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 SUMMARY JUDGMENT OR DEFAULT JUDGMENT

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Introduction 1

Argument 2

A. CREW is Entitled to Summary Judgment 2

B. The Court May Award Default Judgment 9

Conclusion 11

TABLE OF AUTHORITIES

Cases

Am. All. Ins. Co. v. Eagle Ins. Co., 92 F.3d 57 (2d Cir. 1996) 10

Am. Forest Res. Council v. Ashe, 946 F. Supp. 2d 1 (D.D.C. 2013) 8

Campaign Legal Ctr. v. 45Committee, 666 F. Supp. 3d 1 (D.D.C. 2023) 6

Campaign Legal Ctr. v. Iowa Values, No. 1:21-cv-389-RCL, 2024 WL 81278, (D.D.C. Jan. 8, 2024) 6

Clean Wis. v. Env't Prot. Agency, 964 F.3d 1145 (D.C. Cir. 2020) 2, 7, 8

CREW v. FEC, 209 F. Supp. 3d 77 (D.D.C. 2016) 2, 3, 5

CREW v. FEC, 299 F. Supp. 3d 83 (D.D.C. 2018) 6

DHS v. Regents of Univ. of Cal., 591 U.S. 1 (2020) 1, 5, 8, 9

ECU v. FEC, 69 F.4th 916 (D.C. Cir. 2023) ..... passim

Elrod v. Burns, 427 U.S. 347 (1976) 8

End Citizens United PAC v. FEC, No. 21-cv-1665-TJK (D.D.C. Sept. 7, 2023) 5

Env't Def. Fund, Inc. v. Costle, 657 F.2d 275 (D.C. Cir. 1981) 3

FBME Bank Ltd. v. Lew, 142 F. Supp. 3d 70 (D.D.C. 2015) 8

Grims v. District of Columbia, 794 F.3d 83 (D.C. Cir. 2015) 9

In re Carter-Mondale Reelection Comm., Inc., 642 F.2d 538 (D.C. Cir. 1980) 8

James Madison Ltd. v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996) 1, 3, 7, 9

Keegel v. Key W. & Caribbean Trading Co., 627 F.2d 372 (D.C. Cir. 1980) 9, 10

Limnia, Inc. v. U.S. Dep't of Energy, 857 F.3d 379 (D.C. Cir. 2017) 9

Nat'l Fed'n of Fed. Emps. Loc. 1669 v. Fed. Lab. Rels. Auth., 745 F.2d 705 (D.C. Cir. 1984) 9

Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986) ..... passim

Oviedo v. Wash. Metro. Area Transit Auth., 948 F.3d 386 (D.C. Cir. 2020) 7

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) 8

Tourus Recs., Inc. v. Drug Enf't Admin., 259 F.3d 731 (D.C. Cir. 2001) ..... passim

United States v. Carmack, 329 U.S. 230 (1946) 5

Whittaker v. District of Columbia, 228 F.R.D. 378 (D.D.C. 2005) 10

Statutes

52 U.S.C. § 30109 ..... passim

Regulations

Fed. R. Civ. P. 55 10

Fed. R. Civ. P. 56 2

INTRODUCTION

The FEC admits that there is no "dispute as to the facts in this matter." FEC Opp. 8, ECF No. 38. The FEC admits that "the Commission[] issu[ed] … an untimely explanation here" for its dismissal that CREW challenges. *Id.* at 20; *accord id.* at 13 (conceding "the Commission's admittedly untimely explanation"). The FEC does not claim that the dismissal below was "self-explanatory" in light of the evidence that Freedom Vote independently satisfied the political committee statutory tests in 2014, 2015, and 2016 and exhibited a major purpose to influence elections in those same years, and the fact that there was no statute of limitations bar to enforcement. *See* CREW Mot. for Summ. J. at 9–11, 16-17, ECF No. 35. There is thus no genuine dispute that the FEC failed to satisfy the "'fundamental' requirement of administrative law" to "'set forth its reasons' for its decision," *Tourus Recs., Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001), in a statement "before the agency at the time the decision was made," *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996). Accordingly, there can be no dispute that its "failure to do so constitutes arbitrary and capricious agency action," *Tourus Recs.*, 259 F.3d at 737, rendering the dismissal contrary to law, *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986), and entitling CREW to judgment in its favor.

