IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *Plaintiff*, v. FEDERAL ELECTION COMMISSION, *Defendant*.	Civil Action No. 20-CV-0809-ABJ The Hon. Amy Berman Jackson INSTITUTE FOR FREE SPEECH *AMICUS CURIAE* BRIEF

DISCLOSURE STATEMENT

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INTEREST OF *AMICUS CURIAE*[1]

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INTRODUCTION

The Federal Election Commission's unique structure requires a bipartisan agreement and vote before investigating or prosecuting alleged violations of the nation's campaign finance laws—providing a check on potentially biased or overzealous enforcement. This safeguard is critical because the Commission's every action impacts important First Amendment values; and it prevents partisan bias in a delicate area of regulation with the potential to directly tilt election outcomes in favor of one or the other party.

Not content with this bipartisan enforcement process, some FEC commissioners have begun to deliberately conceal the Commission's actions from the Court, with the apparent goal of dismantling this structural safeguard and enforcing the Federal Election Campaign Act ("FECA" or the "Act") their own way. This faction seeks to delegate enforcement of federal campaign finance laws to organizations

[1] *Amicus* files this brief pursuant to the Court's order granting its motion for leave to file an *amicus curiae* brief. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief.

such as the Plaintiff, by refusing to close case files after the Commission declines to prosecute complaints, and then refusing to allow the FEC to defend itself in court once the Agency is sued for its alleged inaction.

This scheme: (1) violates the Due Process rights of respondents to FEC complaints, (2) is an abuse of the Commission's discretion, (3) circumvents FECA's complaint adjudication process, (4) causes the FEC to abdicate its responsibility to enforce federal campaign finance laws, and (5) manipulates the judicial process.

The Court should not sanction this scheme by granting Plaintiff's motion for a default judgment.

FACTUAL AND LEGAL BACKGROUND

1. *The FEC's structure and process.*

The Federal Election Commission is the exclusive civil enforcement authority for FECA violations. 52 U.S.C. §§ 30106(b)(1), 30107(e). Congress created the FEC to operate by consensus; no more than three commissioners can belong to the same political party, and the six-member Commission can only bring enforcement actions with an affirmative vote of four commissioners. 52 U.S.C. §§ 30106(a)(1), 30106(c), 30107(a)(6). Four votes are also required before the Commission can initiate litigation or defend itself against accusations of inaction.[2] 52 U.S.C. §§ 30106(c), 30107(a)(6), 30109(a)(8).

[2] This case is one of several pending lawsuits challenging FEC inaction that the Commission has failed to enter an appearance. *See, e.g., Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 21-cv-0406 (D.D.C. filed February 16, 2021); *Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 20-cv-01778 (D.D.C. filed June 30, 2020); *Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 20-cv-00730 (D.D.C. filed Mar. 13, 2020); *Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 19-cv-2336 (D.D.C. filed August 2, 2019).

Anyone can file an administrative complaint alleging a FECA violation. 52 U.S.C. § 30109(a)(1). After reviewing the complaint and any responses, the Commission votes whether "it has reason to believe" that a respondent has violated or is about to violate FECA. *Id*. at § 30109(a)(2). On an "affirmative vote" of four commissioners, the FEC may investigate the "alleged violation, which may include a field investigation or audit, in accordance with the provisions of [FECA]." *Id*.; *see also* 11 C.F.R. 111.9(a); 11 CFR 111.10(b).

FECA is silent on complaint dismissals—votes indicating that the Commission lacks sufficient consensus to believe the respondent violated the Act. "The statute specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list, which suggests that they are not included under the standard construction that *expressio unius est exclusio alterius*." *Citizens for Responsibility & Ethics v. Fed. Election Comm'n (New Models)*, 993 F.3d 880, 891 & n.10 (D.C. Cir. 2021). Even so, FEC regulations state that when a complaint is dismissed, the parties are notified and the FEC's files are made public. *See* 11 C.F.R. 5.4(a); 11C.F.R. 111.9(b); 11 C.F.R. 111.20; 72 Fed. Reg. 12545 (March 16, 2007) (Statement of Policy Regarding Commission Action at the Initial Stage in the Enforcement Process); 81 Fed. Reg. 50702 (August 2, 2016) (Disclosure of Certain Documents in Enforcement and Other Matters).

The Commission's structure and adjudication process compels commissioners to enforce FECA in a bipartisan fashion. This is a feature of Congress's design for the FEC, not a bug. *See* FED. ELECTION COMM'N, LEGISLATIVE HISTORY OF THE FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976 89 (1977), https://tinyurl.com/vc4n4jny (last visited Aug. 12, 2021) (bipartisan membership prevents the FEC from "becom[ing] a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate." (statement of Sen. Alan Cranston)). Consequently, stalemates can and do occur in the complaint adjudication process.

