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 REPLY IN SUPPORT OF ITS MOTION FOR AN ORDER DECLARING THAT DEFENDANT HAS FAILED TO CONFORM TO THE COURT'S JUDGMENT

This Court ordered the Federal Election Commission ("FEC" or the "Commission"), if it dismissed plaintiff Citizens for Responsibility and Ethics in Washington's ("CREW") complaint on remand, to provide a "contemporaneous, adequate explanation of its reasons for its actions." Order 1, ECF No. 43. Rather than do that, the record shows the FEC once again dismissed CREW's complaint without any contemporaneous basis and created a rationale only after-the-fact. Because that is the same error that this Court found infected the previous dismissal, the Commission's repeat of the error on remand demonstrates it failed to conform.

The FEC's misdirection does not remedy this repeated error. The law does not merely require a "statement of reasons prior to the commencement of litigation," FEC Opp'n 8, ECF No. 49, but rather contemporaneous ones: ones that contribute to "reasoned decisionmaking," *End Citizens United PAC v. FEC*, 69 F.4th 916, 920 (D.C. Cir. 2023) [hereinafter *ECU*] (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988)), and that the record show were before the Commission at "the time the decision was made" so that a reviewing court may

consider them, *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)); *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (reviewing court can have "n[o] more" than was before agency at time of decision). FEC counsel's attempt to salvage its actions through an unsupported suggestion that agency votes are non-final is contradicted by the record and authority, unworkable, and, in any event, irrelevant. Nor did Judge Boasberg contravene this well-established precedent to permit the FEC to uniquely rely on post-hoc rationalizations, as the FEC suggests. *See* FEC Opp'n 13–16 & n.5 (discussing *Campaign Legal Ctr. v. FEC*, No. 19-cv-2336-JEB, 2025 WL 315143 (D.D.C. Jan. 28, 2025)). Rather, the court there recognized that the FEC fails to conform when it repeats its error, and it found that an untimely rationale that nonetheless does not repeat the previous legal error can still establish conformity. *See Campaign Legal Ctr.*, 2025 WL 315143, at *2, *5. Finally, the FEC's claims of "intractable practical difficulties" with following the law, FEC Opp'n 17, do not justify its violations and, moreover, are not credible in light of the agency's admissions.

In short, the FEC is a bipartisan agency and "all actions by the Commission," including dismissing cases after remand, "occur on a bipartisan basis." *CREW v. FEC*, 923 F.3d 1141, 1142 (D.C. Cir. 2019) (Griffith, J., concurring). That there is a set of "controlling commissioners" who get to "express[]" that bipartisan majority's "rationale" under a "rather apparent fiction," *CREW v. FEC*, 892 F.3d 434, 437–38 (D.C. Cir. 2018), does not permit that set to rely on "*post hoc* rationalization[s]" that were not before the Commission at the time of that bipartisan decision and that did not motivate the bipartisan majority "when [they] took the action" to close the file, *DHS v. Regents of U. of Cal.*, 591 U.S. 1, 20–21 (2020). Rather than excuse the Commission from "foundational principle[s]," *ECU*, 69 F.4th at 921, the FEC's

bipartisan structure requires strict adherence to the rule that limits its ability to defend its actions to the explanations that were before the bipartisan decisionmakers at "the time the decision was made." *James Madison Ltd.*, 82 F.3d at 1095; *see also Hill Dermaceuticals*, 709 F.3d at 47. Because there is no such explanation here, and because that is the same error this Court identified before it remanded this action, the FEC failed to conform.

A. Well-Established Precedent, and This Court's Order, Require a Contemporaneous Explanation, Not Merely a Pre-Litigation One

Applying "well-established circuit precedent," the D.C. Circuit recognized 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'" being reviewed. *ECU*, 69 F.4th at 918, 921–22 (quoting *Regents*, 591 U.S. at 20). That principle limits agencies to defending their actions to the justifications existing "at the time the decision was made." *James Madison Ltd.*, 82 F.3d at 1095. "[B]lack-letter administrative law" provides that "a reviewing court 'should have before it *neither more* nor less information than did the agency *when it made its decision.*" *Hill Dermaceuticals*, 709 F.3d at 47 (emphasis added) (quoting *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). "[T]o review more than the information before the [decision-maker] at the time she made her decision risks [courts] requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations." *Heckler*, 749 F.2d at 792.

