

ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5176

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

END CITIZENS UNITED PAC,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 1:21-cv-1665-TJK
Before the Honorable Timothy J. Kelly

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington
DCCC	Democratic Congressional Campaign Committee
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should reverse the district court's denial of Appellant End Citizens United PAC's ("End Citizens United") motion for default judgment. As explained in the opening brief, the district court wrongly relied on a *post hoc* statement of reasons ("Statement") issued by two members of the Federal Election Commission ("FEC") more than two months after the underlying administrative dismissal it purports to explain. Not only that, but the Statement was issued after End Citizens United filed this suit challenging the dismissal on the last date allowed by the Federal Election Campaign Act ("FECA"). Because the district court should have disregarded the Statement as a litigation-driven *post hoc* rationalization, that court also should have concluded that the FEC's unexplained dismissal was contrary to law, granted the motion for default judgment, and remanded to the agency.

Nothing in the Court-appointed *amicus curiae*'s ("*Amicus*") response shows otherwise. *Amicus* admits that under black-letter administrative law, an agency must sufficiently explain its final actions and cannot "backfill its reasons after the fact." Br. of Court-Appointed *Amicus Curiae* ("Opp'n") at 33-34. *Amicus* also acknowledges that this Court in *Common Cause v. FEC*, specifically required FEC statements to be issued "at the time" of a dismissal. 842 F.2d 436, 449 (D.C. Cir. 1988). Yet *Amicus* does not, and cannot, claim the Statement was issued at the time of the challenged dismissal. See Opp'n at 24-25.

Nevertheless, *Amicus* asserts that the district court correctly relied on the belated Statement. But *Amicus* provides no valid justification for the district court's failure to apply the "at the time" rule to the Statement. *Amicus*'s claims that the rule imposes no "firm deadline" and that the FEC often issues late statements fail to excuse the rule or show that the Statement was timely. *Amicus* also falls short when it wrongly claims that *Common Cause*'s "at the time" rule was a meaningless "remark," that *post hoc* statements are "adequate" for judicial review, and that this Court had no power to require timely agency statements in the first place.

Amicus also has provided no support for the district court's conclusion that the Statement was not *post hoc* despite its belated timing. First, *Amicus* cannot distinguish *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, in which the Supreme Court squarely rejected the district court's view that only litigators, and not agency decisionmakers, can issue *post hoc* rationalizations. 140 S. Ct. 1891, 1909 (2020). Second, *Amicus*'s and the district court's claim that a belated explanation is *post hoc* only if it conflicts with a previous one is wrong and would allow agencies to issue late explanations at will. Finally, *Amicus* claims that remand would be "pointless," but the alleged futility of the remedy does not justify the district court's conclusion that the Statement was not *post hoc*. In any event, *Amicus* ignores that the Supreme Court has rejected the view that remand would be pointless, as a court "cannot know" how an agency will respond. *FEC v. Akins*, 524 U.S. 11, 25 (1998).

Unable to defend the district court's ruling on its own terms, *Amicus* asks the Court to affirm on alternate grounds not invoked by the district court: that the FEC's *failed* vote to dismiss under *Heckler v. Chaney* (which is not under review here), in and of itself, allegedly explains the reasons for the agency's later *successful* vote to dismiss (which is under review here). But the Court should reject this theory, which, if accepted, would effectively nullify the statement-of-reasons requirement. This Court requires the FEC to provide a statement of reasons when deadlocked for the very reason that a deadlocked vote itself is inadequate to explain a subsequent dismissal. A failed motion to dismiss under *Heckler*, in particular, cannot indicate the determinative reason the agency dismissed a matter.

Finally, *Amicus* has failed to show that the district court was correct to dismiss for lack of subject-matter jurisdiction. Decades of this Circuit's case law, founded on Supreme Court precedent, have held that jurisdiction under 28 U.S.C. § 1331 exists over a challenge to an agency nonenforcement decision that fails to state a claim because it is unreviewable under section 701(a)(2) of the Administrative Procedure Act ("APA"). *Amicus*'s contrary position invites this Court to effectively overrule no less than *five* of its rulings, based on *Amicus*'s misreading of a case it admits "involved a different type of question." Opp'n at 42. The Court should decline that invitation and hold that the district court erred by dismissing for lack of subject matter jurisdiction.

ARGUMENT

I. The FEC's Unexplained Dismissal Is Contrary to Law

As End Citizens United has explained, the district court erred by not finding that the Commission's unexplained dismissal is contrary to law. Appellant's Br. ("Br.") at 36. It is a foundational principle of administrative law that agency action must be reviewed based on the administrative record, which excludes *post hoc* rationalizations for that action. *See id.* at 22. This Court has accordingly held that if an FEC dismissal is contrary to the General Counsel's recommendation, the "declining-to-go-ahead Commissioners" must issue a statement of reasons explaining their decision "*at the time* when a deadlock vote results in an order of dismissal." *Id.* at 8 (quoting *Common Cause*, 842 F.2d at 449) (emphasis added). The district court here should have applied this rule, disregarded the *post hoc* Statement, and declared the unexplained dismissal contrary to law, given that the *post hoc* Statement was the "only explanation the[controlling] Commissioners have ever offered for their decision." App. 044; *see* Br. at 11-13, 28-34.