Neither FECA nor the Commission's regulations specify that a matter terminates when commissioners tie 3-3 on whether reason exists to believe the respondent violated the Act.[3] But as a practical matter, a tie vote is an "'agency action'" that ends the complaint's adjudication, because there are not the four votes legally required to find "reason to believe," a necessary predicate to proceeding with an investigation. *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm'n (Comm'n on Hope)*, 892 F.3d 434, 437 (D.C. Cir. 2018). This is sometimes known as a "deadlock dismissal" because it "result[s] from the failure to get four votes to proceed with an enforcement action." *New Models*, 993 F.3d at 891.

A "deadlock dismissal" is a "no action decision [] made by the Commission itself, not the staff, and precludes further enforcement." *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000). "[A]n FEC enforcement decision, even one produced by deadlock, is 'part of a detailed statutory framework for civil enforcement ... analogous to a formal adjudication,' . . . it 'assumes a form expressly provided for by Congress.'" *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n (American Action Network)*, 209 F. Supp. 3d 77, 85 n.5 (D.D.C. 2016) (quoting *In re Sealed Case*, 223 F.3d at 780) *appeal dismissed* 2017 U.S. App. LEXIS 5856 (D.C. Cir. 2017). Indeed, FECA does not "differentiate between a deadlock vote that prompts a dismissal and a vote by four or more Commissioners to dismiss the action outright." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n (Comm'n on Hope)*, 923 F.3d 1141, 1142 (D.C. Cir. 2019) (Griffith, J., concurring in denial of rehearing). "[T]he three Commissioners who voted to dismiss ... constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did." *Fed. Election Comm'n v. Nat'l Republican*

[3] Because four votes are required to proceed, a "stalemate" can also occur on votes of 3-2 or 3-1 if one or more Commission seats are vacant or Commissioners do not vote.

Senatorial Comm., 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"). Accordingly, deadlock dismissals receive "great deference." *In re Sealed Case*, 223 F.3d at 781.

Congress designed the FEC to occasionally have deadlock dismissals. *See Id.* at 780 (noting that "the Commission [is] statutorily balanced between the major [political] parties."). Accordingly, "[n]othing in the text of…FECA's judicial review prescription precludes review of a dismissal due to a deadlock." *Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, 1133 (D.C. Cir. 1987). A deadlock dismissal, "like any other, is judicially reviewable." *NRSC*, 966 F.2d at 1476.

2. *The scheme to overcome deadlocks and delegate the FEC's enforcement authority to private actors.*

FECA "favors the resolution of complaints through informal methods with resort to the courts as a last resort." *Common Cause v. Fed. Election Comm'n*, 489 F. Supp. 738, 743 (D.D.C. 1980). But a faction of commissioners recently launched an unprecedented change in the post-deadlock dismissal FEC adjudication process that will cause more litigation against complaint respondents. Indeed, they plan to effectively delegate the Commission's enforcement powers to outside groups to achieve, via private enforcement actions, what the FEC has not voted to do on the statutorily required bipartisan basis, by refusing to dismiss cases or to allow the Commission to defend its decision not to proceed.

The FEC should disclose deadlock dismissals because the decision "terminates [Commission] proceedings" regardless of a vote to close a case. 11 C.F.R. 111.9(b). Traditionally, the FEC unanimously voted to close complaints after a deadlock dismissal and publicized the resolution as well as the case's supporting documents. *See* 11 C.F.R. 5.4(a)(4); 81 Fed. Reg. 50702 (August 2, 2016) (Disclosure of Certain Documents in Enforcement and Other Matters); FEC Vice Chair Allen Dickerson,

FEC open meeting, April 22, 2021, agenda item 2, *Draft Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process*, downloaded and saved audio file at 42:25 – 43:00, https://tinyurl.com/w3cj4t3c (last visited Aug. 12, 2021) ("FEC Meeting"). But that tradition is no more.

Judge Griffith once asked what would happen "if the Commission split 3-3, refused to dismiss the case, and 120 days later, the petitioner brought suit in this court," under 52 U.S.C. 30109(a)(8)(A), to address its grievance. *Comm'n on Hope*, 923 F.3d at 1143 (Griffith, J., concurring in denial of rehearing). His hypothetical is now reality, because a faction of commissioners is determined to deprive the Court of its ability to review deadlock dismissals, in order to pave the way for private enforcement of FECA via default judgments.

