, 2022)). Under the Commission's rules, the "vote[ ] to close such an enforcement file" authorized agency staff to notify AAN that any non-exempt investigatory materials would be "placed on the public record of the Agency." 11 C.F.R. § 5.4(a)(4). Finally, after ten years of proceedings launched by an ideological opponent, AAN would be free to engage in its protected First Amendment activities without threat of further harassment from CREW.

But it was not to be. On October 27, 2022, CREW filed this suit—its fourth seeking a court order that would declare AAN a "political committee" based on activity that occurred over ten years ago and force it to "disclose the identity of its donors." Compl. ¶¶ 57, 63. The Complaint largely echoed the previous allegations. CREW, however, apparently recognized a fundamental problem: FECA requires an aggrieved party to petition the court "within 60 days after" "a dismissal of a complaint by the Commission," 52 U.S.C. § 30109(a)(8)(A), (B); *see Nat'l Rifle Ass'n of Am.*, 854 F.2d at 1334 ("This limitations period is 'jurisdictional and unalterable.'"), and, in this proceeding, the FEC dismissed CREW's complaint years ago.

The Complaint attempts to solve this fundamental jurisdictional problem by claiming that the Commission's vote to close its enforcement file was another "dismissal." Compl. ¶¶ 1, 62; *see* Compl. ¶ 53. But the Commission has never equated an investigative file closure with a "dismissal," the official record of the file closure in this proceeding does not label it as such, *see* Compl. Ex. 3 (Certification, MUR No. 6589R (Aug. 29, 2022)), and no court dismissing a challenge to an FEC dismissal as untimely has ever considered relevant the date at which the agency closed its investigative file.

That is not the only threshold reviewability problem the Complaint tries to solve. Recognizing that *New Models* would bar review even if the Complaint were timely, the Complaint alleges that Commissioner Weintraub's statement of reasons explaining why she *dissented* from the ministerial decision to close the investigative file, which was joined by no other commissioner, somehow retroactively converted her into the "the 'controlling commissioner'" for purposes of the Commission's 2018 failure to act. Compl. ¶¶ 55–56. Because that solo dissent "unequivocally disclaims prosecutorial discretion" as a basis for dismissals that occurred years ago, CREW claims that it may now obtain the judicial review that this Court has already squarely held foreclosed. Compl. ¶¶ 55–56.

The Complaint borrows these theories from Commissioner Weintraub herself—that is, from the same Commissioner who voted against dismissal in 2014 and 2016, deprived the FEC of its quorum in 2018, and dissented from the FEC's file closure vote in 2022. Although Commissioner Weintraub has never voted to end this matter, her statement purports to be the FEC's "controlling statement of reasons" explaining a "dismissal." Compl. Ex. 5 (Statement of Reasons of Commissioner Ellen L. Weintraub, MUR No. 6589R, at 7–8 (Sept. 30, 2022)). In reality, her statement is a dissent. Rather than attempt to justify the Commission's result, the

statement claims that the Commission's *actual* actions and reasoning are "firmly contrary to law." *Id.* at 8. Its self-described purpose is to help "CREW's . . . lawsuit . . . succeed." *Id.* at 13. The statement does not "make judicial review a meaningful exercise" by explaining "the agency's reasons for acting as it did." *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476. Instead, it expressly thumbs its nose both at the reasons the agency itself articulated and at the D.C. Circuit's conclusion that the agency's actions are not reviewable.

Tellingly, no other Commissioner joined the statement, and three Commissioners wrote separately to explain why the statement is wrong. Grounding their reasoning in statutory text and D.C. Circuit precedent, these Commissioners explained that "a dismissal, as a substantive enforcement decision, exists in an entirely different category from customary, non-statutory administrative acts such as closing the file." Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters, at 3 (May 13, 2022), https://www.fec.gov/resources/cms-content/documents/Redacted_Statement_Regarding_Concluded_Matters_13_May_2022_Redacted.pdf. And they explained that Commissioner Weintraub's contrary view "cannot be reconciled with our enabling statute." Statement of Reasons of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, MUR No. 6589R, at 4 (May 13, 2022), https://www.fec.gov/files/legal/murs/6589R/6589R_30.pdf; *see also* Supplemental Statement of Reasons of Chairman Allen J. Dickerson, MUR No. 6589R (Oct. 12, 2022), https://www.fec.gov/files/legal/murs/6589R/6589R_32.pdf.

