



disclose its expenses and contributors, thereby denying CREW and the public information that the FECA entitles CREW and the public to receive.

2. Before the unlawful dismissal, the Commission unanimously voted to find that CREW's complaint raised a reason to believe Freedom Vote violated the law; a rare consensus at an agency known for perpetual deadlock. The FEC's Office of General Counsel ("OGC") then conducted a thorough investigation. The voluminous evidence collected not only validated CREW's allegations but showed Freedom Vote's violations were greater than CREW alleged. According to the investigation, Freedom Vote spent about 83% of its funds in a single year on federal elections, and spent more than 66% and 77% on elections in following years. It further showed that Freedom Vote apparently had no non-electioneering activities. Additionally, at least one donor of a half a million dollars to the group explicitly stated the donation's purpose was for "the reelection of [U.S. Senator] Rob Portman." Freedom Vote also solicited funds by showing its efforts were "working" to damage a candidate's polling.

3. Notwithstanding its prior unanimous decision, the overwhelming evidence, and the recommendation of the FEC's general counsel to proceed, the Commission failed to enter into a conciliation with Freedom Vote or to pursue a civil enforcement action. Rather, on November 9, 2021, the Commission deadlocked three-to-three on whether to proceed by finding the investigation showed probable cause to believe violations of law occurred.

4. The Commission also expressly considered whether to dismiss the action as an exercise of prosecutorial discretion, and rejected that possibility.

5. Nevertheless, unable to procure sufficient votes to proceed, the Commission voted to close the file by a vote of four-to-one, with one commissioner abstaining. One commissioner who voted to find probable cause and proceed joined the dissenting commissioners to close the

file. That commissioner later joined a statement explaining her vote to close, stating that she continued to believe probable cause existed but voted to close due to the intransigence of a non-majority of her colleagues blocking further proceedings in the face of law and fact.

6. The commissioners who voted against finding probable cause provided no contemporary explanation for that action at the time of the Commission's consideration. To date, they have issued no explanation for their vote to terminate proceedings against Freedom Vote over the conclusive weight of the evidence of wrongdoing.

### **JURISDICTION AND VENUE**

6. This Court has personal and subject matter jurisdiction over the parties pursuant to 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 702. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331, 2201(a), and 2202. Venue lies in this district under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e).

### **PARTIES**

7. Plaintiff CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code.

8. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials, ensuring the integrity of those officials, protecting our political system against corruption, and reducing the influence of money in politics. CREW works to advance reforms in the areas of campaign finance, lobbying, ethics, and transparency. Further, CREW seeks to ensure that campaign finance laws are properly interpreted, enforced, and implemented.

9. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions, as well as the outside influences that have been brought to bear on those

actions. A core part of this work is examining and exposing the special interests that have influenced our elections and elected officials and using that information to educate voters regarding the integrity of public officials, candidates for public office, the electoral process, and our system of government.

10. Toward this end, CREW monitors the activities of those who run for federal office as well as those groups financially supporting candidates for office or advocating for or against their election. CREW regularly reviews campaign finance reports that groups, candidates, and political parties file with the FEC disclosing their expenditures and contributors. Using the information in those reports, CREW, through its website, press releases, reports, and other methods of distribution, publicizes the role of these individuals and entities in the electoral process and the extent to which they have violated federal campaign finance laws.

11. CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing violations of the FECA and filing complaints with the FEC serve CREW's mission of keeping the public, and voters in particular, informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance laws.

12. CREW is hindered in carrying out its core programmatic activities when those individuals and entities that attempt to influence elections and elected officials are able to keep their identities hidden. Likewise, the FEC's refusal to properly administer the campaign finance laws, particularly the FECA's reporting requirements, hinders CREW in its programmatic activity, as compliance with those reporting requirements often provides CREW with the only source of information about those individuals and groups funding the political process.

13. As part of CREW's work in carrying out its central mission, CREW focuses on so-called "pay-to-play" schemes. Toward that end, CREW looks for correlations between

donations to the campaign of a member of Congress or candidate and that member's subsequent congressional activities, including advocating for policies and legislation that serve the interests of the member's donors. Information that an individual or entity made a large-dollar contribution may be very revealing about the influences that donor has brought to bear on the member post-election. Without information about the individuals and entities funding the political activities of organizations and individuals, CREW is stymied in fulfilling its central mission.

14. As an example, CREW published a report that revealed the sources of funding of over \$1.5 million dollars in campaign ads that propped up an otherwise underfunded candidate, propelling him to win his primary election. Matt Corley, *Hensel Phelps donations to pro-Buck dark money group finally revealed*, Nov. 19, 2019, <https://perma.cc/XNC6-37W8>. At the time, voters only knew the maker of the ads was a nondescript entity called Americans for Job Security. The group was eventually required to register and report as a political committee and disclose its donors after a complaint and litigation by CREW. That information revealed for the first time the sources of the group's funds, which included Peter Thiel, Sheldon and Miriam Adelson, and Robert McNair, and major corporations like Wynn Resorts, Bass Pro Shops, and Quicken Loans. One of the largest donors was Hensel Phelps Construction, which was also the candidate's former employer. Hensel Phelps made contributions shortly before the group would run its campaign ads to influence the candidate's election. Further, as a government contractor, Hensel Phelps was prohibited from making contributions to influence federal elections but was able to surreptitiously fund ads to do so by utilizing a 501(c)(4) entity that unlawfully failed to register and report as a political committee.

15. As another example, starting in June 2021, CREW published an ongoing report titled *This sedition is brought to you by....*, available at <https://perma.cc/S9M4-VM9M>. In that

report, CREW collected and contextualized data reported by the FEC on contributions to political committees controlled by or allied with members of Congress who voted against certifying the 2020 election. CREW has so far found that more than 717 corporations and industry group PACs have given approximately \$18 million to these members of Congress, despite initial public pledges not to donate to these members.