This case is in its present posture because Commissioner Ellen Weintraub decided to "break the glass" on a plan (the "Weintraub Scheme" or the "Scheme") for a faction of commissioners to abdicate the FEC's regulatory responsibilities, *see* Statement of FEC Vice Chair Ellen L. Weintraub, (April 19, 2018), https://tinyurl.com/pv94yz9z (last visited Aug. 12, 2021) ("Weintraub Statement") (citing 52 U.S.C. § 30109(a)(8)(C)), and manipulate the Court into allowing private entities, such as Citizens for Responsibility & Ethics in Washington ("CREW") and the Campaign Legal Center, to enforce FECA through a "'citizen-suit'" under the Act. *Comm'n on Hope*, 892 F.3d at 440 (labeling a FECA private enforcement action, under 52 U.S.C. 30109(a)(8)(C), a "'citizen-suit'").

Under the Scheme, current Commission Chair Shana Broussard requires four votes to close a case when a complaint is dismissed by deadlock, usually resulting in another deadlocked vote. *See* Statement of FEC Chair James E. "Trey" Trainor III, § II.B., (August 28, 2020), https://tinyurl.com/5fced68j (last visited Aug. 12, 2021) ("Trainor Statement") (redactions in original) ("Commissioners who are ideologically aligned with the professional complainants have adopted [a] tactic to deny

meaningful judicial review of the Commission's decision not to move forward in matters where Commissioners did not agree: refusing to vote to close the file."). Indeed, even when a majority votes to dismiss a case, the Commission can still deadlock on a vote to close the file. *See* Supplemental Statement of Reasons of FEC Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, MUR 7271, (June 10, 2021), https://tinyurl.com/4ksfaz7b (last visited Aug. 12, 2021).

Because the case is not officially closed, the complainant and respondent are never informed of the resolution of the matter, *see* 11 C.F.R. 5.4(a)(4), which "hide[s] [the commissioners'] deliberation and the [case] outcomes from the respondents," FEC Commissioner Sean J. Cooksey, FEC Meeting at 24:14 – 24:35,—leaving them in "limbo," Trainor Statement, and "effectively left to twist in the wind," FEC Vice Chair Allen Dickerson, FEC Meeting at 7:27 – 7:33, while "keep[ing] federal courts in the dark." FEC Commissioner Sean J. Cooksey, FEC Meeting at 24:14 – 24:35. Indeed, "these cases [become] zombie matters—dead but unable to be laid to rest. They remain with the [A]gency and on [its] enforcement docket indefinitely, despite having been adjudicated, with the vote outcome and [c]ommissioners' reasoning withheld from the complainant, the respondent, and the public." FEC Commissioner Sean J. Cooksey, Mem. re: Motion to Amend Directive 68 to Include Additional Information in Quarterly Status Reports to Commission, June 3, 2021, 2, https://tinyurl.com/hwa798e6 (last visited Aug. 12, 2021) ("Cooksey Mem.").

Traditionally, after the FEC closes a case dismissed by deadlock and publicizes the result, it releases a statement of reasons from the "controlling group," the three commissioners that voted to dismiss. *NRSC,* 966 F.2d at 1476. Complainants may subsequently sue the Commission, arguing "dismissal of the complaint … is contrary to law." 52 U.S.C. §§ 30109(a)(8)(A), (C). The FEC then explains that the complaint was dismissed by deadlock and defends the decision of the "control

group." According to Commissioner Weintraub, until now, the FEC has never before refused to defend itself "in the history of the agency." Nihal Krishan, *Elections Commission Chief Uses the "Nuclear Option" to Rescue the Agency from Gridlock*, MOTHER JONES, Feb. 20, 2019, https://tinyurl.com/e3exdfnn ("Mother Jones").

But under the Scheme, the statement of reasons from the controlling commissioners is precluded from being revealed to anyone, including the reviewing court. The complainant then acts on the statutory authorization to sue the FEC for failing "to act on [the] complaint" within 120 days after "the complaint is filed," 52 U.S.C. 30109(a)(8)(A)—even though the FEC has acted. That action, however, is hidden from the reviewing court.

Refusing to close a file was unheard-of over the past 40 years. But now it frequently occurs under the Scheme.[4] And if the complainant sues the FEC for delay and the Agency refuses to defend itself in court, the private entity moves for default judgment. *See* 52 U.S.C. 30106(c); 52 U.S.C. §§ 30107(a)(6), (7), (8), (9); Trainor Statement. Federal courts are given the false impression that these "deadlocked cases are unresolved." Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever: Here is the inside story of how Democrats, after a decade of defeats at the nation's top campaign watchdog, are trying to enforce election laws in party by losing on purpose in federal court*, N.Y TIMES, June 8, 2021, at A13, https://tinyurl.com/fx8jnsw ("NYT Article").