In response, *Amicus* acknowledges that under ordinary administrative law principles, "[a] court cannot conclude that an agency's decision was reasonable and reasonably explained when the agency provided no or insufficient reasoning," including where an agency attempts to "backfill its reasons after the fact." Opp'n at 32-34. *Amicus* further acknowledges that, for the FEC in particular, "[t]his Court has

cautioned that a statement of reasons should be issued ‘at the time’ of the Commission’s vote.” *Id.* at 21-22 (quoting *Common Cause*, 842 F.2d at 449).

The Court should therefore reject *Amicus*’s contention that the district court was nevertheless correct to rely on the Statement. *Amicus* has failed to justify the district court’s judgment based either the district court’s own reasoning or on alternative reasons not found in the district court’s opinion, which *Amicus* provides in an attempt to rescue the court’s flawed ruling.

A. The District Court Incorrectly Held that the Statement Is Not a *Post Hoc* Rationalization

None of the reasons offered by the district court justifies its reliance on the *post hoc* Statement. Br. at 23-34. The Supreme Court has emphasized that “the problem [with *post hoc* rationalizations] is the *timing*, not the speaker.” *Regents*, 140 S. Ct. at 1909 (emphasis added). As a result, the district court erred by (1) declining to apply this Court’s requirement that an FEC statement be issued “at the time” of the agency’s dismissal, *see* Br. at 21-28; and (2) attempting to justify its consideration of the Statement for invalid reasons unrelated to its timing, *see* Br. 28-34. *Amicus* has not demonstrated otherwise.

1. The district court erred by not applying *Common Cause*’s “at the time” requirement

Like the district court, *Amicus* does not even claim that the Statement was issued “at the time” of, or contemporaneously with, the agency’s dismissal. *See*

Opp’n at 21-25. Instead, *Amicus* asks this Court to nullify *Common Cause*’s “at the time” requirement, which would allow FEC Commissioners to issue *post hoc* statements reflecting convenient litigating positions at will. Each of the five reasons *Amicus* offers to justify that result lacks merit.

First, *Amicus* asserts that *Common Cause*’s “at the time” requirement does not impose a “firm” or “strict deadline” on when controlling Commissioners must issue a statement. Opp’n at 22. But this Court need not identify any deadline—firm, strict, or otherwise—to determine that a post-litigation statement issued more than two months after a dismissal was not issued “at the time” of that dismissal. *Cf. Regents*, 140 S. Ct. at 1909 (concluding that an agency explanation was a *post hoc* rationalization without identifying any deadline).

Second, *Amicus* incorrectly suggests that this Court had no power in *Common Cause* to dictate the timing of an FEC statement of reasons given “inherent limitations on a court’s ability to impose procedural requirements [on agencies] beyond those expressed by Congress.” Opp’n at 22. *Amicus*’s error is that it relies on inapposite cases holding that courts may not impose rulemaking procedures on agencies in addition to those in the APA. *See* Br. at 22. The rule against *post hoc* rationalizations, however, “is a rule directed at reviewing courts” that arises from APA § 706’s requirement that judicial review of agency action must be limited to the “whole record.” *Loc. 814, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen v.*

NLRB, 546 F.2d 989, 992 (D.C. Cir. 1976). The APA thus empowers this Court not only to require a statement, but also to require that it be timely.

Third, *Amicus* echoes the district court when it claims that the FEC has often issued belated statements of reasons and that courts have evaluated those statements. Br. at 22-23; *cf.* App. 045-46. But even if it is “common” for FEC controlling Commissioners to wait “weeks or months” to issue a statement, App. 045-46, all that proves is that the notoriously dysfunctional FEC honors the “at the time” requirement more in the breach than in the observance. The agency’s apparent frequent violations of the rule against *post hoc* justifications also highlight the obvious incentives Commissioners have to delay issuing a statement until they know whether one is necessary to assert prosecutorial discretion as a litigating position that nullifies judicial review. Br. at 24-26; *see, e.g., CREW v. FEC* (“*New Models III*”), 55 F.4th 918, 929-30 (D.C. Cir. 2022) (Millett, J., dissenting from denial of reh’g en banc) (explaining that FEC Commissioners “affixing a brief invocation of prosecutorial discretion to lengthy substantive analyses in statements of reasons has become commonplace” in order to “shield” that analysis “from judicial review”).