This Court followed that well-established precedent to declare the FEC's first dismissal of CREW's complaint was contrary to law. *See* Mem. Op. 6, ECF No. 44 ("The FEC's dismissal of CREW's complaint was contrary to law because the agency failed to explain its actions at the time of the dismissal."). Accordingly, it ordered the FEC to conform by "deciding whether to dismiss Plaintiff's administrative complaint" on remand "and issuing a contemporaneous,

adequate explanation of its reasons for its actions" if it again dismissed. Order 1.

Nevertheless, the FEC claims that the "real gravamen of the Commission's error" in *ECU* and in its first dismissal here "was its failure to issue a statement of reasons prior to the commencement of litigation against it." *See* FEC Opp'n 8. The FEC argues that its new practice here of delaying notification until after post-hoc rationalizations are manufactured addresses this "real gravamen" by preventing pre-explanation litigation, and thus it need not provide an explanation contemporaneous with its decision to dismiss. Not so. That the FEC's errors in *ECU* and in its first dismissal here were particularly egregious does not serve to permit it to repeat its error, this time a bit less egregiously. In applying *ECU*, this Court did not merely order the FEC to conform by issuing an explanation at some point before CREW brought litigation—a conceptual oddity since this litigation was already pending—but rather ordered the FEC to issue one "contemporaneous" with its decision. Order 1.

The FEC attempts to defend its myopic focus on the fact that *ECU* recognized that tardy explanations may simply reflect a "convenient litigating position[]," and that the rule against untimely explanations works to combat that potential evil. 69 F.4th at 923. That is not the sole value the D.C. Circuit recognized, however, behind the principle of contemporaneity. Rather, the rule "serves three 'important statutory policies' of § 30109," including "'contribut[ing] to reasoned decisionmaking by the agency' by 'ensuring reflection and creating an opportunity for self-correction.'" *Id.* at 920 (quoting *Common Cause*, 842 F.2d at 449). A "non-contemporaneous statement" does not "contribut[e] to reasoned decisionmaking by the Commission [n]or provid[e] an opportunity for self-correction in any meaningful sense." *Id.* at 923 (internal quotation marks omitted). To contribute to "reasoned decisionmaking," the explanation must exist contemporaneously with and be part of that decisionmaking process. It

would be unlawful, for example, for the Commission to dismiss cases based on a coin flip even if it could manufacture a justification after that fact but before a legal challenge was brought. *See Ohio v. EPA*, 603 U.S. 279, 292 (2024) ("An agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained.'"); *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012) ("To survive arbitrary and capricious review, an agency action must be the product of reasoned decisionmaking."). That is why *ECU* held that the statement is required "at the time when a deadlock vote results in an *order* of dismissal," rather than at the time of dismissal itself. *ECU*, 69 F.4th at 921 (emphasis added). That order issues from the Commission at the time of the vote, even if it is only purportedly "effective" at some later time, because the vote to close the file is the event from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). In the absence of any in-record evidence contemporaneous with that decision that reveals its justification, the decision is, to a reviewing court, indistinguishable from a coin flip.

That need for contemporaneous explanations is of paramount importance to a Commission which is granted the privilege to operate under the "fiction" that permits a non-majority to "express[] the [majority's] rationale for dismissal." *CREW*, 892 F.3d at 437–38. For all other agencies, the explanation must issue from the "decisionmakers," *Loc. 814, Int'l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976), and thus there is little risk that the offered explanation will depart from the decisionmakers' actual subjective intents or lack "an opportunity for self-correction" by those same persons, *ECU*, 69 F.4th at 923, but the same is not true of the FEC. Rather, after a deadlock on the merits, a majority must decide if that deadlock is so intractable that a dismissal is warranted: a decision that will be specific to that particular disagreement and the commissioners' desire to submit that disagreement to a court for judicial