"[A] court may not authorize a citizen suit unless it first determines that the Commission acted 'contrary to law' under FECA or under the APA's equivalent 'not in accordance with law.'" *Comm'n on Hope*, 892 F.3d at 440 (quoting 52 U.S.C. § 30109(a)(8)(C); 5 U.S.C § 706(2)(A)). But if the Commission cannot appear in court to defend itself and the reasoning of the "control group," *see* 52 U.S.C. §§ 30106(c),

[4] In 2020, the FEC failed to close four cases dismissed by deadlock. As of May 2021, the Commission has failed to close 13 of these cases. *See* Cooksey Mem. at 3.

30107(a)(6), 30109(a)(8)(C), at some point the Court will issue a default judgment on the claim that the FEC unlawfully failed to act. If the FEC fails to respond to the Court's order, then the private entity "may bring" an original action against the complaint respondent "to remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C).

This is the final part of the Scheme: To "refuse to comply with the court order" to "prompt an independent lawsuit (say, by CREW against Crossroads GPS), which would enable the court to bypass the FEC and [ultimately] decide whether the [respondent] broke the law." Mother Jones.

"That's not the way [FECA] was intended to work. It's not the way the courts or the public have long assumed it works. And it is not a process that is in any way fair to the interest of the parties before [the Commission], respondents or complainants." FEC Vice Chair Allen Dickerson, FEC Meeting at 8:32 – 8:45. "By closing the file and making the complaint, response, and certain [FEC] internal documents public, [commissioners] ensure the credibility of [FEC] enforcement by providing complainants, respondents, and the public with transparency regarding the Commission's actions and reasoning. And [the FEC] provide[s] for the orderly development of the law as courts consider [the Commission's] arguments in litigation raised from one of the matters [the FEC] consider[s]." *Id.* at 9:02 – 9:26.

Commissioner Weintraub asserts that leaving FEC cases open gives the Commission an opportunity to build consensus about FECA enforcement. *See* Commissioner Ellen Weintraub, FEC Meeting at 14:11 – 15:25; Vice Chair Allen Dickerson, FEC Meeting at 20:10 – 20:27; Commissioner Steven Walther, FEC Meeting at 27:56 – 29:30; Chair Shana Broussard, FEC Meeting at 33:28 – 33:51. But the Scheme is not engendering consensus among commissioners on deadlocked matters, and it is not seriously intended to.

None of the "cases where there has been an initial split [vote] and then a refusal to close the file [has been] put back on the agenda for the Commission to consider." Commissioner James E. "Trey" Trainor, III, FEC Meeting at 38:14 – 39:15. And if no "consensus" develops before a Section 8 lawsuit is filed, it is misleading to pretend that the Commission has not acted on the matter. Indeed, it is "very disingenuous" for Weintraub to assert that her scheme is designed to cause the FEC "to work toward compromise," and "very misleading to the public to [indicate consensus building is] going on behind closed doors and [the commissioners are] trying to get to some sort of compromise." *Id*. at 39:17 – 39:47. Instead, Weintraub and her faction of commissioners are deceiving, misleading, and hiding information from the parties to the administrative complaint, and from the courts. *See* FEC Commissioner Sean J. Cooksey, FEC Meeting at 22:16 – 22:58.

In sum,

> First, the Democrats [on the Commission] are declining to formally close some cases after the Republicans vote against enforcement. That leaves investigations officially sealed in secrecy and legal limbo. Then the Democrats are blocking the F.E.C. from defending itself in court when advocates sue the commission for failing to do its job.

NYT Article. As the *New York Times* understated, "the new maneuver drastically accelerates and smooths the way for outside groups to pursue campaign finance challenges in the federal courts." *Id.* "[B]ecause the agency [is not] defending itself in [these] lawsuits, groups have a mostly clear path to sue [political groups,] candidates[,] and campaigns directly." *Id*.

As a result, complaint respondents are faced with discovery obligations and other litigation burdens, all because the three Commissioners are refusing to close a case that was dismissed by deadlock, and defend the Commission's decision. Accordingly, "the Commission's policy creates an incentive for political groups to file

complaints against their opponents in order to gain access to their strategic plans, as well as to chill the opponents' activities." *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 172 (D.C. Cir. 2003). That is why Commissioner Weintraub said, "'I find myself in the odd position of sometimes rooting for [the FEC] to lose.'" Mother Jones.

Weintraub's scheme demonstrates her "desire to engage in gamesmanship and to engage in procedural hijinks" to "hide" adjudicated cases. FEC Commissioner Sean J. Cooksey, FEC Meeting at 23:39 – 24:01. She says her scheme is necessary because her colleagues are being "obstinate." *See* NYT Article. Indeed, "Weintraub has complained for years that the FEC was dysfunctional when her Republican colleagues disagreed with her legal positions and outvoted her. Now, she is dismissing her colleagues' views, boasting publicly about her plans to block the agency from defending itself in court whenever she disagrees with its legal position." Former FEC Commissioner Caroline Hunter, *How My FEC Colleague is Damaging the Agency and Misleading the Public*, POLITICO MAGAZINE, Oct. 22, 2019, https://politi.co/2zRfIJY.

