IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. **FEDERAL ELECTION COMMISSION,** Defendant.	Civil Action No. 22-35-CRC

PLAINTIFF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON'S MOTION FOR AN ORDER DECLARING THAT DEFENDANT HAS FAILED TO CONFORM TO THE COURT'S JUDGMENT

After this Court declared the Federal Election Commission's ("FEC") prior dismissal of Plaintiff's complaint contrary to law for the lack of a timely explanation and remanded this matter to the FEC with instructions to issue a "contemporaneous, adequate explanation" in the event it once again dismissed, Order, ECF No. 43 [hereinafter Mar. 17 Order], the FEC repeated its error within two weeks. On March 27, the FEC reconsidered this matter, again deadlocked, and then closed the file by majority vote. Certification, MUR 7465R (Freedom Vote) (Mar. 28, 2025), *available at* https://www.fec.gov/files/legal/murs/7465R/7465R_03.pdf [hereinafter Mar. 27 Certification]. Once again, however, it did so without an on-the-record explanation for its action, leaving the justification to be crafted sometime after.

Rather than conform with the Court's order, the Commission appears to have tried to game it, declaring that such dismissal would only become "effective" more than two weeks later, on April 15. *Id.* Neither this Court's order nor the law on which it relied to declare the prior dismissal contrary to law, however, permits such gamesmanship. Rather, they recognized that the

explanation must exist "[w]hen the FEC voted to close the file," Mem. Op. 7, ECF No. 44, as that represents "the time the [challenged] decision was made." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (quoting *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981)).

CREW therefore brings this motion to "challenge the FEC's actions in this matter" on remand, *see* Mem. Op. 13 n.2, to seek a declaration that the FEC has failed to conform and that CREW may bring a civil action "to remedy the violation involved in the original complaint," 52 U.S.C. § 30109(a)(8)(C).[1]

BACKGROUND

Notwithstanding overwhelming evidence that Freedom Vote violated campaign finance laws, and over the recommendation of the FEC's Office of General Counsel to enforce the law against the group, *see* AR1530–59,[2] the FEC deadlocked on advancing enforcement in this matter, AR1815–16. Then the Commission acted by a four-to-one vote, on November 9, 2021, to "close the file," terminating the administrative proceeding. *Id.* An explanation from the deadlocking commissioners for their deadlock that led to that dismissal did not exist, however, until March 7, 2022. AR1835–45.

Consequently, because "[a]gencies must explain their actions at the same time that they take them," this Court declared the dismissal lacked a "contemporaneous explanation" and was contrary to law. Mem. Op. 6, 9. In accordance with the FECA, this Court remanded to the "FEC to conform to the Court's ruling" within thirty days. *Id.* at 13 n.2; 52 U.S.C. § 30109(a)(8)(c); *see also* Mar. 17 Order (ordering the FEC to issue a "contemporaneous, adequate explanation" in

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[1] In accordance with Local Civil Rule 7(m), the parties conferred with respect to this motion and the FEC anticipates filing opposition.
[2] Citations to the administrative record are to documents contained in the Joint Appendix, filed July 30, 2024. *See* ECF No. 41.

the event of dismissal on remand). The Court further retained jurisdiction over this matter, noting that "[s]hould the FEC attempt to conform to the Court's ruling, CREW may challenge the FEC's actions in this matter." Mem. Op. 13 n.2.

On remand, the FEC acted on this matter on March 27, 2025. Mar. 27 Certification. On that day, the commissioners again deadlocked on moving forward with this matter against the recommendation of the FEC's Office of General Counsel, and then the Commission acted, by a four-to-zero vote, on March 27, 2025, to again terminate administrative proceedings. *Id.* at 2. According to the Certification, this time they voted to "[c]lose the file effective April 15, 2025." *Id.*

Once again, however, an explanation for that dismissal—one from the two commissioners voting against the General Counsel's recommendation that created the deadlock that led to dismissal—did not exist at the time the FEC acted. Rather, the two commissioners issued a Statement of Reasons some weeks later, on April 15, 2025, seeking to justify the four commissioners' vote to close. *See* Statement of Reasons of Vice Chairman James E. "Trey" Trainor, III and Commissioner Allen J. Dickerson, MUR 7465R (Freedom Vote) (Apr. 15, 2025), *available at* https://www.fec.gov/files/legal/murs/7465R/7465R_08.pdf.