The FEC's attempts to nevertheless evade judgment here fail. It cannot distinguish any authority that establishes that a post-hoc statement is no different from silence in fulfilling the agency's obligation to "offer[] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024). Both an action for which there is no explanation and one for which there is only a post hoc rationalization are "arbitrary and capricious." *Tourus Recs.*, 259 F.3d at 737; *see also DHS v. Regents of Univ. of Cal.*, 591 U.S. 1, 22, 30 (2020) (agency's post hoc rationalization was "not properly before" the court, leaving action inadequately explained and thus arbitrary and

capricious). The FECA does not afford a different rule for the FEC. *See End Citizens United PAC v. FEC*, 69 F.4th 916, 919, 923 (D.C. Cir. 2023) [hereinafter *ECU*] (dismissal supported only by post-hoc rationalization is arbitrary and capricious and contrary to law).

The FEC essentially concedes as much but claims instead the Court "should" nonetheless exercise discretion to deny summary judgment in favor of a voluntary remand. *See* FEC Opp. 1. Summary judgment, however, is not discretionary, while the FEC's request for voluntary remand is subject to "broad discretion." *Clean Wis. v. Env't Prot. Agency*, 964 F.3d 1145, 1174 (D.C. Cir. 2020). Even if the Court could decline judgment in favor of remand, that exercise would be inappropriate where the FEC seeks remand to prejudice CREW and to repeat its legal error and delay proceedings.

CREW respectfully requests the Court enter summary judgment against the FEC. Its unexplained dismissal is the definition of "arbitrary or capricious" action that is "contrary to law." *Orloski*, 795 F.2d at 161. In the alternative, the Court may enter default judgment in light of the FEC's willful default, the FEC's continued refusal to offer any explanation for that default, the prejudice it seeks to inflict on CREW, and the lack of even a hint of meritorious defense in light of the parties' agreement that the dismissal below is without any cognizable justification.

ARGUMENT

A. CREW is Entitled to Summary Judgment

"The Court will grant summary judgment 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *CREW v. FEC*, 209 F. Supp. 3d 77, 85 (D.D.C. 2016) (quoting Fed. R. Civ. P. 56(a)). As the FEC concedes, there is no "dispute as to the facts in this matter." FEC Opp. 8. There was no explanation "before the [Commission] at the time the decision [to dismiss] was made," *James*

Madison Ltd., 82 F.3d at 1095 (quoting *EDF, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981)), and accordingly no explanation before the Court that could justify the FEC's action. The FEC does not contend the dismissal was self-explanatory because, in light of the conclusive evidence, it was not. Rather, the FEC dismissed without any reason for doing so, thereby engaging in quintessential "arbitrary and capricious agency action." *Tourus Recs.*, 259 F.3d at 737. Consequently, the unexplained and inexplicable dismissal was contrary to law, *Orloski*, 795 F.2d at 161, and CREW is "entitled to judgment as a matter of law," *CREW*, 209 F. Supp. 3d at 85.

Nevertheless, the FEC attempts to evade the march of logic by claiming that its failure actually "prevents the Court from conducting the 'contrary to law' analysis FECA commands." FEC Opp. 1. The FEC cites no authority for its remarkable proposition that it, unlike every other agency, may act without explanation or justification. Rather, its position is flatly contradicted by precedent and logic.

The FEC concedes that precedent establishes the "uncontested principle that an agency must provide reasons for the decisions it makes," and that its failure to provide them renders the action arbitrary and capricious, based on the authorities cited by CREW. FEC Opp. 16. Yet it suggests, with no basis in authority, a different rule somehow applies for an untimely explanation. *Id.* at 17. Not so. Judicial review is limited to the explanation that was "before the agency at the time the decision was made," *James Madison Ltd.*, 82 F.3d at 1095; *ECU*, 69 F.4th at 921 (FEC must defend on "the grounds that the agency invoked when it took the action" and thus explanation must be "issued 'at the time when a deadlock vote results in an order of dismissal'"). For purposes of judicial review, therefore, an untimely explanation is no different than no explanation: neither are part of the record the court may review.