None of the cases *Amicus* cites involving review of belated FEC statements provide support for the district court’s ruling. *See* Opp’n at 23. As *Amicus* concedes, the courts in those cases “did not expressly consider[] whether the statements were timely.” *Id.* at 23-24. But in the one case where this Court did expressly consider

whether an FEC statement was timely, the Court declined to consider that statement because it was issued “after [the plaintiff] filed its complaint” and an “agency cannot *sua sponte* update the administrative record when an action is pending in court.” *CREW v. FEC* (“*Commission on Hope*”), 892 F.3d 434, 438 n.5 (D.C. Cir. 2018); *see also* Br. at 21. The district court should have followed *Commission on Hope*, which *Amicus* cannot distinguish. True, the disregarded statement there was issued more than five months after dismissal, *see* Opp’n at 25, but the Court refused to consider the statement because it was issued post-litigation, 892 F.3d at 438 n.5, like the Statement here. In any event, *Commission on Hope*’s disapproval of a five-month-late statement in no way means that the more than two-month-late statement here was issued “at the time” of the FEC’s dismissal.

Commission on Hope is also not distinguishable merely because the statement excluded there was issued by a non-controlling Commissioner, as *Amicus* asserts. *See* Opp’n at 25; App. 045 n.4. *Commission on Hope* excluded that statement from the record because of its timing, not the identity of the Commissioner who wrote it. 892 F.3d at 438 n.5. Proving the point, the Court did not exclude a separate “joint statement” by the other two non-controlling Commissioners, which was issued at “[a]bout the same time” as the controlling Commissioners’ statement. *Id.* *Amicus* emphasizes that the excluded single Commissioner’s statement “ha[d] little if any relevance for judicial review,” Opp’n at 25, but that was also true of the “joint

statement” that was allowed. The fact this Court enforced the rule against *post hoc* rationalizations to a belated statement that allegedly mattered little for judicial review anyway, highlights the importance of enforcing the rule, especially here where it should have prevented judicial review from being erroneously based on a document outside the administrative record.

Fourth, *Amicus* claims that the Statement is “adequate to facilitate meaningful review” despite not being issued at the time of the agency’s dismissal, because the Statement nevertheless “satisfies the function of *DCCC*’s request for a statement of reasons.” Opp’n at 22-23. The Court should reject this attempt to redefine what makes a statement “adequate.” By definition, “‘post hoc’ rationalizations” are “an *inadequate* basis for review” because they are not part of the “whole record.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Loc. 814*, 546 F.2d at 992 (same). A statement therefore must be contemporaneous to be “adequate to fulfill th[e] function” of “assuring meaningful judicial review” based on the record. *Common Cause*, 842 F.2d at 449 n.33.

Finally, *Amicus* falls back on describing *Common Cause*’s “at the time” requirement as a mere “remark” that was *dicta*. Br. at 24-25. But this Court’s remark follows from the “‘foundational principle of administrative law’ that judicial review of agency action is limited to ‘the grounds that the agency invoked when it took the action.’” *Regents*, 140 S. Ct. at 1907; *see also, e.g., MediNatura, Inc. v. Food &*

Drug Admin., 998 F.3d 931, 942 (D.C. Cir. 2021) (explaining that the bar on *post hoc* rationalizations “is not focused so much on the specific location of the agency’s rationale as it is on the agency’s articulation of its rationale *at the time* it takes its action”) (emphasis in original)). Also, *Common Cause* articulated this essential timing aspect of the statement-of-reasons requirement in the context of describing the values served by a statement of reasons, 842 F.2d at 449, all of which are furthered by a timely statement, *see* Br. at 23-28.

In sum, the district court erred by not applying the “at the time” requirement.

2. The district court erred by basing its consideration of the Statement on invalid grounds unrelated to timing

Amicus can also provide no support for the district court’s flawed reasons for considering the Statement despite its belated issuance. *See* Br. at 28-34.

First, *Amicus* insists that the district court was correct that the “*post hoc* rationalization rule is primarily concerned with litigation documents (or even bare assertions by counsel).” Opp’n at 36; *cf.* App. 044. But this insistence flies in the face of recent Supreme Court precedent rejecting this argument and stating that the rule’s *only* concern is timeliness. *See Regents*, 140 S. Ct. at 1909; *cf. MediNatura*, 998 F.3d at 942. In fact, at least one other federal court has already declined to follow the district court’s ruling here, explaining that “[t]he problem with [*End Citizen United PAC v. FEC*’s] approach—focusing on the *author(s)* of the *post hoc*

rationalization—is that the Supreme Court in *Regents* all but expressly rejected it.” *IAP Worldwide Servs., Inc. v. United States*, 160 Fed. Cl. 57, 76 (2022).