On the same day that the statement of reasons issued, the two commissioners joined a third to issue a "policy statement" related to, but not part of the record of, these proceedings. *See* Policy Statement of Vice Chairman James E. "Trey" Trainor, III and Commissioner Allen J. Dickerson and Dara Lindenbaum Concerning Enforcement Procedures (Apr. 15, 2025), *available at* https://www.fec.gov/resources/cms-content/documents/Policy-Statement-Concerning-Enforcement-Procedures-15apr2025-FINAL.pdf. The statement was not joined by the Commissioner who voted to find probable cause in these proceedings. Mar. 27 Certification.

In the statement, the three commissioners discussed the Court's March 27, 2025 decision and declared that they "do[] not interpret the court's ruling to require that explanatory Statements of Reasons must be pre-written and issued at the moment the Commission votes to dismiss a complaint" because "[t]hat rule would pose intractable practical difficulties and hamper the Commission's ability to function as a bipartisan deliberative body." Policy Statement at 2. The Policy Statement does not serve to explain the FEC's dismissal on remand and would suffer from the same tardiness even if it tried. Even in attempting to justify the tardiness, however, the Policy Statement does not explain how the Commission is able to debate and adopt contemporary justifications in dismissals that are not the result of partisan deadlock or why the FEC, as opposed to all other agencies, must be exempted from the rule of contemporaneity.

In accordance with this Court's order, the parties filed a joint status report on April 16, 2025. The Court then ordered the parties to submit a new joint status report by May 16, 2025, informing the Court about the need for any additional proceedings. Min. Order, Apr. 17, 2025. That report was submitted alerting the Court to CREW's intention to file this instant motion.

ARGUMENT

This Court declared that the FEC's prior dismissal of CREW's complaint was contrary to law because "the agency failed to explain its actions at the time of the dismissal." Mem. Op. 6. The Court ordered the FEC to reconsider the matter and, if it dismissed it again, to "issu[e] a contemporaneous, adequate explanation of its reasons for its actions." Mar. 17 Order 1. Because the FEC did not do so within the thirty days the Court and the FECA provide, it failed to "conform with such declaration." 52 U.S.C. § 30109(a)(8)(C). Where the FEC fails to conform with a court's order, courts in this circuit have issued orders recognizing the FEC's failure and affirming the administrative complainant's right to file a civil action against the administrative respondent under section 30109(a)(8)(C). *See* Order, *Campaign Legal Ctr. v. FEC*, No. 20-cv-

809-ABJ (D.D.C. Apr. 21, 2022), *available at* https://www.fec.gov/resources/cms-content/documents/clc_order_04-21-2022.pdf; Order, *Campaign Legal Ctr. v. FEC*, No. 20-cv-1778-RCL (D.D.C. Feb. 11, 2021), *available at* https://www.fec.gov/resources/cms-content/documents/clc_201778_dc_order.pdf.

Although the FEC is "'free on remand to reach the same result' or a different one 'on different grounds,'" *Campaign Legal Ctr. v. FEC*, No. 19-cv-2336-JEB, 2025 WL 315143, at *3 (D.D.C. Jan. 28, 2025) (quoting *City of Charlottesville v. FERC*, 774 F.2d 1205, 1212 (D.C. Cir. 1985)), the FEC's dismissal here is not "free of the legal errors identified in this Court's previous Opinion and Order," *CREW v. FEC*, No. 14-cv-1419-CRC, 2017 WL 11810872, at *3 (D.D.C. Apr. 6, 2017). Rather, the defect in the FEC's dismissal identified in this Court's previous Opinion and Order was the failure of the FEC to ensure a "contemporaneous, adequate explanation," Mar. 17 Order, that is one that existed "[w]hen the FEC voted to close the file," Mem. Op. 7. Because no explanation existed at the time of the March 27, 2025 vote, the FEC repeated the same legal error that this Court declared infected the prior dismissal.

That the explanation this time was only weeks, rather than months, late is immaterial. Black letter law, as this Court recognized in its prior order, requires contemporaneity, not merely a reduction in tardiness. Nor, for that matter, does the law that this Court declared the FEC to have violated hinge on when an agency decides its action is "effective." *Cf.* Mar. 27 Certification. Nor, finally, do pleas of inconvenience permit the FEC to repeat its legal error. The FEC is obligated to reconsider the matter and not repeat its error. The FEC failed to do that here and thus failed to conform with this Court's order.