Accordingly, the D.C. Circuit applied "well-established circuit precedent," including authority regarding actions without any explanation, to a case involving the FEC's untimely post hoc rationalization for a dismissal. *See ECU*, 69 F.4th at 918.[1] There, the D.C. Circuit relied on earlier authority, *Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir. 1988), in which the dismissal was not just belatedly justified but wholly "unexplained," *id.* at 439. Yet the D.C. Circuit did not draw the distinction the FEC now asserts. It did not suggest that, in the absence of explanation, it was "unable to evaluate" the dismissal until the Commission first weighed in. *Cf.* FEC Opp. 9.[2] Indeed, it could not since the absence of even a "conclusory" explanation in the record barred the commissioners from offering additional explanation on remand relevant to the question before it. *ECU*, 69 F.4th at 922. Rather, the absence of contemporaneous explanation was definitive on the question of why the Commission dismissed: it proved the Commission did so without any reason, no different than if the commissioners had voted based on a coin flip. Accordingly, the D.C. Circuit recognized the rules that apply to unexplained actions apply equally to actions only supported by post-hoc rationalizations, and thus deemed that the dismissal only supported by such untimely rationale was "contrary to law," *ECU*, 69 F.4th 923–24, to be remanded to the FEC pursuant to 52 U.S.C. § 30109(a)(8)(C); *see* Order, *End Citizens United PAC v. FEC*, No.

[1] The FEC takes issue with the D.C. Circuit's characterization of this precedent, but zealous arguments of counsel and a *sua sponte* district court decision issued without the benefit of briefing hardly constitute grounds to declare the law "not settled." *Cf.* FEC Opp. 20 n.2.

[2] The FEC continues to confuse the dismissal that is on review with the explanation the FEC would need to justify that dismissal, claiming that in the absence of explanation there is nothing for the court to review. *See, e.g.*, FEC Opp. 21 (accusing CREW of "recast[ing]" its claim). A dismissal happened, however, when there was a vote to dismiss. AR1815–16. CREW is challenging that dismissal. The lack of contemporaneous explanation does not change the fact that the dismissal occurred and injured CREW. Rather, it establishes that dismissal was without any justification: the definition of an arbitrary and capricious agency action.

21-cv-1665-TJK (D.D.C. Sept. 7, 2023) (attached as Exhibit A to CREW's Mot. for Summ. J., ECF No. 36-1).

The Supreme Court similarly had no difficulty in rejecting an action as arbitrary and capricious in the face of an untimely post hoc rationalization. In *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1 (2020), the Supreme Court rejected an agency's proffered explanation as an "impermissible *post hoc* rationalization[] and thus … not properly before" the Court, *id.* at 22. Yet the Court did not, as the FEC suggests here, become paralyzed and unable to render judgment under the APA. Rather, it concluded, in the absence of a cognizable timely and adequate explanation, the agency's "decision [was] arbitrary and capricious." *Id.* at 30.

The FECA's review provisions adhere to the APA. Contrary to the FEC's assertion, a contrary to law finding does not require a "finding denot[ing] that the Commission's interpretation of the Act or its related analysis was incorrect." FEC Opp. 18. Rather, courts have long recognized that, similar to review under the APA, a dismissal is contrary to law under the FECA if either "(1) … a result of an impermissible interpretation … *or (2)* if the FEC's dismissal of the complaint … was arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161 (emphasis added); *accord CREW*, 209 F. Supp. 3d at 85; *see also United States v. Carmack*, 329 U.S. 230, 243 n.14 (1946) ("'Arbitrary' is defined … as [] without adequate determining principle" or "unreasoned" and "'[c]apricious' is defined …. as … apt to change suddenly… whimsical"). The disjunctive establishes that there may be dismissals, like this one, that are arbitrary or capricious that do not depend on error in the Commission's interpretation or analysis. The FECA, moreover, expressly contemplates contrary-to-law judgments where the Commission has not weighed in on the merits of a complaint at all: those involving a failure to act. 52 U.S.C.