STANDARD OF REVIEW

The Court should dismiss the Complaint for lack of subject matter jurisdiction. "In response to a motion to dismiss a complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the plaintiff must prove by a preponderance of the evidence that

the Court has jurisdiction." *Nat'l Ass'n for Home Care & Hospice, Inc. v. Burwell*, 77 F. Supp. 3d 103, 107 (D.D.C. 2015) (Cooper, J.).

The court "assume[s] the truth of all material factual allegations in the complaint." *Am. Nat. Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011). But the court will "not assume the truth of legal conclusions," *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016) (citing *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)), nor "accept 'threadbare recitals of a cause of action's elements, supported by mere conclusory statements,'" *ibid.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)).

ARGUMENT

I. THE COURT SHOULD DISMISS BECAUSE CREW LACKS STANDING

To establish Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

CREW asserts it is injured because FECA requires AAN to disclose information that AAN has not disclosed. Compl. ¶¶ 10–12. But CREW has not plausibly pled "that the alleged information deficit hindered" its activities, *TransUnion*, 141 S. Ct. at 2214, and the Supreme Court recently clarified that "[a]n 'asserted informational injury that causes no adverse effects cannot satisfy Article III,'" *ibid.* (quoting *Trichell*, 964 F.3d at 1004).

The closest CREW comes to identifying any actual adverse effects is its general allegation that "CREW needs . . . reports required by the FECA" to "assess whether an individual, candidate, political committee, or other regulated entity is complying with federal campaign finance law." Compl. ¶ 10. But that general description of CREW's activities does not explain how it is harmed

from an inability to make such assessments. The injury to CREW cannot stem from its desire to assess anyone else's legal compliance because the Supreme Court and D.C. Circuit have both made clear that "the public interest that private entities comply with the law cannot 'be converted into an individual right by a statute that denominates it as such.'" *TransUnion*, 141 S. Ct. at 2206 (quoting *Lujan*, 504 U.S. at 576–77); *see Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997) ("To hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred would be tantamount to recognizing a justiciable interest in the enforcement of the law.").

CREW's other alleged harms are even more conclusory. According to the Complaint, "CREW is hindered in its programmatic activity" when a regulated entity "fails to disclose" required information and "when the FEC fails to properly administer the FECA's reporting requirements." Compl. ¶¶ 10–11. But here again, the Complaint contains no actual factual allegations that purport to show how CREW's programmatic activities are hindered when someone else does not file disclosure reports, or when CREW is dissatisfied with the FEC's administration of FECA. CREW's "threadbare recitals" of informational injury are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 678–79. Thus, CREW has not plausibly alleged "programmatic" harm.

If that were not enough, CREW's own allegations provide additional "reason to doubt their claim that the information would help them." *Campaign Legal Center v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020). According to the Complaint, "CREW is committed to protecting the right of citizens to be informed about the activities of government officials" and "reducing the influence of money in politics." Compl. ¶ 8. But the Complaint seeks the identity of AAN's donors for activities that took place mid-2009 to mid-2011. Compl. ¶¶ 30, 57, 63. If "overnight is a long

time in politics" and "a week is forever," *see* M.J. Lee, *Dan Rather: Mitt has 'good chance'*, Politico (Apr. 30, 2012), https://www.politico.com/story/2012/04/dan-rather-mitt-has-good-chance-075736 (capitalization altered), a decade must be eternity or more. As CREW never explains how obtaining AAN's more-than-a-decade-old donor list will help it fulfill its supposed mission today, there is substantial reason to doubt that AAN's information will help CREW.

Perhaps anticipating the fundamental problems with its Complaint, CREW brazenly suggests that ordinary Article III pleading requirements do not apply to "violations of the FECA that require accurate disclosure of contribution information and the filing of public reports by political committees." Compl. ¶ 12 (citing *Campaign Legal Center*, 952 F.3d at 356). But the Supreme Court rejected a similar argument in *TransUnion*, explaining that an "informational injury" defined by federal statute becomes cognizable under Article III only where the plaintiff "identifie[s] . . . downstream consequences from failing to receive the required information." 141 S. Ct. at 2214 (quotation marks omitted); *see Spokeo*, 578 U.S. at 339 ("Congress cannot erase Article III's standing requirements"). Because CREW has not plausibly alleged any downstream consequences arising from its failure to obtain AAN's information, the Complaint must be dismissed.