A. <u>An In-Record Explanation Must Exist at the Time the Commission Votes to Close the File</u>

As this Court recognized, "[a]gencies must explain their actions at the same time that they

take them." Mem. Op. 6. That is because courts only review the record that was "before the agency at the time the decision was made." *James Madison Ltd.*, 82 F.3d at 1095 (quoting *Env't Defense Fund, Inc.*, 657 F.2d at 284); *see also DHS v. Regents of U. of Cal.*, 591 U.S. 1, 20–21 (2020) (emphasizing 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'" (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)); *End Citizens United PAC ("ECU") v. FEC*, 69 F.4th 916, 921 (D.C. Cir. 2023) (explanation must exist "at the time when a deadlock vote results in an order of dismissal" (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988)). Here, "the time the decision was made" to dismiss proceedings on remand, *James Madison Ltd.*, 82 F.3d at 1095—the action that CREW may challenge, 52 U.S.C. § 30109(a)(8)(A)—is when a majority of the Commission voted on March 27, 2025, to close the file. Accordingly, to conform with the Court's order to "issu[e] a contemporaneous, adequate explanation of its reasons for its action," Mar. 17 Order, the record must contain some explanation for that vote that existed as of March 27, 2025. There is none, however, and consequently, the FEC failed to conform.

That the FEC's actions were to "[c]lose the file effective April 15, 2025," *see* Mar. 27 Certification, does not alter its obligations. Its obligation is to identify in-record materials that exist as of "the time the decision was made," *James Madison*, 82 F.3d at 1095 (quoting *Env't Defense Fund, Inc.*, 657 F.2d at 284)—not merely to identify an explanation crafted within whatever period the agency awards itself. The explanation must exist "when a deadlock vote results in an order of dismissal," *ECU*, 69 F.4th at 921 (quoting *Common Cause*, 842 F.2d at 449); that is when a vote occurs that creates an order of dismissal, rather than the dismissal itself. Indeed, this Court recognized in its decision that "[w]hen the FEC *voted* to close the file, and therefore dismiss CREW's complaint, the controlling commissioners were required, by law, to explain their

reasoning at the time of the dismissal." Mem. Op. 7 (emphasis added).

The vote to close the file is the "consummation of the agency's decisionmaking process" from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks omitted); *see also CREW v. FEC*, No. 22-cv-3281 (CRC), 2023 WL 6141887, at *7 (D.D.C. Sept. 20, 2023) (the vote to close the file "adversely affect[s]" legal rights). The delay of those consequences to some later date—even assuming a vote to close the file "effective" at some later date would do that, *but see Spannaus v. FEC*, 990 F.2d 643, 644 (D.C. Cir. 1993) (FECA's 60-day clock to challenge dismissal runs from vote to close the file, not from notice to complainant); *CREW v. FEC*, 799 F. Supp. 2d 78, 83 (D.D.C. 2011) ("[T]he FEC voted to dismiss … on June 29, 2010, thereby triggering Plaintiffs' 60-day clock in which to appeal the dismissal.")—does not alter the fact that those consequences will follow irrevocably from a successful vote to close, *see Doe, 1 v. FEC*, 920 F.3d 866, 871 n.9 (D.C. Cir. 2019) (the vote to "clos[e] the file" works to "terminate[] proceedings"). The APA itself contemplates that an agency may delay the effective date of an act without rendering the act non-final and outside the scope of judicial review. *See* 5 U.S.C. § 705; *see also Humane Soc'y of the U.S. v. U.S. Dep't of Agric.*, 41 F.4th 564, 571 (D.C. Cir. 2022) ("[A] duly prescribed rule is law even if it sets a future effective date."). It is enough that the agency has completed its decision-making. *NRDC v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (agency action is final and subject to challenge "as long as the interim decision is not itself subject to further consideration by the agency"); *Nat'l Treasury Emps. Union v. FLRA*, 712 F.2d 669, 671–72, 674 (D.C. Cir. 1983) (delay of effective date of adverse action did not render action non-final for purposes of review because "final agency action occurs when the agency has made an unalterable decision and only implementation of that decision remains"). Nothing in the record reveals the March 27, 2025 vote as preliminary or tentative; the Commission

did not reconvene on the selected date to finalize its earlier plan. Rather, the Commission committed itself to a course of action: to close the file, but to only notify the parties and the public later. As such, the March 27, 2025 majority vote—the one time a majority of the Commission came together to exercise the agency's powers—is the event at which the agency "took the action." *ECU*, 69 F.4th at 921. Accordingly, the agency is limited to defending its action on in-record evidence of "the grounds that the agency invoked" by March 27, 2025, "when it took [that] action." *Id.*