resolution. Statement of Commissioner Ellen L. Weintraub on the Opportunities Before the D.C. Circuit in the *New Models* Case to Re-Examine *En Banc* Its Precedents Regarding 'Deadlock Deference' 9 (Mar. 2, 2022) [hereinafter Weintraub Statement], https://www.fec.gov/resources/cms-content/documents/2022-03-02-ELW-New-Models-En_Banc.pdf (commissioners who wish to proceed will nonetheless vote to close "in hopes the complainant will sue the agency and obtain a judicial reversal"). Because the explanation will be drafted by someone other than the majority that voted to close, there is significant risk that the explanation will not reflect the disagreement that motivated the vote to close unless the explanation is reviewed and agreed to before the action becomes final.

This is hardly a theoretical possibility. For example, Commissioner Weintraub previously noted that when she provided the necessary fourth vote to close the file in a matter, a controlling statement of reasons issued about thirty days later by two other commissioners invoked justifications for her vote that were not, in fact, her motivations. *See* Weintraub Statement at 14–15 ("[W]hen [the two commissioners] wrote that they voted so 'in exercise of our prosecutorial discretion,' the 'our' referred to the individual discretion of the two of them, not that of the Commission"). That after-the-fact and erroneous invocation then worked to preclude judicial review of the legal dispute behind the deadlock that Commissioner Weintraub sought to submit to judicial review when she provided the decisive vote to close the file. *See id.* at 9; *see also CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021). Had Commissioner Weintraub been presented with the statement prior to the vote to close—or even a more spartan "initial explanation" that at least sketched out these purported justifications at the time, *see Regents*, 591 U.S. at 20–21—she could have sought correction or withheld her vote; but as she did not have access to the yet to be created explanation, she could not. It appears Commissioner Broussard was similarly unaware of

the justification that would be used to defend her first vote to close this matter, as her statement of reasons did not reflect any disagreement over the prudence of proceeding that her colleagues would subsequently cite. *See* AR1824–32 (citing "the statute of limitations" as the disagreement motivating dismissal). The current act-first-then-wait-and-see-the-justification-for-your-act approach hardly contributes to "reasoned decisionmaking," *ECU*, 69 F.4th at 920, and "invite[s] mischief," *Campaign Legal Ctr.*, 2025 WL 315143, at *6.

Essentially conceding that it may only defend its actions with in-record evidence of an explanation contemporaneous with the final decision, the FEC nonetheless suggests that these concerns are satisfied by its new policy because, it claims, the Commission's decision to close the file may be altered at any time before the dismissal becomes "effective" and is published. *See* FEC Opp'n 9–10 (stating that "[d]uring the 30 days between the vote certification and the closing of the file, the Commission may come to a consensus (or at least a majority) after an initial split; reverse course entirely; or correct errors"). FEC counsel's litigation position, however, has no basis in the record or the FEC's policies.

The vote on remand here was to "[c]lose the file effective April 15, 2025." *See* Certification 2, MUR 7465R (Freedom Vote) (Mar. 28, 2025), *available at* https://www.fec.gov/files/legal/murs/7465R/7465R_03.pdf. There is no suggestion in the record that the vote is non-final, may be reconsidered, or is in any way preliminary. Rather, it records a definite and inevitable act: the closure of the file on a date certain. Similarly, the post-hoc policy statement of certain commissioners defending the agency's acts here does not claim that additional time was needed to review draft explanations and reconsider the matter, but rather reflects the belief that statements are to be drafted only *after* an action is finalized and irrevocable. *See* Policy Statement of Vice Chairman James E. "Trey" Trainor, III and