II. THE COURT SHOULD DISMISS BECAUSE CREW'S SUIT IS TIME BARRED

This action is untimely. The Complaint asserts the Commission's recent vote to close its file was a "dismissal." Compl. ¶¶ 1, 62; *see* Compl. ¶ 53. In reality, the FEC dismissed CREW's complaint in 2014 and, on remand, in 2016. There is no support for CREW's novel argument that the agency's recent decision to take the ministerial act of closing the file was another "dismissal." Because any challenge to the agency's *actual* dismissals was long ago time-barred—as CREW itself knows since it brought timely actions challenging those dismissals years ago—the Court should dismiss the Complaint for lack of subject matter jurisdiction.

A. The FEC Dismissed CREW's Complaint Years Ago And FECA Prohibits Suit After 60 Days.

The time for CREW to seek review of the FEC's dismissal of its administrative complaint ran long ago. FECA provides that a party aggrieved by "a dismissal of a complaint by the Commission" must petition the court for review "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(A), (B). "This limitations period is 'jurisdictional and unalterable.'" *Nat'l Rifle Ass'n of Am.*, 854 F.2d at 1334; *see also Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993). Accordingly, "a petitioner's failure to comply with the 60-day limit in [FECA] divests the district court of jurisdiction." *Jordan v. FEC*, 68 F.3d 518, 518–19 (D.C. Cir. 1995).

In this case, the Commission first dismissed CREW's complaint "in June 2014." *CREW I*, 209 F. Supp. 3d at 83. As required by the text of FECA and D.C. Circuit precedent, this Court recognized that when "the Commissioners deadlocked 3-3 . . . on whether to commence an investigation," the Commission had dismissed the complaint. *Ibid.*; *accord Democratic Cong. Campaign Comm.*, 831 F.2d at 1133; *Common Cause*, 842 F.2d at 449. Recognizing the time-bar, CREW brought suit within 60 days.

On remand from this Court's first review, "the Commission again dismissed CREW's complaint in a deadlocked decision," *CREW II*, 299 F. Supp. 3d at 86, this time in October 2016, Certification, MUR No. 6589R (Oct. 18, 2016), https://www.fec.gov/files/legal/murs/6589/16044401006.pdf. Cognizant again of the time-bar, CREW timely sued again, and this Court again concluded the agency had acted contrary to law and again remanded the complaint to the agency, ordering it to act within thirty days.

The FEC did not "dismiss[ ] again." *AAN I*, 410 F. Supp. 3d at 25. "[H]ad the complaint been dismissed again," CREW would have sued the FEC again and "the saga would have continued." *Ibid*. Instead, "[t]he agency failed to act" and CREW "invoked FECA's citizen-suit

provision to sue AAN directly." *Id.* at 7, 25; *see* 52 U.S.C. § 30109(a)(8)(C). This Court ultimately dismissed CREW's citizen suit, and CREW's appeal "is currently being held in abeyance." Compl. ¶ 52.

The history is long, but the lesson is short. The FEC first dismissed CREW's complaint in 2014 and, following this Court's remand, the FEC dismissed CREW's complaint again in 2016. These were the only times the agency dismissed the complaint. Because the statutory deadline to challenge the FEC's dismissals ran long ago, CREW's untimely effort to challenge those dismissals yet again "must be dismissed for lack of jurisdiction." *Jordan*, 68 F.3d at 519.

B. Contrary To CREW's Assertion, The FEC's Decision To Close Its File Was Not Another "Dismissal."

Seeking to evade this jurisdictional hurdle, the Complaint falsely alleges that "the FEC once again voted to dismiss" "[o]n August 29, 2022." Compl. ¶ 53; *see* Compl. ¶¶ 1, 62. In reality, the Commission voted at that time only to "[c]lose the file" and "[s]end the appropriate letter" notifying AAN that any non-exempt investigatory materials would be placed on the public docket within 30 days. Compl. Ex. 3 (Certification, MUR No. 6589R (Aug. 29, 2022)); *see* 11 C.F.R. § 5.4(a)(4).