§ 30109(a)(8)(C); *see, e.g., Campaign Legal Ctr. v. Iowa Values*, No. 1:21-cv-389-RCL, 2024 WL 81278, at *2 (D.D.C. Jan. 8, 2024) (discussing prior holding that "the FEC's failure to act on the administrative complaint was 'contrary to law'").

For that reason, a judgment here would not leave the FEC without "reasoning to which the agency can conform." FEC Opp. 19. A failure to act judgment, for example, does not provide the agency with any correction on its analysis, yet the FEC is able to conform with such judgments. *See, e.g.*, *Campaign Legal Ctr. v. 45Committee*, 666 F. Supp. 3d 1, 5 (D.D.C. 2023) (finding FEC conformed with declaration finding it had failed to act). Similarly, a declaration that the FEC, like all other agencies, must have a "contemporaneous explanation" for its action, *ECU*, 69 F.4th at 923, one "before the agency at the time the decision was made," *James Madison Ltd*, 82 F.3d at 1095, provides a very clear directive with which the agency may conform. The agency would not "issu[e] a timely explanation for its *original* decision," *cf.* FEC Opp. 19, since the FEC must always take new action after a contrary to law judgment, *see CREW v. FEC*, 299 F. Supp. 3d 83, 90 (D.D.C. 2018) (noting that after contrary to law judgment, "the FEC again divided three-to-three and dismissed CREW's complaint"). Rather, it must take new action, and if on remand the Commission again deadlocks and considers dismissal, the commissioners who deadlocked must provide their explanation to the Commission for that deadlock before the vote to close, just as they do in all cases not involving deadlocks. *See* CREW Mot. for Summ. J. 14–15, ECF No. 36. The Commission may then exercise its "opportunity for self-correction" over that explanation or adopt it as an accurate explanation of the disagreement by voting to close. *See ECU*, 69 F.4th at 920 (quoting *Common Cause*, 842 F.2d at 449).

The absurdity in the FEC's position, that judgment is impossible absent its explanation, is made plain once one considers the Court's path if the FEC did not ask for voluntary remand. The

FEC's argument implies that but for its request, this matter would be at a standstill, with the Court unable to offer any relief. As a consequence of the FEC's argument, the FEC would be rewarded for refusing to offer contemporary rationales as it could defeat any suit under 52 U.S.C. § 30109(a)(8)(C) simply by confining its explanations to post-hoc rationalizations. That would, according to the FEC, render the Court "unable to evaluate" the case, issue judgment against the FEC, or authorize a citizen suit, essentially leading to a default victory for the FEC. *See* FEC Opp. 9. Precedent precludes such gamesmanship, however. It requires the FEC's explanation be "before the agency at the time the decision was made," *James Madison Ltd*, 82 F.3d at 1095, or its action will be held "arbitrary and capricious," *Tourus Recs.*, 259 F.3d at 737, and thus "contrary to law," *Orloski*, 795 F.2d at 161.

Ultimately, the FEC does not and cannot contest the fact that the standards for summary judgment are met here. Rather, the FEC suggests that the Court nevertheless "should decline" to grant summary judgment, and instead "should grant" voluntary remand. FEC Opp. 1. But, while a voluntary remand is subject to the Court's "broad discretion," *Clean Wis.*, 964 F.3d at 1174, "a court has no discretion to deny summary judgment where the movant has met its burden," *Oviedo v. Wash. Metro. Area Transit Auth.*, 948 F.3d 386, 396 n.7 (D.C. Cir. 2020).