Indeed, *Regents* controls here. There, the Supreme Court refused to consider then-Secretary of Homeland Security Kirstjen Nielsen’s memorandum purporting to explain agency action that had occurred months before. *Regents*, 140 S. Ct. at 1904, 1907-10; *see* Br. at 28-29. *Regents* is not distinguishable because the Nielsen memorandum was issued after litigation started, as *Amicus* claims. *See* Opp’n at 38. The same is true of the Statement here and so this Court should be equally “skeptical” of its contents. *Id.* The presence of a “new” decisionmaker also fails to distinguish *Regents*, *id.*, because the Supreme Court disregarded the Nielsen memorandum due to its “timing, not the speaker,” *Regents*, 140 S. Ct. at 1908-09. Next, the fact the Nielsen memorandum belatedly offered “novel justifications” that were “nowhere to be found” in the administrative record, *see* Opp’n at 38, makes *Regents* analogous to this case, not different. Finally, following *Regents* would not “upend decades of case law permitting supplementation or elaboration by the agency decisionmaker,” as *Amicus* claims, Opp’n at 38, because there was no previous explanation for the *post hoc* Statement in this case to supplement, *see* Br. 31-33.

Unable to distinguish *Regents*, *Amicus* relies on earlier decisions that do not help its cause. *See* Opp’n at 35-36. The decisions stating that courts may not consider *post hoc* rationalizations offered in litigation documents or by counsel, *see id.* at 36,

merely illustrate Chief Justice Roberts’s observation in *Regents* that “the Court has often rejected justifications belatedly advanced by advocates,” even though the rule applies more broadly to “agency officials themselves,” 140 S. Ct. at 1909 (citing *Overton Park*, 401 U.S. at 419). The decisions *Amicus* cites from this Court, *see* Opp’n at 35-36, are also inapt because they hold that explanations from agency decisionmakers are not *post hoc* when provided to supplement an earlier explanation in response to a district court remand order. *See Menkes v. U.S. Dep’t of Homeland Sec.*, 637 F.3d 319, 337 (D.C. Cir. 2011); *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006); *Loc. 814*, 546 F.2d at 992. That is not the case here. Br. at 31-33.

Second, as End Citizens United has explained, *see* Br. at 30-32, the district court mistook the problem for the solution when concluding that the Statement was not a *post hoc* rationalization because it was “the only explanation the[controlling] Commissioners have ever offered for their decision.” App. 045. *Amicus* provides no support for the erroneous view that the rule against *post hoc* rationalizations applies only where a belated explanation contradicts a previous one. Indeed, this Court and the Supreme Court have explicitly held to the contrary. *See* Br. at 31; *see also NLRB v. Metro Life Ins. Co.*, 380 U.S. 438, 442-44 (1965) (remanding to the agency and explaining that “the Board’s action here cannot be properly reviewed” because of “the Board’s lack of articulated reasons” and the insufficiency of its *post hoc* rationalizations offered in litigation). And with good reason: If the district court were

correct, agency decisionmakers could refuse to explain their decisions unless required to do so by courts, at which point they could respond to their opponents' arguments. Br. at 31.

Finally, *Amicus* claims that “even if the Statement were a *post hoc* rationalization, remand would not be appropriate.” Opp’n at 39; *see also id.* at 18. On the contrary, remand would be *required*. Because the Statement is a *post hoc* rationalization, the FEC’s dismissal was necessarily “contrary to law” under FECA. Br. at 35-36. Upon a “contrary to law” finding, FECA provides just one remedy: the district court “may direct the Commission to conform . . . within 30 days” to the court’s order, “failing which the complainant may bring . . . a civil action” against the respondent to enforce FECA. 52 U.S.C. § 30109(a)(8)(C); *see, e.g., CREW v. FEC*, 316 F. Supp. 3d 349, 418 (D.D.C. 2018) (holding that an FEC dismissal was “contrary to law and *must* be remanded for reconsideration by the agency” (emphasis added)), *aff’d*, 971 F.3d 340 (D.C. Cir. 2020); *Antosh v. FEC*, 599 F. Supp. 850, 856-57 (D.D.C. 1984) (finding that “the Commission has acted contrary to law,” and “[a]ccordingly, the Court, as *required* by [52 U.S.C. § 30109(a)(8)(C)], remands this case to the [FEC] for proceedings consistent with this Opinion” (emphasis added)). Remand is therefore necessary not only to allow the agency the opportunity to correct its error, but also to preserve the complainant’s private right of action.

Amicus argues that the district court was correct to consider the Statement based on its speculation that remand would be “pointless.” Opp’n at 40; *cf.* App. 044-045. The alleged futility of the remedy, however, has no bearing on whether the district court erred in the first place, and so this argument effectively asks this Court to grant the FEC license to violate the rule against *post hoc* justifications with no repercussions, since it will always be possible that the agency could “express[] the same basis for their votes” on remand. Opp’n at 39.