Commissioners Allen J. Dickerson and Dara Lindenbaum Concerning Enforcement Procedures 3 (Apr. 15, 2025), *available at* https://www.fec.gov/resources/cms-content/documents/Policy-Statement-Concerning-Enforcement-Procedures-15apr2025-FINAL.pdf ("[W]riting of a Statement of Reasons typically cannot begin until after deliberations have occurred and after votes have been taken."). In fact, the policy statement justifies this by pointing to their desire to craft post-hoc rationalizations that were not presented to the commissioners when they voted to close the file. *See id.* (claiming post-vote time needed to create new justifications that "engag[e]" with general counsel reports). Similarly, the FEC's purported policy on file closures makes no mention of any time for reconsideration, but rather flatly states that once the Commission votes to close, "that action *will* be effective 30 days after." *FEC implements new enforcement case closure procedures* (Apr. 3, 2024) (emphasis added), https://www.fec.gov/updates/fec-implements-new-enforcement-case-closure-procedures.[1] Indeed, FEC counsel admits that this time is not used for reconsideration, but to "engage with the points and arguments raised by OGC and their contrary-minded colleagues in the executive session," FEC Opp'n 18; in other words, they used the time to manufacture post-hoc rationalizations that were not expressed in deliberations and could not have motivated the majority.

In contrast, the FEC offers nothing but its own counsel's briefing to suggest a different rule applies. The only authority it cites is a recent district court decision that it claims holds that

[1] This "policy" oddly appears to exist only in the form of a press release announcing it. The FEC has not released nor made available the actual text of the policy the Commission presumably voted to endorse. Nor did the FEC follow any rulemaking procedures as would be needed to adopt a change that is "determinative of the issues or rights to which it is addressed" of complainants by altering the time in which they may bring suit. *See CropLife Am. v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003). In any event, such policy cannot override or alter the well-established precedent and foundational principals of judicial review under the FECA or the Administrative Procedures Act. *See Loper Bright Ents. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

"Commissioners nevertheless remain free to break the deadlock, if possible, correct errors, or change course." FEC Opp'n 12 (citing *Campaign Legal Ctr.*, 2025 WL 315143, at *8). More will be said on this opinion shortly, but for now it is enough to say the FEC's characterization bears no resemblance to the opinion. Rather than conclude that a vote-to-close is non-final, the district court merely noted that the FEC's suggestion (then made without any cited backup) of non-finality would, if true, be an additional reason to rule for the FEC:

> And if the Court accepts the agency's contention that the 30-day period between the vote and the vote's formal effective date allows "the Commission to come to consensus (or at least a majority) after an initial split, reverse course entirely, or correct errors," the Statement of Reasons are indeed contemporaneous with the no-reason-to-believe decision.

Campaign Legal Ctr., 2025 WL 315143, at *7 (cleaned up); *see also* FEC's Opp'n to Pls.' Mot. for an Order Declaring that Def. has Failed to Conform to the Remand Order 9 n.6, No 19-cv-2336-JEB (D.D.C. Nov. 25 , 2024), ECF No. 94, *available at* https://www.fec.gov/resources/cms-content/documents/fec-opp-pls-mot-order-decl-def-failed-conform-11-25-2024.pdf (making this claim without citation). That is far from authority for the FEC counsel's idiosyncratic interpretation of the FEC's processes.

It is also unclear how exactly the FEC's interpretation would play out even if it were true. The Commission may only act by majority vote. *See* 52 U.S.C. § 30106(c). Once a majority decides to close the file, it could not reverse course except by another majority. What happens if after that vote to close, half of the original deadlock desires to correct errors, or change course after seeing their colleagues controlling explanation? By withdrawing their support, does that revoke the vote to close? Or must they somehow form a new majority notwithstanding the fact that their previous withholding of their vote would have been sufficient? And what if the membership of the Commission changes within those thirty days such that there is no longer a

quorum to act?

In the end, FEC counsel's suggestion does not alter the fact that the vote to close is a final agency act for which there must be a contemporaneous adequate explanation, even if the FEC might later reverse course. "[*A*]*ny* agency action is *always* subject to displacement …." *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 80 (D.C. Cir. 2020). "If the mere possibility of displacement rendered a governing agency [action] non-final for purposes of judicial review, no [action] would ever count as final." *Id.* As long as the legal consequences will flow without additional actions from the decisionmakers, then the act is final. *Id.* at 78; *see also Nat'l Treasury Emps. Union v. FLRA*, 712 F.2d 669, 671–72, 674 (D.C. Cir. 1983) (action is final if "only implementation of that decision remains").