Nor does the FEC establish its last-minute request for voluntary remand here is an appropriate substitute to judgment. The FEC admits its goal in remand is to "require[]" CREW "to file a new lawsuit" against the FEC in order to exhaust its remedies and vindicate its interests. FEC Opp. 21. Indeed, the FEC suggests that it intends to require CREW to sue the agency to cajole it into taking any action, *see id.* at 20 (citing failure to act suit), thus requiring at least one additional suit before CREW could even again challenge the FEC's dismissal, *compare also id.* at 21 (requesting remand without "timeline") *with In re Carter-Mondale Reelection*

Comm., Inc., 642 F.2d 538, 542, 545 (D.C. Cir. 1980) (discussing FECA's "detailed time schedule" which "should be observed"); 52 U.S.C. § 30109(a)(8)(C) (conformity must occur "within 30 days" to preclude private action). The FEC's plan to flood the court's docket with unnecessary litigation is a great waste of CREW's and the court's resources. *See Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C. 2013). During that time, moreover, CREW would not only be prejudiced by the deprivation of the development of case law, *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 74 (D.D.C. 2015), but also evidence CREW would need to support its potential citizen suit—its sole plausible hope of vindicating its interests—would spoliate, which the FEC does not dispute, *cf.* FEC Opp. 8 (confining argument to spoliation of evidence in support of CREW's exhaustion suit against the FEC). Also, during that time, CREW, deprived of the "facts" that are the source of speech, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011), would suffer "loss of First Amendment freedoms," *Elrod v. Burns*, 427 U.S. 347, 373 (1976). For its part, the FEC states it does not intend to use that time to "cure [its] own mistakes" *Clean Wis.*, 964 F.3d at 1175, but rather to repeat them, *see* FEC Opp. 21. Far from "speculation," FEC Opp. 23, the FEC plans to follow its new policy to continue voting to dismiss without any contemporaneous explanation and to rather manufacture post-hoc explanations during a fabricated thirty-day grace period it awarded itself, *see* FEC Opp. 21 & n.3 (citing policy),[3] in violation of law, *see ECU*, 69 F.4th at 921–22 (explanation must exist in the record "when it took the action" (quoting *Regents*, 591 U.S. at 4)); *James Madison Ltd.*, 82 F.3d at

[3] The FEC has followed its policy to issue only post-hoc rationalizations in deadlock votes in matters closed after this policy was announced. *See, e.g.*, Statement of Reasons of Commissioners Allen J. Dickerson and James E. "Trey" Trainor, III, MUR 8071 (NRSC) (Apr. 10, 2024) https://www.fec.gov/files/legal/murs/8071/8071_18.pdf; Certification, MUR 8071 (NRSC) (Mar. 12, 2024), https://www.fec.gov/files/legal/murs/8071/8071_13.pdf (closing the file and dismissing case twenty-nine days before post-hoc rationalization issued).

1095; *Nat'l Fed'n of Fed. Emps. Loc. 1669 v. Fed. Lab. Rels. Auth.*, 745 F.2d 705, 708 (D.C. Cir. 1984) ("agency must explain its reasons in its decision," not afterwards). The agency's "profess[ed] intention" to take inadequate corrective action precludes voluntary remand. *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017).

In short, a prejudicial voluntary remand to permit the FEC to repeat its error is no substitute to summary judgment where, as here, there is no genuine dispute that the standards for summary judgment are met. The "well-established" law for almost forty years is that the Commission must "provide a timely explanation of its reason for dismissing an administrative complaint," *ECU*, 69 F.4th at 918; *id.* at 920 (citing *Common Cause*, 842 F.2d at 449), which all parties agree the Commission failed to do here. That "failure … constitutes arbitrary and capricious agency action," *Tourus Recs.*, 259 F.3d at 737, and a post hoc rationalization does not alter that fact, *see Regents*, 591 U.S. at 22, 30. Accordingly, as an "arbitrary or capricious" action lacking adequate explanation, the dismissal was "contrary to law." *Orloski*, 795 F.2d at 161.

B. The Court May Award Default Judgment

CREW shares Rule 55's "preference for judgment[] on the merits," *Grims v. District of Columbia*, 794 F.3d 83, 92 (D.C. Cir. 2015), and so requests summary judgment. Nevertheless, while the Court may, in its discretion, set aside the default if it awards summary judgment, *see Keegel v. Key W. & Caribbean Trading Co.*, 627 F.2d 372, 373 (D.C. Cir. 1980), it may award default judgment here if it chooses.