In the words of sympathetic ideological journalists, Commissioner Weintraub's scheme "is effectively an effort to sabotage her own agency" and use citizen-suits brought by ideological groups to determine set policies that cannot be approved by majority vote at the Commission. *See* Mother Jones. The problem is, it also sabotages the statutory plan, the rights of respondents, and the reviewing role of federal courts.

Commissioner Weintraub admits her scheme is unprecedented and a deliberate surrender of the FEC's enforcement powers to private parties. *See* What Next, *Washington's Most Broken Institution? How to play bipartisan hardball*, SLATE, at 11:45 – 12:23, 25:44 – 26:12 (Aug. 12, 2021), https://tinyurl.com/man2hf95. Indeed, abrogating the Commission's authority is "the point" of her plan. *See* NYT Article.

SUMMARY OF ARGUMENT

The Weintraub Scheme is an unconstitutional violation of respondents' due process rights, and violates FECA. Rather than participate in this unprecedented maneuver, the Court should thwart it by refusing to issue a default judgment in this case.

The Scheme is not an unreviewable assertion of the Commission's prosecutorial discretion, but a dereliction of the Agency's duty to "formulate policy" and exercise "exclusive jurisdiction with respect to the civil enforcement of [FECA]," 52 U.S.C. § 30106(b)(1), and to be truthful with respondents, the public, and the courts. Americans' constitutional right to engage in political expression must be protected from such devious governmental interference. The Fifth Amendment's Due Process clause does not allow an administrative agency to intentionally delegate its enforcement function to private entities, much less to groups that are ideologically averse to the individuals and organizations that are the targets of a complaint. Fundamental fairness principles, encompassed in the Due Process clause, demand that people subject to the regulation of their First Amendment freedoms enjoy the protections of the procedures Congress laid out in FECA. The Weintraub Scheme greatly impacts these fundamental rights and carries a high risk of infringing on their First Amendment liberties with no benefit to the government. Therefore, the Scheme is unconstitutional under the Fifth Amendment.

Likewise, this arbitrary and capricious scheme constitutes an abuse of discretion and, thus, violates FECA. The Scheme defies Commission regulations, the D.C. Circuit's view of the Agency's adjudication process, and departs from the Commission's history and tradition. Accordingly, the Weintraub Scheme is contrary to law.

ARGUMENT

I. THE COURT SHOULD NOT ENTER A DEFAULT JUDGMENT WITHOUT REVIEWING THE FEC'S ADMINISTRATIVE RECORD.

"A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). "[D]efault judgments are disfavored because entering and enforcing judgments as a penalty for delays in filing is often contrary to the fair administration of justice." *Nat'l Rest. Ass'n Educ. Found. v. Shain*, 287 F.R.D. 83, 86 (D.D.C. 2012) (internal quotation marks and citations omitted). Because of "a strong policy favoring the adjudication of a case on its merits," *Baade v. Price*, 175 F.R.D. 403, 405 (D.D.C. 1997), a default judgment "must be a sanction of last resort." *Webb v. D.C.*, 146 F.3d 964, 971 (D.C. Cir. 1998) (internal quotation marks and citation omitted). "The disfavor in which [default] judgments are held is especially strong in situations where the defendant is the government." *Payne v. Barnhart*, 725 F. Supp. 2d 113, 116 (D.D.C. 2010).

Because a "default judgment may not be entered against the United States absent an independent factual showing of a meritorious claim," *Carvajal v. Drug Enf't Agency*, 246 F.R.D. 374, 375 (D.D.C. 2007), administrative agencies must "file a certified list of the contents of the administrative record with the Court within 30 days" of their initial responsive pleadings in all cases that, like this one, "involve[e] the judicial review of administrative agency actions." LCvR 7(n)(1).

Civil rules typically do not address entities that are not before the Court, but court orders often do. And because a default judgment requires an independent factual showing as much as any other, the Court should order the FEC to produce its administrative record in this case before even considering a default judgment. Because the Weintraub Scheme exists, the Court cannot assume that the FEC is

still adjudicating this case, or that there has been a "failure … to act on such complaint," as required by the statute. 52 U.S.C. § 30109(a)(8). The Court cannot force the FEC to defend itself, but it can compel the production of government documents necessary for the administration of justice.