In any case, the Court should reject *Amicus*’s speculation that remand would be pointless, for two reasons. First, the outcome on remand is not certain; as the Supreme Court explained in *Akins*, complainants have standing to challenge FEC dismissals that are declared contrary to law “even though [on remand] the FEC might reach the same result exercising its discretionary powers lawfully” because “we cannot know” how the agency will respond. 524 U.S. at 25; *see* Br. at 33. That uncertainty is only heightened here, where the agency has not appeared in the case to even claim that its decision on remand would be the same.

Second, and in any event, remand would not be pointless even assuming the FEC would reach the same result. The Supreme Court in *Regents* rejected the notion that remand would be a “useless formality” after refusing to consider an agency decisionmaker’s *post hoc* justification, because remand would nevertheless promote agency accountability, instill confidence that an agency’s explanation is not a

litigating position, and promote the orderly functioning of agency review. 140 S. Ct. at 1909; *see* Br. at 33.

While *Amicus* overlooks *Regents* and *Akins*, the authorities it relies on only further undermine its position. *See* Opp’n at 18, 40. For example, *Amicus* cites *Manin v. Nat’l Transp. Safety Bd.*, 627 F.3d 1239, 1243 n.1 (D.C. Cir. 2011), for the proposition that remand is unnecessary where there is “not the slightest uncertainty as to the outcome of a proceeding on remand,” Opp’n at 18, but ignores that *Manin* (like *Regents*) held that remanding due to an agency’s *post hoc* rationalization is *not* one of those situations, *see id.* at 1243-44 (remanding and explaining that “we are not rejecting the possibility of the Board employing on remand the reasoning the FAA has asserted [*post hoc*] in its briefing before us”). Indeed, *Manin* distinguishes other cases relied upon by *Amicus* where, in contrast, the agency was able to satisfy the “harmless error doctrine.” *Id.* at 1243 n.1 (distinguishing *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72, 79 (D.C. Cir. 1999) and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969)); *see also Prohibition Juice Co. v. United States Food & Drug Admin.*, 45 F.4th 8, 24-25 (D.C. Cir. 2022) (applying the harmless error doctrine).

In sum, the district court erred by relying on the *post hoc* Statement.

B. The Agency's Failed Vote to Dismiss Under *Heckler* Does Not Provide an Alternative Basis for Affirming the District Court

Unable to defend the district court's opinion based on its own reasoning, *Amicus* asks this Court to affirm on alternative grounds not stated in the district court's opinion. Opp'n at 27-32 & n.3. *Amicus* claims that the agency's *failed* vote to dismiss pursuant to *Heckler v. Chaney* either sufficiently explains or at least "indicates the determinative reason for" the agency's separate (and successful) vote to dismiss. Opp'n at 27, 30 (citation omitted). The district court did not entertain this theory despite being made aware of the *Heckler* vote.¹ In fact, the district court found that the Statement "is the only explanation the[controlling] Commissioners have ever offered for their decision." App. 044.

In any event, the Court should reject this alternative theory for two reasons. First, this Court's precedents requiring an FEC statement of reasons have held that a deadlocked Commission vote is inadequate to explain an FEC dismissal. Second, a failed *Heckler* vote is particularly inadequate to explain an FEC dismissal.

¹ See Pl.'s Mot. for Default J. at 6, ¶ 17, *End Citizens United PAC v. FEC*, No. 1:21-cv-1665-TJK (D.D.C. Oct. 18, 2021), ECF No. 10 (citing Statement of Reasons of Vice Chair Allen Dickerson and Comm'r Sean J. Cooksey, MURs 7340 (June 25, 2021), https://www.fec.gov/files/legal/murs/7609/7609_13.pdf ("We disagreed and voted to dismiss under *Heckler v. Chaney*.")).

1. Deadlocked FEC votes do not provide reasons for dismissal

Amicus's theory directly conflicts with this Court's precedents holding that an FEC vote, in and of itself, cannot explain the agency's subsequent dismissal. *See Democratic Congressional Campaign Comm. v. FEC* ("DCCC"), 831 F.2d 1131, 1133-34 (D.C. Cir. 1987); *Common Cause*, 842 F.2d at 449; *CREW v. FEC* ("*New Models II*"), 993 F.3d 880, 894 (D.C. Cir. 2021). In this Court's opinion first requiring statements of reasons to explain FEC deadlocks, then-Circuit Judge Ruth Bader Ginsburg rejected the FEC's argument, "citing *Heckler v. Chaney*, that deadlocks on the Commission are immunized from judicial review because they are simply exercises of prosecutorial discretion." *DCCC*, 831 F.2d at 1133-34 (citation omitted). The Court explained that a dismissal is subject to judicial review, and a statement of reasons is necessary, even if one could infer that a deadlocked vote preceding dismissal signaled an exercise of prosecutorial discretion: "[A] 6-0 decision not to initiate an enforcement action presumably would be reviewable under the words of [FECA], although the unanimous vote might represent a firmer exercise of prosecutorial discretion than a [deadlocked] 3-2-1 division." *Id.* at 1134. Just five months later, this Court reaffirmed *DCCC* and specified that the statement of reasons *DCCC* requires must issue "at the time when a deadlock vote results in an order of dismissal." *Common Cause*, 842 F.2d at 449.