Prior to this proceeding, no one has ever suggested file closure is a "dismissal." In fact, years of litigation proceeded in this Court—and continues to proceed at the D.C. Circuit—based on the understanding that the requisite dismissals occurred long ago. The Complaint cites no judicial opinion, scholarly writing, or other authority that supports its brazen claim to the contrary. Indeed, the position is so far outside the mainstream that the FEC Chair felt compelled to address the issue again in a supplemental statement explaining, in no uncertain terms, that "[c]losing the file is a convenient, ministerial act, not a dismissal of a matter on its merits," and that any assertions to the contrary are "without legal support of any kind." Supplemental Statement of Reasons of

Chairman Allen J. Dickerson, MUR No. 6589R, at 1 (Oct. 12, 2022), https://www.fec.gov/files/legal/murs/6589R/6589R_32.pdf.

It appears the sole adherent to the Complaint's view is the Commissioner that urged CREW to file this lawsuit. Putting aside the naked political nature of her actions—contrary to the bipartisan structure of the agency—even her statement makes no real effort to justify the position,[3] instead appearing to acknowledge that equating file closure with dismissal contradicts "[t]he D.C. Circuit's jurisprudence regarding the dismissal of Commission enforcement complaints." Compl. Ex. 5 (Statement of Reasons of Commissioner Ellen L. Weintraub, MUR No. 6589R, at 2 (Sept. 30, 2022)). And rather than try to distinguish D.C. Circuit precedent, the statement just repeatedly disparages binding Circuit authority as "woefully misplaced," "damag[ing]," and even as "science fiction." *Ibid.* (emphasis removed).

Of course, it is not for this Court to decide the wisdom of D.C. Circuit precedent. But even if it were, the Circuit's view is the correct one. FECA, as has been explained, requires four Commissioners to find "reason to believe" a violation has occurred to initiate enforcement. 52 U.S.C. § 30109(a)(2); *see also* 52 U.S.C. § 30106(c). By contrast, the text of FECA is completely

[3] Apparently, Commissioner Weintraub first attempted to equate file closure with dismissal at an FEC open meeting held April 22, 2022. Her comment prompted three Commissioners to issue a statement explaining why "it is wrong to conflate the declination to proceed with enforcement and the attendant issuance of a statement of reasons with the nominal act of file closure." Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters, at 2 (May 13, 2022), https://www.fec.gov/resources/cms-content/documents/Redacted_Statement_Regarding_Concluded_Matters_13_May_2022_Redacted.pdf. Grounding their reasoning in statutory text and D.C. Circuit precedent, these Commissioners explained that "a dismissal, as a substantive enforcement decision, exists in an entirely different category from customary, non-statutory administrative acts such as closing the file." *Id.* at 3; *see also* Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, MUR No. 6589R (May 13, 2022), https://www.fec.gov/files/legal/murs/6589R/6589R_30.pdf. Despite their reasoning having been available, Commissioner Weintraub's statement does not purport to refute it.

silent with respect to file closure and attaches no significance to that non-statutory act. Accordingly, the answer to the Commissioner's gripe that "the D.C. Circuit has focused on the Commission's split reason-to-believe votes" to mark dismissal when, she believes, it should have considered the vote "to close the file," Compl. Ex. 5 (Statement of Reasons of Commissioner Ellen L. Weintraub, MUR No. 6589R, at 2–3 (Sept. 30, 2022) (parenthetical omitted)), is simply that FECA's text directs that result. It is not the D.C. Circuit that has given pride-of-place to the Commission's "reason to believe" votes, but FECA itself.

In addition to the statutory text, the history of the FEC's file closure procedure is instructive. FECA directs the Commission to keep investigatory materials confidential. *See* 52 U.S.C. § 30109(a)(12). The Freedom of Information Act, on the other hand, generally requires that agency records be publicly disclosed. In 1980, the Commission adopted a regulation "that reconciles FECA with the Freedom of Information Act." *AFL-CIO*, 333 F.3d at 171; *see* Public Records and the Freedom of Information Act, 45 Fed. Reg. 31291 (FEC, May 13, 1980). Pursuant to that rule, all

> non-exempt 52 U.S.C. 30109 investigatory materials shall be placed on the public record of the Agency 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*.

11 C.F.R. § 5.4(a)(4) (emphasis added); *see* 11 C.F.R. § 4.4(a)(4) (parallel codification). There are no other references to file closure in the Commission's regulations, and none in FECA itself. Accordingly, this history of the FEC's non-statutory file closure procedure shows that it is merely an administrative function to demarcate the "public release of all investigatory file materials not exempted by the Freedom of Information Act," *AFL-CIO*, 333 F.3d at 170, and not to serve as a shadow dismissal procedure.