Although the Commission failed to obtain the necessary votes to defend this action, *see* 52 U.S.C. §§ 30106(c); 30107(a)(6), that failure does not excuse the FEC from producing the documents underlying the adjudication of this case. No FECA voting requirement covers this ministerial action. The Court is tasked with determining whether the FEC has acted within its legal authority. If the Commission voted on the administrative complaint at issue here, then disclosure of that vote and any accompanying Statement of Reasons is crucial to the Court's task. The Court should order the Commission to produce the record for the administrative complaint at issue in this case before ruling on Plaintiff's motion for a default judgment.

II. THE SCHEME TO DELEGATE FEC ENFORCEMENT RESPONSIBILITIES TO PRIVATE PARTIES IS UNLAWFUL.

The Commission's refusal to close dismissed cases, combined with its subsequent refusal to defend itself against default judgments, works a constructive delegation of the Commission's enforcement powers to private parties. This practice is unconstitutional, because it denies respondents in FEC enforcement matters their Fifth Amendment right to due process of law. Furthermore, the Commission's failure to close complaints that it will not pursue is an arbitrary and capricious application of FECA and an abuse of discretion.

A. The Scheme violates the Fifth Amendment.

FEC complaint respondents are being deprived of their constitutional liberty to engage in the most "fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam), without due process of law, in violation of the Fifth Amendment.

"The First Amendment affords the broadest protection [for] political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* (internal punctuation marks and citation omitted). The Commission's refusal to close a complaint that will not be pursued means that its decision to decline prosecution of the matter is never disclosed to the respondent (or anyone else). *See* 52 U.S.C. § 30109(a)(12); 11 C.F.R. 5.4(a)(4); 81 Fed. Reg. 50702 (August 2, 2016) (Statement of Policy on Disclosure of Documents). Consequently, neither respondents nor the public learn if the conduct in the complaint is legal or not. Instead of being informed that they are no longer in jeopardy, respondents, and similarly situated political actors, remain in legal limbo, unaware of the Commission's interpretation of the statute. This will naturally cause such actors to shy away from engaging in legally permissible and constitutionally protected activities.

"Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). "Officials can misuse even the most benign regulation of political expression to harass those who oppose them." *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 54 (2d Cir. 1980) (Kaufman, C.J., concurring).

The Weintraub Scheme is not an unreviewable exercise of prosecutorial discretion, but a general policy that abdicates the FEC's duty to administer FECA.

The Commission cannot close or disclose cases dismissed by deadlock because a faction of its members "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (internal quotation marks and citation omitted). Consequently, the FEC is violating complaint respondents' Due Process rights, and the matter must be reviewed by the Court.

"[L]iberty [is] specifically protected by the [Fifth] Amendment against any [government] deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label [the government] chooses to fasten upon its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). Due process standards depend on a law's function, regardless of whether it takes a criminal or civil regulatory form. *See, e.g., FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253-54 (2012) (applying the criminal law's fair-notice requirements to an agency's civil enforcement action). The FEC does not stand above the Fifth Amendment. Just as the FEC's regulations are susceptible to Fifth Amendment challenges, *see Holmes v. Fed. Election Comm'n*, 823 F.3d 69, 76 (D.C. Cir. 2016), so are its uncodified practices. People accused of violating campaign finance laws are entitled to due process.

Procedural due process "has never been, and perhaps can never be, precisely defined." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981). It "is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Id.* (internal quotation marks and citation omitted). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (internal quotation marks and citation omitted). "Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first

considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter*, 452 U.S. at 24.

"Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). To assess the interests at stake the Court generally considers three factors: (1) the private interests affected by the government's action; (2) the risk of an erroneous deprivation of the private party's interest under the government's procedures; and (3) the government's interest. *Id.* at 335. And "when governmental agencies," like the FEC, "adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

"Although today 'prosecutorial' usually refers to criminal proceedings, it was not always so. Under the APA, agency attorneys who bring civil enforcement actions are engaged in 'prosecuting functions,' 5 U.S.C. § 554(d)." *Comm'n on Hope*, 892 F.3d at 438. Indeed, the "Supreme Court has recognized that federal administrative agencies in general, and the Federal Election Commission in particular, have [nearly] unreviewable prosecutorial discretion to determine whether to bring an enforcement action." *Id.* (internal citations omitted); *Chaney*, 470 U.S. at 833 n.4 (example of an exception to unfettered prosecutorial discretion). Therefore, an FEC adjudication is akin to a criminal prosecution, *see Chaney*, 470 U.S. at 832, and, consequently, requires analogous constitutional safeguards.

The Commission's constructive delegation of civil enforcement authority violates the Fifth Amendment's Due Process Clause. An administrative agency's adjudication function shares "the characteristics of [an indictment] decision [by] a prosecutor in the Executive Branch []—a decision which has long been regarded as

the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Id.* (quoting U.S. Const., Art. II, § 3).