Here, there is no dispute that the vote to close was not replicated and there were no additional steps the Commission needed to undertake before the case was dismissed. The vote thus constituted a final agency action. As such, it could only be done in the presence of an adequate rationale, *see Tourus Recs., Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001), and the agency is limited to defending its acts with in-the-record evidence of its rationale "at the time the decision was made," *James Madison Ltd.*, 82 F.3d at 1095 (internal quotation marks omitted); *see also Tourus Recs.*, 259 F.3d at 737 (court could consider pre-decisional memoranda because they present a "'contemporaneous explanation of the agency action,' and are therefore appropriate subjects for [the court's] consideration" and "disclose[d] the factors that were considered" (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973) *and Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). Because the FEC presented no contemporaneous records of the factors considered here, and because its failure is the same error that infected its prior dismissal and which it was ordered not to repeat, the FEC failed to conform with this

Court's judgment.

B. Judge Boasberg Did Not Contravene This Precedent

Against this "well-established … precedent," *ECU*, 69 F.4th at 918, the FEC relies heavily on a recent decision by Judge Boasberg in another matter considering the FEC's actions on remand. *See* FEC Opp'n 13–16 & n.5 (accusing CREW of failing to "acknowledge the court's holding in that case or explain its relevance to the instant Motion") (citing *Campaign Legal Ctr.*, 2025 WL 315143). But the FEC simply misrepresents Judge Boasberg's decision.

In that case, the FEC's dismissal was held contrary to law, and affirmed by the D.C. Circuit, because the controlling analysis "rested on a flawed and overly broad interpretation of the internet exemption." *See Campaign Legal Ctr.*, 2025 WL 315143, at *2 (discussing *Campaign Legal Ctr.*, 106 F.4th 1175, 1194–95 (D.C. Cir. 2024); *Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 64-66 (D.D.C. 2022)). The Commission was ordered on remand to "sketch the bounds of the internet exemption and more fully analyze the facts before it" within thirty days of the September 20 remand. *Id.* (cleaned up). Within that time, on October 10, the FEC reconsidered the matter, voted 2-4 against reason to believe, then 5-1 to close the file effective in thirty days. *Id.* Prior to that effective termination date, the FEC notified the court on October 11 about its actions, and then submitted on October 30 evidence that the Commission had considered on October 10 whether to proceed with sketching the bounds of the internet exemption in the enforcement proceeding or whether to initiate rulemaking, which the Commission subsequently did on October 23 by a majority vote. *Id.* Statements of Reasons then issued on November 5 and 6, with five commissioners grounding dismissal in reasons other than the internet exemption. *Id.*

The plaintiffs sought an order from the court declaring that the FEC had failed to conform. Relevant here, Judge Boasberg—echoing this Court's judgment in another matter, *see*

CREW v. FEC, No. 14-cv-1419-CRC, 2017 WL 11810872 (D.D.C. Apr. 6, 2017)—reasoned that conformance only requires the agency to "not repeat the previously identified shortcomings." *Campaign Legal Ctr.*, 2025 WL 315143, at *3. "As the Statements of Reasons ma[d]e clear," the Commission's reconsideration "was not based on any misapprehension of the internet exemption the D.C. Circuit had previously rejected." *Id.* at *5. Rather, it "sidestepped on remand the maladies diagnosed by th[e] [c]ourt and the D.C. Circuit and thus conformed with the declaration that its earlier action was contrary to law." *Id.* Although the plaintiffs also sought to challenge the remand statement as untimely, *see id.* at *6, that error could not establish a failure to conform since it was a new and different kind of error.

Here, of course, the "maladies diagnosed by this Court," *id.* at *6, was the absence in the record of any explanation contemporaneous with the vote to close, *see* Mem. Op. 6. Accordingly, here, and unlike in *Campaign Legal Center*, the failure to include a contemporaneous rationale is a failure to conform.