Less than two years ago, in *New Models II*, this Court again reaffirmed *DCCC*'s statement-of-reasons requirement, despite also holding that dismissals based on prosecutorial discretion are nonreviewable. 993 F.3d at 894 (“The second principle that emerges from our precedents is that the Commission *must* provide a statement of reasons explaining dismissal of a complaint.” (emphasis added)). *New Models II* also reaffirmed *DCCC*'s “reject[ion of] the Commission’s assertion that unexplained deadlocked dismissals are *per se* unreviewable because they reflect nothing more than an exercise of ‘prosecutorial discretion.’” 993 F.3d at 894. As the Court explained, a statement of reasons is nevertheless necessary to determine if “the Commission ‘may have’ acted contrary to law,” even though a dismissal is nonreviewable if “the controlling Commissioners *provide a statement of reasons* explaining the dismissal turned in whole or in part on enforcement discretion.” *Id.* (emphasis added and citation omitted).

The rule that a deadlocked FEC vote, in and of itself, is insufficient to explain the reasons for a Commission dismissal follows from the black-letter administrative law requirement that an agency must “*articulate* a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added). Indeed, this Court has found that even a statement of reasons—which necessarily provides more information than a vote—can fail “to meet the standard of reasoned agency decisionmaking” if it is too “terse”

and rejects an argument “without elaboration.” *Robertson v. FEC*, 45 F.3d 486, 493 (D.C. Cir. 1995). Although *New Models II* downplayed the importance of the length of an assertion of prosecutorial discretion, *see* Opp’n at 28-29, the Court nevertheless reaffirmed that this assertion must appear in a statement of reasons, 993 F.3d at 894, like the one in that case, which “included nearly 100 words . . . explaining the reasons for exercising prosecutorial discretion,” *id.* at 887 n.5.

A statement of reasons is particularly necessary in cases where a dismissal resulting from deadlock may be explainable on prosecutorial discretion grounds so that a court can determine if the dismissal is, in fact, nonreviewable. For example, only a statement of reasons can specify whether the controlling Commissioners “relied on an *independent* ground of prosecutorial discretion” (which renders the dismissal nonreviewable), or whether they “reference[d] their merits analysis as a ground for exercising prosecutorial discretion” (which would be subject to “contrary to law” review). *New Models III*, 55 F.4th at 920-21 (Rao, J., *concurring in denial of reh’g en banc*) (emphasis added). Although *New Models II* held that a court cannot review the substance of legal reasons that controlling Commissioners offer “*alongside* the assertion of prosecutorial discretion,” Opp’n at 34 (emphasis added), this is true only where the assertion of prosecutorial discretion is offered as a “distinct ground[]” that “rest[s] squarely on prudential and discretionary considerations.” *New Models II*, 993 F.3d at 884, 886; *see also id.* 887 (emphasizing

that “[h]ere the prosecutorial discretion is exercised *in addition to the legal grounds*”) (emphasis in original).

Because a statement of reasons is necessary to explain an FEC dismissal resulting from a deadlocked vote, that vote alone cannot constitute a “sufficient expression” of the reasons for dismissal, Opp’n at 27, or “‘indicate[] the determinative reason for the final action taken,’” which *Amicus* admits would be necessary to allow the FEC to “‘elaborate later on that reason,’” *id.* at 30 (quoting *Regents*, 140 S. Ct. at 1908). *Amicus*’s argument to the contrary, if accepted, would effectively nullify the contemporaneous statement-of-reasons requirement. Controlling Commissioners already have incentives to assert prosecutorial discretion in a statement of reasons as a convenient litigation position to shield their legal reasoning from judicial review. Br. at 24-25. But if a mere deadlocked vote preceding dismissal could serve as the functional equivalent of a statement of reasons, such Commissioners could shield their legal reasoning and reasons for invoking prosecutorial discretion from the courts and the public, further undermining important values of administrative law. Br. at 23-28.