Accordingly, regulatory authority cannot be delegated "to a private entity." *Ass'n of Am. R.R. v. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) (vacated and remanded on other grounds *sub nom Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43 (2015)). "Although objections to delegations are 'typically presented in the context of a transfer of legislative authority from the Congress to agencies,'" the D.C. Circuit held "that 'the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals.'" *Id.* at 670-71 (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984)). "[D]elegating the government's powers to private parties saps our political system of democratic accountability." *Id.* at 675. Executive powers should remain with "disinterested government agencies [that] ostensibly look to the public good, not private gain." *Id.*

The Weintraub Scheme is a delegation of responsibility "in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Indeed, the Scheme "attempts to confer [executive] power" on private entities to regulate their political opponents—"an intolerable and unconstitutional interference with personal liberty []. The delegation is [] clearly arbitrary, and [] clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Id.*

When a prosecutor does not retry a defendant after a jury deadlocks, or otherwise dismisses charges with prejudice, the defendant obtains some knowledge of what the law requires. Moreover, it is "fundamental to how" rights are

adjudicated "in this country" and in "every [legal] system" in history "that the presumption is in favor of the defense, in the favor of the respondent. And that to overcome that presumption the government needs to bear a burden; it needs to get to a majority of whatever the decision body is." FEC Vice Chair Allen Dickerson, FEC Meeting at 43:22 – 43:54. It is a "very basic concept that where a body is evenly divided on whether to move forward with enforcement, you don't move forward with enforcement," *id*. at 43:58 – 44:06, and a "really basic principle of due process." *Id*. at 44:43 – 44:46.

When the Commission deliberately fails to follow traditional judicial processes and denies respondents their Fifth Amendment due process rights by refusing to close the case and inform them of a deadlock dismissal, it hangs the Sword of Damocles over their exercise of fundamental speech rights.

FEC complaint respondents' right to have their case closed and the resolution disclosed after a deadlock dismissal outweighs any purported governmental interest in concealing the case outcome. *See Lassiter*, 452 U.S. at 24; *Eldridge*, 424 U.S. at 334.

The Commission must "avoid unnecessarily infringing on First Amendment interests." *AFL-CIO*, 333 F.3d at 179. The FEC's failure to close the matter and disclose its dismissal greatly affect the private First Amendment interests of complaint respondents, and of those similarly situated. *Eldridge*, 424 U.S. at 335. Refusing to close a case inhibits respondents' political advocacy efforts by placing them in legal limbo of not knowing if their conduct was unlawful, paralyzing them from pursuing additional political advocacy lest they suffer greater penalties, and forcing them to allocate resources, which could be used for their First Amendment activities, for a potential FEC fine that will never occur because the case was dismissed. Consequently, "the risk of an erroneous deprivation of [the private party's] interest [under the government's] procedures" is high. *Id*. And the FEC has

no legitimate "interest" in refusing to close a case after a deadlock dismissal because it neither gains nor loses anything from denying respondents their Fifth Amendment due process rights after a deadlock dismissal. *Id*.

When a complaint results in a deadlock dismissal, the Commission is making an adjudication and/or a binding determination that "directly affect[s] the legal rights of" complaint respondents. *See Hannah*, 363 U.S. at 442. Accordingly, "it is imperative that [the Commission] use the procedures which have traditionally been associated with the judicial process." *Id*. But the FEC is not doing so.

The Court ought not participate in the FEC's machinations to pretend complaints dismissed by deadlock are open and violate the Fifth Amendment by outsourcing the Commission's enforcement powers to private groups. The FEC must verify that the complaint is truly open, and the obstructive commissioners should reveal whether they are in fact coordinating with outside groups to act on unactionable complaints, before the Court lends its hand to the Scheme. "As a federal agency sworn to uphold the law and serve the public interest, the Commission has no legitimate interest in obscuring or hiding [its case closure] activities from scrutiny." Cooksey Mem. at 3-4.

B. The Scheme violates FECA.

"The Administrative Procedure Act embodies a basic presumption of judicial review and instructs reviewing courts to set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *DOC v. New York*, 139 S. Ct. 2551, 2567 (2019) (internal quotation marks and citations omitted).

"FECA's procedures are entirely compatible with the APA, which [] allows for judicial review to determine whether agency action is contrary to law." *New Models*, 993 F.3d at 890. "In FECA, Congress adopted a 'contrary to law' standard that

mirrors the APA, which requires courts to set aside agency action that is 'otherwise not in accordance with law.'" *Id.* (citing 5 U.S.C. 706(2)(A)).