Ignoring this relevant discussion, the FEC turns instead to the court's treatment of the plaintiffs' assertions of new errors which, reflecting their non-centrality to the issues before the court, were set out in a terse footnote and two pages of a reply brief. *See* Pls.' Mot. for an Order Declaring that Def. has Failed to Conform to the Remand Orders 4 n.1, *Campaign Legal Ctr. v. FEC*, 19-cv-2336-JEB (D.D.C. Oct. 30, 2024), *available at* https://www.fec.gov/resources/cms-content/documents/clc-pls-mot-order-decl-def-failed-conf-remand-order-10-30-2024.pdf; Pls.' Reply in Further Support of Mot. for an Order Declaring that Def. has Failed to Conform 9–12, *Campaign Legal Ctr. v. FEC*, 19-cv-2336-JEB (D.D.C. Dec. 13, 2024), *available at* https://www.fec.gov/resources/cms-content/documents/clc-pls-reply-in-further-supp-of-mot-for-an-order-12-13-2024.pdf. Yet even assuming the court's discussion of the plaintiffs' claims of

novel errors is relevant to the question of conformity before this Court, the FEC again misstates Judge Boasberg's opinion.

In considering whether statements issued after the thirty days to conform would render the act nonconforming, the court noted that the purpose of these statements and their compliance with the rule of contemporaneity existed to "facilitate contrary-to-law, rather than conformance, review." *Campaign Legal Ctr.*, 2025 WL 315143, at *7. "[T]he two modes of review," the court reasoned, "differ in meaningful ways." *Id.* "The conformance court is not asked to perform the kind of top-to-bottom merits-based appraisal that the Statement of Reasons is designed to enable." *Id.* Accordingly, the court did not examine the timeliness of a statement in relation to a vote to close, but instead considered their probity on the separate question of whether the Commission's acts within the thirty days were in conformity.

The court did attempt to "glean some important lessons from *ECU*'s treatment of the Statements of Reasons," noting that there was less risk "that the FEC will strategically adopt *post hoc* rationalizations that prejudice litigants" when a matter returns to a court after remand. *Id.* The court then concluded that the statements "reflect the Commissioners' real-time thinking" for purposes of this distinct review, and that they were "within the realm of reason, in this context, to qualify as a contemporaneous rationale." *Id.*[2]

Even assuming the district court was correct to apply this rule of reason rather than the "foundational principle[s] of administrative law," *ECU*, 69 F.4th at 921, this conclusion has no bearing here. This is not a case where the FEC is submitting after-the-fact evidence to show that there was a contemporaneous in-record explanation at the time of the vote to close. The error

[2] As already noted above, the court then stated that the FEC's suggestion that the vote was not final until the dismissal became effective, if true, would support its conclusions. *Id.*

here is not simply that the statements of reasons is untimely for the purposes of conformance review; rather the error is that the untimeliness of the statements and the lack of any other in-record evidence of the motivation to close the file demonstrate that the FEC has committed the same legal error this Court identified in its March 17 opinion and order: the failure to memorialize in the record a contemporaneous adequate rationale for the vote to close. Accordingly, the relevant portion of Judge Boasberg's decision supports finding the FEC failed to conform here.

C. The Commission Can Memorialize Its Contemporaneous Rationale

Turning from its legal obligations, the FEC at last argues that it, and it alone among all agencies, is uniquely subject to "practical realities" and "intractable practical difficulties" that make memorializing contemporaneous rationales impossible. FEC Opp'n 1, 17. Yet the FEC's resort to hyperbolic strawmen does not contravene its admission that the FEC can and does satisfy its legal obligations in other matters and nothing prevents it from doing so in deadlocked cases.

Turning first to the FEC's hyperbole, neither the law nor CREW ask the Commission or a subset of commissioners to publish to the public "its statement of reasons for dismissing an enforcement MUR at the time they vote to dismiss." FEC Opp'n 1. The rule against *post hoc* explanations relates to the timing of the explanation and the need for contemporaneous records showing the explanation was "before the [decision-maker] at the time she made her decision," *Heckler*, 749 F.2d at 792, and was the decisionmakers' justification "at the time the decision was made," *James Madison Ltd.*, 82 F.3d at 1095. The rule also does not require a statement that could become "operative immediately in the event of a split vote." FEC Opp'n 11. The split vote is neither the act of the agency, *see* 52 U.S.C. § 30106(c) (the FEC acts only by majority votes), nor the final act that is on review, *see* 52 U.S.C. § 30109(a)(8)(A) (complainants may challenge

the "order of the Commission dismissing the complaint"); *see Campaign Legal Ctr. v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024) ("[A] deadlock will give rise to a dismissal only if a majority of Commissioners separately votes to dismiss the complaint ….").[3] Nor need the commissioners come to deliberations prepared with "fully written statements," FEC Opp'n 11, or "prejudg[ements]," *id.* at 18. Rather, they are permitted to memorialize the rationale that emerges through deliberation at the time of resolution, when there is an opportunity for the majority to correct errors, in an "initial explanation" that "indicates the determinative reason for the final action," on which they may later expand into a "fuller explanation." *Regents*, 591 U.S. at 20–21.