In sum, the Complaint intentionally confuses the clear distinction between the Commission's substantive "reason to believe" vote, required by FECA, and the ministerial vote to

close the file under the Commission's administrative regulations. Because the Commission's substantive votes (and thus its actual dismissals) occurred far outside the time FECA allows for seeking judicial review, the Complaint "must be dismissed for lack of jurisdiction." *Jordan*, 68 F.3d at 519.

III. THE COURT SHOULD DISMISS BECAUSE THE FEC'S DECISION IS UNREVIEWABLE

Even if CREW's suit were not long ago time-barred, it would still have to be dismissed because it is yet another effort to obtain review of an FEC decision to dismiss a complaint in an exercise of its unreviewable prosecutorial discretion, which this Court already held unreviewable in *AAN III*. Just as the FEC's 2014 dismissal precluded review of CREW's citizen suit, it would preclude judicial review here even if there were some new dismissal. CREW cannot avoid that fact by claiming that a lone commissioner's solo dissent somehow retroactively vitiates the reasoning that the FEC *actually* embraced years ago.

A. The FEC Exercised Its Prosecutorial Discretion To Dismiss CREW's Claims.

This Court dismissed CREW's citizen suit against AAN because D.C. Circuit precedent unambiguously required that result. In *New Models*, the D.C. Circuit squarely held that "a Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review." *AAN III*, 590 F. Supp. 3d at 174 (quoting *New Models*, 993 F.3d at 884); *see also CHGO*, 892 F.3d at 442 ("The law of this circuit 'rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions.'").

The FEC's dismissal in this matter is on all fours with *New Models*. There, just like here, the controlling Commissioners' statement of reasons when CREW's complaint was initially dismissed back in 2014 included a "robust analysis" of the legal reasons for their decision and "made only passing reference to prosecutorial discretion." 993 F.3d at 886. There, just like here,

CREW argued that the legal analysis sufficed to distinguish the case from *CHGO*, reasoning that "the Commission's statement of reasons in this case featured only a brief mention of prosecutorial discretion alongside a robust statutory analysis, whereas the statement of reasons in [*CHGO*] rested exclusively on prosecutorial discretion." *Id.* at 883. And the D.C. Circuit squarely rejected CREW's argument, concluding that it "matters[ ] not whether legal interpretation underlay the decision" to dismiss because any "Commission decision that rests even in part on prosecutorial discretion cannot be subject to judicial review" no matter how brief the FEC's invocation of discretion and "irrespective of the length of its legal analysis." *Id.* at 884, 886 n.4, 887.

"Faced with these parallel circumstances," this Court held that its review of CREW's citizen suit had been unambiguously foreclosed "in *New Models*." *AAN III*, 590 F. Supp. 3d at 174. That was the required result. Even CREW subsequently acknowledged the similarities, citing this Court's dismissal of its citizen suit as a reason to overturn *New Models*. Notice Supp. Authority at 2, *New Models II* (No. 19-5161), Doc. #1937809. The judges that would have reversed *New Models* agreed, describing this litigation and that one as "almost identical" and explaining that, under *New Models*, this Court "had no choice but to dismiss CREW's [citizen] suit" because the FEC had invoked enforcement discretion in its original dismissal. *New Models II*, 55 F.4th at __, 2022 WL 17578942, at *10 (Millett, J., joined by Pillard, J., dissenting from the denial of rehearing en banc).

B. The FEC's Prosecutorial Discretion Stops Further Review.

For the same reasons, the D.C. Circuit's *New Models* decision would eliminate the foundation for CREW's fourth lawsuit and preclude judicial review of the allegations even if it were not time-barred. It is undisputed that, in 2014, the FEC relied on its prosecutorial discretion when it elected not to pursue CREW's allegations against AAN. Compl. ¶ 44. Because this suit

seeks to pursue allegations that have already been dismissed through an exercise of the FEC's unreviewable prosecutorial discretion, it fails for the same reason as the citizen suit.

The Complaint contends otherwise, asserting this suit will not examine the FEC's enforcement discretion but only the more recent statement authored by "Commissioner Weintraub." Compl. ¶¶ 55–60. For reasons that are explained below, the Complaint is wrong to assert that "Commissioner Weintraub . . . now speaks for 'the Commission' in this case." Compl. ¶ 55. But even that were true, the case would remain unreviewable because the Commission invoked its prosecutorial discretion when it issued "the initial statement" explaining dismissal in 2014. *AAN III*, 590 F. Supp. 3d at 174 n.7.