The "same standard of review applies to all FEC decisions, whether they be unanimous or determined by tie vote." *American Action Network*, 209 F. Supp. 3d at 85 (string cite of D.C. Cir. cases omitted).

"[C]ourts may review an agency's statutory interpretation." *New Models*, 993 F.3d at 894 (citing *Orloski v. Fed. Election Comm'n*, 795 F.2d 156 (D.C. Cir. 1986)). And "the Commission cannot apply an otherwise permissible interpretation of FECA in an unreasonable way—which is the same review that courts regularly conduct under Section 706 of the APA." *Id.* (citing *Orloski* and 5 U.S.C. 706(2)(A)). Accordingly, when the Commission makes "'an impermissible interpretation of FECA," or its conduct is "'arbitrary or capricious, or an abuse of discretion,'" courts may intervene. *American Action Network*, 209 F. Supp. 3d at 85 (quoting *Orloski*, 795 F.2d at 161) (internal brackets omitted).

"[T]he FEC's decisions are reversible if the Court determines that the agency 'entirely failed to consider an important aspect of the relevant problem' or has 'offered an explanation for its decision that runs counter to the evidence before it.'" *Id.* at 88 (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)) (brackets omitted). At a minimum, "the agency must articulate a rational connection between the facts found and the choice made." *Id.* (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)) (internal quotation marks and brackets omitted). The FEC's "burden of showing a coherent and reasonable explanation for its exercise of discretion" may be "minimal," but the Commission must nevertheless carry it. *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58, 70 (D.D.C. 2000) (internal quotation marks and citation omitted).

The Commission cannot meet its burden here.

The Weintraub Scheme is contrary to law, arbitrary, capricious, and an abuse of the Commission's discretion. No provision of FECA requires four commissioner votes to close a case. Indeed, this policy defies the FEC's own regulations requiring notification to a respondent when the proceedings are "otherwise terminate[d]." 11 C.F.R. 111.9(b). Therefore, its refusal to close deadlocked dismissal cases is contrary to law.

The Commission's new policy also constitutes an abuse of discretion. The FEC cannot make a "coherent and reasonable explanation" for its refusal to close a case dismissed by deadlock. *Buchanan*, 112 F. Supp. 2d at 70. The deadlocked vote terminates the proceedings against the complaint respondent. Commission tradition necessitated that these cases be dismissed, *see* FEC Vice Chair Allen Dickerson, FEC Meeting at 42:25 – 43:00, and courts in the D.C. Circuit take it for granted these cases are closed, *see*, *e.g., Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n (New Models)*, 380 F. Supp. 3d 30, (D.D.C. 2019), *aff'd* 993 F.3d 880, 883 (D.C. Cir. 2021); *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n (Comm'n on Hope)*, 236 F. Supp. 3d 378, 390 (D.D.C. 2017), *aff'd* 892 F.3d 434, 437 (D.C. Cir. 2018); *In re Sealed Case*, 223 F.3d at 779, 781; *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476; *Crossroads GPS*, 316 F. Supp. 3d at 366; *American Action Network*, 209 F. Supp. 3d at 81,[5]—demonstrating the ministerial and perfunctory nature of closing deadlocked cases.

It is the Commission's job to enforce FECA. *See Buckley*, 424 U.S. at 124-41 (duly appointed commissioners must enforce FECA); *Buchanan*, 112 F. Supp. 2d at

[5] The panel in *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm'n*, 952 F.3d 352, 355 (D.C. Cir. 2020) (per curium), observed that after a deadlocked vote on whether to start an investigation, the commissioners "voted unanimously to dismiss all five complaints." And Judge McFadden noted that after a deadlocked reason to believe vote, the Commission held another vote to close the file. *Campaign Legal Ctr. v. Fed. Election Comm'n*, 312 F. Supp. 3d 153, 158 (D.D.C. 2018). That vote was unanimous too. *Id.*

72 (the FEC is "expected" to evaluate FECA complaints). But because of the Scheme, the Commission is abdicating its responsibilities to administer FECA and manipulating the Court so that private entities may pursue litigation against complaint respondents. *See* NYT Article; Weintraub Statement; Trainor Statement. There is no "rational," *American Action Network*, 209 F. Supp. 3d at 88, or "reasonable explanation" for this decision. *Buchanan*, 112 F. Supp. 2d at 70. Therefore, the Commission is abusing its discretion.

CONCLUSION

Plaintiff's application for a default judgment should be denied.

Dated: August 16, 2021

Respectfully submitted,

/s/ Ryan Morrison

Ryan Morrison
(DC Bar No. 1660582)
Julie Smith
(DC Bar No. 435292)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, DC 20036
T: 703.894.6800
F: 703.894.6811
E: rmorrison@ifs.org
Counsel for Amicus Curiae