2. Failed *Heckler* votes in particular do not provide reasons for dismissal

Not only do deadlocked FEC votes in general not provide the reasons for a subsequent dismissal, but, for two reasons, a failed vote to dismiss under *Heckler* in particular could not provide such reasons. First, because the vote failed, it is not the

subject of judicial review here, which instead is the agency’s “dismissal of the complaint.” 52 U.S.C. § 30109(a)(8). “As with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners.” FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545-46 (Mar. 16, 2007). As *Amicus* acknowledges, the Commission’s vote to dismiss under *Heckler* failed, 2-3, while the agency successfully dismissed the administrative complaint when it “voted unanimously to ‘[c]lose the file’ on all allegations, effectively concluding the Commission’s investigation.” Opp’n at 12 (quoting App. 091); see, e.g., *Doe v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019) (“When the Commission ended its investigation and closed the file, it ‘terminate[d] its proceedings’ within the meaning of 11 C.F.R. § 111.20(a).”). The “dismissal of the complaint,” 52 U.S.C. § 30109(a)(8)(C), under review in this case therefore is the agency’s successful 5-0 vote to close the file, App. 091, not its failed vote to dismiss under *Heckler*.

Second, not only is the failed *Heckler* vote not under review here, but the fact of that vote also does not indicate the reasons for agency’s dismissal, let alone the determinative reason. A vote to dismiss pursuant to *Heckler* is just one of a handful of votes—including a “reason to believe” vote—that may take place (and deadlock) prior to a successful Commission vote to close the file. See FEC Statement of Policy, 72 Fed. Reg. at 12,545-46. This Court has made clear, however, that for purposes of

judicial review of the dismissal, it is the “reason to believe” vote that matters: When the Commission deadlocks on whether to approve the General Counsel’s reason-to-believe recommendation, the reasons the dissenting Commissioners voted “contrary to the recommendation of the General Counsel” provide the basis for judicial review of the resulting dismissal. *Common Cause*, 842 F.2d at 449; *see DCCC*, 831 F.2d at 1133. The Commission’s enforcement guidebook accordingly states that in “matters where the Commission does not adopt a recommendation by [the General Counsel] *to find reason to believe*, the Commissioners who voted against the recommendation are required to issue a Statement of Reasons providing the basis for their rejection of the recommendation.” FEC, Guidebook for Complainants and Respondents on the FEC Enforcement Process 14 (May 2012) (emphasis added), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf.

Among the votes besides “reason to believe” that may also take place before an FEC dismissal, a failed vote to dismiss under *Heckler* has no special claim to indicating the determinative reasons the controlling Commissioners may have voted against “reason to believe.” The two votes are distinct, may occur at different times (like here, *see* App. 087, 090), and present different legal questions. A motion to find “reason to believe” asks if “the available evidence in the matter is at least sufficient to warrant conducting an investigation.” FEC Enforcement Policy, 72 Fed. Reg. at 12,545-46. In contrast, a motion to dismiss under *Heckler* asks if the matter “merit[s]

the additional expenditure of Commission resources.” *Id.* As a result, a Commissioner’s vote in favor of a *Heckler* motion does not necessarily mean that prosecutorial discretion was a reason—let alone the “determinative” reason—that Commissioner rejected the General Counsel’s reason-to-believe recommendation. That question can be answered only by the required contemporaneous statement of reasons, which is precisely why this Court has repeatedly required such statements to explain FEC dismissals resulting from deadlock. *See supra* pp. 17-20.

II. Reviewability Under FECA is Not a Jurisdictional Issue

The district court also erred by dismissing this case for lack of subject-matter jurisdiction, Br. at 34-35, given that recent Circuit precedent has reaffirmed that, under FECA, “reviewability is not a jurisdictional issue,” *Campaign Legal Ctr. & Democracy 21 v. FEC* (“*Democracy 21*”), 952 F.3d 352, 356 (D.C. Cir. 2020) (*per curiam*) (citing *PETA v. U.S. Dep’t of Agric.*, 797 F.3d 1087, 1097 (D.C. Cir. 2015)).

Amicus’s contorted efforts to distinguish *Democracy 21* are meritless. *See* Opp’n at 40-48. *Democracy 21* is merely the latest link in an unbroken chain of Circuit and Supreme Court precedent unambiguously holding that “Section 701(a)(2) of the APA is not . . . a jurisdictional bar.” *PETA*, 797 F.3d at 1097 (citing *Oryszak v. Sullivan*, 576 F.3d 522, 524-25 & n.2 (D.C. Cir. 2009) (“[W]e conclude [that APA § 701(a)(2)] is not a jurisdictional bar.”) (citing *Trudeau v. FTC*, 456 F.3d 178, 184-85 (D.C. Cir. 2006) (“[T]he APA neither confers nor restricts

jurisdiction.”) (citing *Califano v. Sanders*, 430 U.S. 99, 107 (1977) (“[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.”)))); *see also Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (“Applying *Oryszak* and *Trudeau*, we conclude that a complaint seeking review [under APA] § 701(a)(2), . . . should be dismissed under Rule 12(b)(6), not under the jurisdictional provision of Rule 12(b)(1).”); *New Models II*, 993 F.3d at 895 (affirming grant of summary judgment—rather than dismissal for lack of subject-matter jurisdiction—where prosecutorial discretion rendered FEC dismissal nonreviewable).