Indeed, that was this Court's holding in *AAN III*. There, just like here, CREW argued its suit should continue notwithstanding *New Models* because the Commission's initial statement of reasons had been "superseded" by a second statement that "never invoked prosecutorial discretion." CREW Mem. Opp'n Recon. at 7, 15, *AAN III* (No. 1:18-cv-00945), Dkt. No. 62.[4] And the Court rejected that argument, explaining that "if the passing reference to prosecutorial discretion in the initial statement made the first dismissal unreviewable under *New Models*, then the Court lacked the power to issue the remand order that resulted in the second statement." *AAN III*, 590 F. Supp. 3d at 174 n.7. Because "the Commissioners never would have issued a second statement" without the erroneous remand, it made no difference whether the "second statement did not mention prosecutorial discretion at all." *Ibid.* Either way, the citizen suit "must" be dismissed. *Id.* at 175. *Accord CHGO*, 892 F.3d at 439–40 (holding a "court may not authorize a

[4] In fact, the FEC's second statement of reasons "incorporated by reference" its prior invocation of discretion—as even CREW now appears to acknowledge. Compl. ¶ 52.

citizen suit" when "the Commission exercises its prosecutorial discretion to decline an enforcement action").

The same is true here. CREW again claims the FEC's invocation of discretion has been "superseded" by a later statement—this time, the statement issued by a single commissioner in 2022, purportedly explaining why the Commission failed to act in 2018. Compl. Ex. 5 (Statement of Reasons of Commissioner Ellen L. Weintraub, MUR No. 6589R, at 6, 8 (Sept. 30, 2022)). And, like before, CREW claims that the later statement overcomes the Commission's original invocation of discretion. Compl. ¶¶ 56, 64. However, CREW does not, and cannot, dispute that, like before, both the 2018 non-action and Commissioner Weintraub's latest new statement of reasons "never would have issued" but for the prior remands. *AAN III*, 590 F. Supp. 3d at 174 n.7.

In short, it makes no difference whether the 2022 decision was a yet another dismissal. Just as the Commission's "initial statement" invoking its prosecutorial discretion barred CREW's subsequent citizen suit even if "the second statement did not mention prosecutorial discretion at all," *ibid.*, the same initial statement precludes review here. This suit pursues the same allegations as the citizen suit and all prior suits. Because the Commission already dismissed the allegations through an exercise of its prosecutorial discretion, this case "necessarily" would require the court to "subject the Commission's exercise of discretion to judicial review, which it cannot do." *CHGO*, 892 F.3d at 439–40.

C. The Single Commissioner Statement Cannot "Disclaim" The FEC's Prosecutorial Discretion.

Nothing in Commission Weintraub's 2022 statement of reasons provides any basis to disturb that conclusion.

To begin with, the statement does not purport to explain the Commission's August 2022 decision to close the file—the supposed basis of jurisdiction here—but to give "the rationale for

the Commission's May 10, 2018, [reason-to-believe] votes." Compl. Ex. 5 (Statement of Reasons of Commissioner Ellen L. Weintraub, MUR No. 6589R, at 7 (Sept. 30, 2022)). The Complaint agrees, but then seeks to invoke this Court's jurisdiction based upon the Commission's vote to close the file. Compl. ¶ 53. The Complaint cannot have it both ways. Either the statement controls the 2018 vote, in which case CREW's suit is untimely, or it provides the views of a single commissioner regarding the 2022 ministerial act of closing the file, which is not subject to judicial review. Either way, it provides no basis for judicial review of anything.

CREW's contrary theory rests on the premises not only that the 2022 action is a dismissal (which it is not, *see* Section II, *supra*), but that Commissioner Weintraub's statement somehow single-handedly retroactively altered the basis for the FEC's previous dismissals of CREW's complaint. That "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013). Commission Weintraub's single-commissioner statement is not "controlling" as to long-ago decisions from which its author dissented, and Commissioner Weintraub cannot unilaterally declare herself to "speak[] for 'the Commission'" as to all actions ever taken "in this case." Compl. ¶¶ 54–55. As the D.C. Circuit has explained, the FEC must issue "a statement of reasons by the declining-to-go-ahead Commissioners *at the time when a deadlock vote results in an order of dismissal*." *Common Cause*, 842 F.2d at 449 (emphasis added). "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." *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476. Here, the supposedly controlling statement not only was issued by a Commissioner who repeatedly voted against the action in question, but was issued *years* after the Commission's substantive vote. *See* Compl. ¶¶ 53–54. That is not a controlling statement; it is just a dissenting Commissioner's attempt to rewrite history.