The rationale behind the contemporaneity rule requires the explanation to exist before the decision. For the decisionmakers—here, the majority vote that is the only means by which the Commission is lawfully empowered to act, 52 U.S.C. § 30106(c)—to have an "opportunity for self-correction," *ECU*, 69 F.4th at 923 (quoting *Common Cause*, 842 F.2d at 449), they must examine and correct the justification for their action before they commit to it. That need is all the greater for the FEC as it prepares justifications under the "rather apparent fiction" that treats a statement by a non-majority of commissioners "as if [it] were expressing the Commission's rationale for dismissal." *CREW v. FEC*, 892 F.3d 434, 437–38 (D.C. Cir. 2018). To ensure that the justification a Court will review accurately reflects the understandings behind the majority that voted to close the file, it is necessary that that same majority review and, if necessary, revise the record of that justification. If that justification is not accurate—if it, for example, reflects a non-majority's prudential concerns that were not shared by and did not motivate the determinative majority vote—then the majority must have an opportunity to revise it when they are able to withhold their vote to close. To permit otherwise would "invite mischief," *Campaign Legal Ctr.*, 2025 WL 315143, at *6, particularly where the grounds invoked may impact the nature of, or preclude entirely, judicial review of the decisive vote invited by dismissal, *see e.g., CREW v. FEC*,

993 F.3d 880 (D.C. Cir. 2021).

B. <u>The FEC Recognizes and Follows this Practice in other Situations</u>

The FEC recognizes the fact that its explanations for closing files must be decided upon and memorialized before the vote to close terminates proceedings and follows that very practice in other situations in which it dismisses cases, at least those where a majority of the Commission rejects or seeks to alter the recommendation of the Office of General Counsel. In those cases, before the vote to close the file, the FEC deliberates on its rationale for disagreeing and then agrees on an explanation in the form of a contemporaneous memorandum. *See, e.g.*, Certification, MUR 8122 (Lafazan for Congress) (Feb. 6, 2024), *available at* https://www.fec.gov/files/legal/murs/8122/8122_13.pdf (approving, prior to vote to close the file, "the Factual and Legal Analysis … subject to the revisions circulated by Chairman Cooksey's Office …."); Certification, MUR 8020 (Pat Ryan for Congress) (Mar. 30, 2023), *available at* https://www.fec.gov/files/legal/murs/8020/8020_08.pdf (rejecting General Counsel's recommendation and approving justification "subject to the edits discussed at the table"). Of course, where they adopt the General Counsel's recommendation, the Commission has before it a contemporaneous explanation which is then made public and can be reviewed in any subsequent judicial challenge. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 45 n.19 (1981).

The fact that the Commission's merits vote deadlocked, rather than reflecting a majority judgment, presents no fundamentally different scenario. *Cf.* Policy Statement. The deliberations will presumably reveal some disagreement among the commissioners. If a majority believes that the disagreement is intractable and warrants dismissal, they can, either on that date or at a subsequent meeting, memorialize their disagreement on their record without the majority adopting either side of the disagreement. *Common Cause*, 842 F.2d at 449 & n.32 (explanatory statements

by non-majorities are "not law"). If writing a fulsome explanation is still beyond their ability, they may at least create a contemporaneous "initial explanation" that "indicate[s] the determinative reason for the final action," on which they may later expand into a "fuller explanation." *Regents*, 591 U.S. at 20–21. But they may not remain silent.

To ensure the explanation does not depart, for whatever reason, from the majority's actual understanding behind its vote to close, the explanation must be "before the agency at the time the decision was made." *James Madison*, 82 F.3d at 1095 (quoting *Env't Def. Fund, Inc.*, 657 F.2d at 284). Here, the FEC once again "failed to explain its actions at the time of the dismissal," Mem. Op. 6, providing only similarly post-hoc explanations that this Court deemed non-cognizable in its March 17 decision. Accordingly, the FEC failed to conform with this Court's order to "issu[e] a contemporaneous, adequate explanation of its reasons for its actions." Mar. 17 Order.

CONCLUSION

The FEC did not "explain [its] actions at the same time that [it] t[ook] them" when it voted to close the file in this matter. Mem. Op. 6. Because the FEC failed to conform with this Court's declaration and order to issue a new "contemporaneous, adequate explanation," Mar. 17 Order, at "the time the decision was made" to dismiss this matter once again on remand, *James Madison*, 82 F.3d at 1095 (quoting *Env't Def. Fund, Inc.*, 657 F.2d at 284), CREW respectfully requests an order from this Court declaring such failure.

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Respectfully submitted,

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