In contrast with the FEC's hyperbole, this Court was very clear in its March 17 order what the FEC was required to do to conform and the sequence in which it must act. After remand, "all the FEC would have to do is [1] *review* the already-written reasons for dismissal, [2] *update them if needed*, [3] *hold another vote* on probable cause and/or dismissal, and [4]

[3] This fact answers the FEC's question in a footnote of its opposition about the relevance of the majority's rationale. FEC Opp'n 12 n.4. The deadlock vote is not itself subject to review and could not be challenged if it did not result in a majority's vote to close the file. It is the majority vote to close, and the rationale behind that majority, that is relevant to judicial review. *See* 52 U.S.C. § 30109(a)(8)(C). As the FEC surmises, where a majority dismisses in the face of a deadlock, "the reasoning of the members of the majority … as to why they voted to close the file will simply be that the case was deadlocked on the merits." FEC Opp'n 12 n.4. But then it is vital to know what that majority thought the deadlock was; some other deadlock may not have motivated them to close the file. For example, a deadlock over the prudence of moving forward would typically *not* motivate a vote to close, because that sort of deadlock would not prevent enforcement from proceeding. Similarly, a commissioner may dismiss in the hope of sending a particular deadlock issue to judicial review; an explanation which omitted that issue, or relied on other issues that may prevent a court from reaching it, would contravene her intent and not reflect that rationale for the decision when it was made. Within the constraints of describing the actual disagreements that motivated the majority to close the file, courts have reasonably then looked to the controlling commissioners to defend their position, *see DCCC v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987), but none have suggested that controlling commissioners may add "new" reasons, *Regents*, 591 U.S. at 21, or unilaterally take new action without four affirmative votes that would permit them to "deal with the problem afresh," *id.*; *see* 52 U.S.C. § 30106(c).

issue the controlling statements of reasons." Mem. Op. 12 (emphasis added). Rather than imposing an impracticable burden, this Court recognized that these steps impose only a "relatively modest amount of work" to accomplish "in 30 days." *Id.* at 13. Getting this command backwards, the record reveals the FEC first "h[e]ld another vote" and only then did a subset of commissioners "review" the statements and "update them."

"[I]ntractable practical difficulties" did not compel this backwards practice. FEC Opp'n 17. The FEC admits that the Commission can and does memorialize justifications at the same time as it votes to close the file. *See* FEC Opp'n 19. And it admits that the Commission's process, even in the event of a deadlock, creates contemporaneous rationales arrived through deliberation before there is a vote to close. *Id.* at 17–18. If that is the case, nothing prevents the commissioners—whether the full majority or the subset constituting the "controlling commissioners," *CREW*, 892 F.3d at 437—to then and there make a record of that resolution to serve as the explanation for the majority's subsequent vote to close when the explanation would contribute to "reasoned decisionmaking" and there is an "opportunity for self-correction," *ECU*, 69 F.4th at 920 (cleaned up). They may later provide a "fuller explanation" if needed. *Regents*, 591 U.S. at 20. But they may not add unanticipated issues later, either to address previously unaddressed "arguments raised by OGC and their contrary-minded colleagues," FEC Opp'n 18, or to include idiosyncratic justifications that did not in fact motivate the majority vote, *see, e.g.*, Weintraub Statement 14–15; *Regents*, 591 U.S. at 21 (agency "may not provide new" reasons after deciding).

CONCLUSION

The Commission 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,"

Order 1, at "the time the decision was made" to dismiss this matter once again on remand, *James Madison Ltd.*, 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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