The FEC's belated attempt to set aside its default fails. Even looking past the untimeliness of the FEC's request, *but see Whittaker v. District of Columbia*, 228 F.R.D. 378,

381 (D.D.C. 2005) (denying request to set aside made seven months after default),[4] the FEC fails to establish "good cause" here. *Keegel*, 627 F.2d at 373. The FEC does not suggest its default was anything other than "willful," *see id.* (willful defaults not to be set aside); indeed, it is harder to imagine a more willful default than one taken by a certified vote of a government agency. Certification, No. 22-cv-00035 (CRC) (D.D.C. filed Jan. 6, 2022), Feb. 15, 2022, https://www.fec.gov/resources/cms-content/documents/fec_cert_02-18-2022.pdf. The set aside, if only for the purposes of granting voluntary remand, is also highly prejudicial. *See infra* p. 8; *Keegel*, 627 F.2d at 373. The FEC's defense lacks even a "hint" of merit *Keegel*, 627 F.2d at 374, as there is no genuine dispute that leaves "the factfinder some determination to make," *Am. All. Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir. 1996). The FEC "admit[s] [to an] untimely explanation" here. FEC Opp. 13. That definitively resolves this case against the FEC.

For the same reason, CREW has "establishe[d] [its] claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). The parties agree the FEC's explanation was an impermissible post hoc rationalization. The parties agree there is no explanation in the record for the dismissal, and the FEC does not suggest the dismissal was self-explanatory. Accordingly,

[4] The FEC inexplicably accuses CREW of "sharp practice" because it claims CREW did not remind the FEC of its default, even where the FEC was defending discovery as defaulted parties are permitted to do. FEC Opp. 13. Contrary to the FEC's suggestion, however, CREW in fact gave the FEC ample notice of its status of default. *See, e.g.*, CREW Mot. to Compel Ex. B-1, ECF No. 6-2 (attaching email correspondence from CREW's counsel to FEC's counsel on April 4, 2022, alerting the FEC to its default). Despite that notice, the FEC strategically chose to litigate without seeking relief from that default, likely because the FEC's counsel appears to lack the authority to seek that relief on the Commission's behalf or, for that matter, oppose judgment. *See* Certification, Civ. No. 22-35 (CRC) (D.D.C.), Jan. 9, 2024, https://www.fec.gov/resources/cms-content/documents/fec-certification-01-10-2024.pdf (rejecting authorizing FEC counsel to defend this case); Certification, Civ. No. 22-35 (CRC) (D.D.C.), Nov. 9, 2023, https://www.fec.gov/resources/cms-content/documents/fec-certification-11-09-2023.pdf (authorizing FEC counsel only authority to produce the record and oppose CREW's motion to compel).

there is no dispute that the FEC failed to fulfill the "'fundamental' requirement of administrative law" to "'set forth its reasons' for [its] decision," *Tourus Recs.*, 259 F.3d at 737. That alone renders the dismissal arbitrary and capricious, *id.*, and thus contrary to law, *Orloski*, 795 F.2d at 161.

CONCLUSION

Though the FEC opposes judgment here, it fails to identify any genuine dispute that would preclude summary judgment against it. The parties agree the record here lacks any contemporaneous explanation for its dismissal that was "before the agency at the time the decision was made." *James Madison Ltd.*, 82 F.3d at 1095. Contrary to the FEC's suggestion, that failure does not deprive this Court of the ability to award judgment under 52 U.S.C. § 30109(a)(8)(C), but rather necessarily renders the dismissal "arbitrary and capricious," *Tourus Recs.*, 259 F.2d at 737, and thus "contrary to law," *Orloski*, 795 F.2d at 161. Accordingly, CREW respectfully requests entry of summary judgment or, in the alternative, default judgment against the FEC so that it may finally move forward with vindicating its rights.

Dated: July 30, 2024

Respectfully submitted,

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