For example, in *Oryszak*, the Court explained that a district court that dismissed an APA claim under Rule 12(b)(1) on the ground that the challenged decision was committed to agency discretion by law, “should [have] dismissed not for want of subject matter jurisdiction but for failure to state a claim.” 576 F.3d at 524. The Court agreed that the challenged decision was committed to agency discretion under APA § 701(a)(2), but clarified that the district court had subject-matter jurisdiction nevertheless pursuant to 28 U.S.C. § 1331, which “‘confer[s] jurisdiction on federal courts to review agency action.’” *Oryszak*, 576 at 524-25 (quoting *Califano*, 430 U.S. at 105).

In the face of this long line of authority, *Amicus* relies on a 2000 case that is not relevant here because, as *Amicus* admits, it “involved a different type of

question.” Opp’n at 42 (citing *Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 313 & n.** (D.C. Cir. 2000)). In a ruling that does not involve prosecutorial discretion or even cite the APA, *Entravision* held that the district court lacked jurisdiction to hear a petition for review of an agency order denying a request for reconsideration. 202 F.3d at 313. In so holding, the Court followed *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), and stated that “[t]o the extent that” two previous Circuit rulings not at issue here “treat nonreviewability under *Brotherhood of Locomotive Engineers* as nonjurisdictional, those holdings are disapproved.” *Entravision*, 202 F.3d at 313 n.**. *Entravision* thus has no application here since none of the cases culminating in *Democracy 21* involve “nonreviewability [of reconsideration orders] under *Brotherhood*.” *Id.*; see *supra* pp. 23-24.

This Court has indicated repeatedly that *Entravision* is irrelevant to the reviewability of agency nonenforcement decisions: On at least *five* occasions since 2000, the Court has held that APA section 701(a)(2) is not a jurisdictional bar—with nary a mention of *Entravision* or *Brotherhood*. See *Democracy 21*, 952 F.3d at 356 (decided in 2020); *PETA*, 797 F.3d at 1097 (decided in 2015); *Sierra Club*, 648 F.3d at 854 (decided in 2011) *Oryszak*, 576 F.3d at 524-25 & n.2 (decided in 2009); *Trudeau*, 456 F.3d at 185 (decided in 2006). Not only that, but in its 2011 *Sierra Club* ruling, this Court declined to follow a 2007 ruling mistakenly stating that APA 701(a)(2) is jurisdictional, because it is inconsistent with the Court’s earlier 2006

ruling in *Trudeau*. See *Sierra Club*, 648 F.3d at 854 (declining to follow *Association of Irrigated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007)).

Undeterred, *Amicus* relies heavily on *Association of Irrigated Residents* and makes the sweeping claim that this Court’s decisions in *Democracy 21*, *Oryszak*, *Sierra Club*, and *Trudeau* all should not be followed because that line of cases “begins *after*” and “cannot supersede *Entravision*.” Opp’n at 45. But *Amicus* overlooks that the *Democracy 21* line of decisions can be traced at least to the Supreme Court’s 1977 decision in *Califano* holding that the APA is not jurisdictional, 430 U.S. at 107, which predates both *Entravision* and *Brotherhood*. See *Sierra Club*, 648 F.3d at 854 (describing *Trudeau*’s reliance on *Califano*).²

Finally, unable to find support in this Court’s applicable precedents, *Amicus* appeals to the political question doctrine, but finds no support there either. See Opp’n at 46-48. At no point does *Amicus* claim that the issue in this case is a nonjusticiable “political question,” see *id.*, nor could it. As this Court has explained, “[t]hat a plaintiff complains about an action that is committed to agency discretion by law does not mean his case is not a ‘civil action[] arising under the Constitution, laws, or treaties of the United States.’” *Oryszak*, 576 F.3d at 524-26 (quoting 28 U.S.C.

² For the same reasons, *Amicus*’s reliance on *Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349 (D.C. Cir. 2000) and *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456 (D.C. Cir. 2001), see Opp’n at 42-43, is also misplaced.

§ 1331). *Amicus's* appeal to the political question doctrine also conflates justiciability with jurisdiction. *See id.* at 527 (Ginsburg, J., concurring) (“Because justiciability is not jurisdictional, a court need not necessarily resolve it before addressing the merits.”).

CONCLUSION

For the above reasons, the Court should reverse the district court’s denial of End Citizens United’s motion for default judgment.

Dated: January 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2016 in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I certify that on January 13, 2023, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Kevin P. Hancock
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