The substance of the supposedly controlling statement confirms as much. The D.C. Circuit requires a statement of reasons to provide "the agency's reasons for acting as it did" and "make judicial review a meaningful exercise." *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476. The statement here, by contrast, does not purport to *justify* the Commission's decision to dismiss CREW's complaint; it instead condemns that decision as "firmly contrary to law." Compl. Ex. 5 (Statement of Reasons of Commissioner Ellen L. Weintraub, MUR No. 6589R, at 8, 13 (Sept. 30, 2022)). The statement is effectively a dissent, written by a Commissioner that voted *against* the result she supposedly controls. Its avowed purpose is to help "[CREW's] lawsuit" against *the Commission* "succeed." *Ibid.* (emphasis added). If controlling, the statement would be the regulatory equivalent of a boxer taking a dive. The thought that it does control for purposes of judicial review is thus self-evidently ridiculous.

Indeed, while it ultimately makes no difference since the Commission's *non-action* in 2018 was not a judicially reviewable dismissal, the Complaint is not even correct to claim that Commissioner Weintraub controlled the result in 2018. When, in April 2018, Commissioner Weintraub refused to vote, she announced that she was "breaking the glass" to "[p]lac[e] this matter in CREW's hands." Compl. Ex. 2 (Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & AAN*, at 1 (Apr. 19, 2018)). For the next several years, CREW subjected AAN to invasive and burdensome discovery of its confidential, highly confidential, and First Amendment privileged information. If, as the Complaint alleges (¶¶ 54–55), Commissioner Weintraub had seized control a month later in May 2018, then CREW's citizen suit would have been moot almost as soon as it was filed, as there would have been some actual agency action to review. At a minimum, one would have expected the Commission to inform the Court its jurisdiction was now in question. *See C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 190 (D.D.C. 2020)

(Cooper, J.) (noting the presumption of good faith afforded agency officials). Instead, no one ever notified the Court, and CREW's citizen suit was allowed to proceed on the theory that the Commission had not acted at all. The simplest explanation for what would otherwise be a stunning failure of candor is that, in May 2018, no one—not even Commissioner Weintraub—believed that the situation had changed, and that the agency was now taking some sort of affirmative action that she controlled. That theory was invented after the fact in order to aid CREW in mounting this blatant collateral attack on the Court's dismissal of CREW's citizen suit. The Court should not indulge it.

CONCLUSION

For the reasons stated above, the Court should dismiss this case.

Respectfully submitted,

By: s/ Stephen J. Obermeier
Stephen J. Obermeier (D.C. Bar No. 979667)
Caleb P. Burns (D.C. Bar No. 474923)
Jeremy J. Broggi (D.C. Bar No. 1191522)
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000
sobermeier@wiley.law

Counsel for American Action Network

Dated: January 6, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

AMERICAN ACTION NETWORK,

Intervenor-Defendant.

Civil Action No. 1:22-cv-03281 (CRC)

[PROPOSED] ORDER GRANTING
AMERICAN ACTION NETWORK'S MOTION TO DISMISS

Upon consideration of American Action Network's Motion to Dismiss, it is hereby

ORDERED that the Motion to Dismiss is **GRANTED.** It is further

ORDERED that the Complaint is **DISMISSED WITH PREJUDICE** in its entirety.

This constitutes a final appealable order.

SO ORDERED this _____ day of _____ 2023.

CHRISTOPHER R. COOPER
United States District Judge

LOCAL RULE 7(k) CERTIFICATION:
NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with Local Civil Rule 7(k), the following attorneys are entitled to be notified of the proposed order's entry:

Stuart C. McPhail
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1331 F Street NW
Suite 900
Washington, DC 20004

Greg J. Mueller
FEDERAL ELECTION COMMISSION
Office of General Counsel
1050 First Street, NE
Washington, DC 20463

Stephen J. Obermeier
Jeremy J. Broggi
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000