16. CREW requires access to information detailing the true sources of the money used to fund the political activities of federal candidates and outside groups. As a result, CREW is harmed when the FEC fails to properly administer the FECA, particularly the statute's reporting requirements, thereby limiting CREW's ability to obtain and review campaign finance information.

17. Defendant FEC is the federal agency established by Congress to oversee the administration and civil enforcement of the FECA. *See* 52 U.S.C. §§ 30106, 30106(b)(1).

### **STATUTORY AND REGULATORY FRAMEWORK**

#### ***Registration and Reporting Requirement for Political Committees***

18. The FECA defines the term "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year." 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). Expenditures include "any ... payment ..., deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office." 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111. In addition, the Supreme Court in *Buckley v. Valeo* carved out from this definition organizations that, while meeting one of the statutory thresholds, are (1) not under the control of a candidate and (2) do not have a "major purpose" of "nominat[ing] or elect[ing] ...

candidate[s].” 424 U.S. 1, 79 (1976). A group that “extensive[ly]” spends on elections has a major purpose to influence elections and cannot be excused from reporting. *FEC v.*

*Massachusetts Right to Life, Inc.*, 479 U.S. 238, 262 (1986). Neither the courts nor the FEC has defined the threshold of spending that qualifies as “extensive,” but a group devoting half of its yearly expenses to electioneering is sufficient.

19. All political committees must file a statement of organization within ten days after becoming a political committee within the meaning of 52 U.S.C. § 30101(4). 52 U.S.C. § 30103(a); 11 C.F.R. 102.1.

20. All registered political committees are required to file periodic reports with the FEC that, among other things, (1) identify all individuals who contribute an aggregate of more than \$200, (2) identify all political committees that made a contribution to the political committee at issue, (3) detail a political committee’s debts and obligations, and (4) list all of a political committee’s expenditures. 52 U.S.C. § 30104(b)(2)–(8); 11 C.F.R. § 104.3.

21. A political committee’s duty to file reports is continuous until the political committee terminates its status with the FEC. Each failure to file a required report on the date it is due is a continuation of the unlawful behavior or, in the alternative, a new violation. A political committee may only terminate its status and end its reporting obligation when it ceases making any expenditure or accepting any contributions to influence federal elections. 52 U.S.C. § 30103(d). Moreover, political committees are under a continuous duty to supplement or correct any missing or erroneous reports. FEC, Filing Amendments, <https://perma.cc/A9SC-3D8Y> (last visited Jan. 5, 2022) (“The committee must file an amended report if it: [d]iscovers that an earlier report contained erroneous information, [or] [d]oes not obtain all of the required information concerning a particular transaction”); *see also* FEC, AO 1999-33 at 3 (MediaOne PAC) (Jan. 28,

2000) (political committee “must amend” prior erroneous reports that omitted contributor information).

22. Political committees are also required to identify themselves as the source of public communications they make through disclaimers that appear in the communication. 52 U.S.C. § 30120(a)(3), (d)(2); 11 C.F.R. § 110.11. A “public communication” includes “broadcast, cable or satellite communication, ... to the general public, or any other form of general public political advertising.” 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26. The disclaimer “must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate’s committee.” 11 C.F.R. § 110.11(b), (d).

#### ***Enforcement Procedures and Administrative Exhaustion***

23. Under the FECA, any person who believes there has been a violation of the Act may file a sworn complaint with the FEC. 52 U.S.C. § 30109(a)(1). Based on the complaint, the response from the person or entity alleged to have violated the Act, facts developed by the Office of General Counsel (“OGC”), and any OGC recommendation, the FEC then votes on whether there is “reason to believe” a violation of the FECA has occurred. 52 U.S.C. § 30109(a)(2). A “reason to believe” exists where a complaint “credibly alleges” a violation of the FECA “may have occurred.” FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). If four commissioners find there is “reason to believe” a violation of the FECA has occurred, the FEC must notify the respondents of that finding and “shall make an investigation of such alleged violation.” 52 U.S.C. § 30109(a)(2). Upon the basis of that investigation, the OGC recommends whether there is a “probable cause” to believe a violation occurred. 52 U.S.C. § 30109(a)(3). If four commissioners vote to find probable cause exists, the Commission “shall attempt” to

conciliate with the respondent, 52 U.S.C. § 30109(a)(4), failing which the Commission may institute a civil action in federal court upon the affirmative vote of four commissioners, 52 U.S.C. § 30109(a)(6).

24. If four commissioners fail to find reason to believe or probable cause to believe a violation of the FECA has occurred and the Commission then dismisses the matter, the complainant, as a “party aggrieved” by the dismissal, may seek judicial review in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed “within 60 days after the date of the dismissal.” 52 U.S.C. § 30109(a)(8)(B).

25. The district court reviewing the FEC’s dismissal of a complaint may declare the FEC’s actions “contrary to law.” 52 U.S.C. § 30109(a)(8)(C). The court also may order the FEC “to conform with such declaration within 30 days.” *Id.* If the FEC fails to abide by the court’s order, the FECA provides the complainant with a private right of action, brought in the complainant’s own name, “to remedy the violation involved in the original complaint.” *Id.* The statute of limitations on that private right of action only begins to run when the FEC fails to conform with the court’s order after thirty days.

### **FACTUAL BACKGROUND**

26. CREW filed an administrative complaint against Freedom Vote with the FEC on August 8, 2018, alleging Freedom Vote qualified as a political committee no later than 2016, but failed to report as required. Exhibit 1, *available at* <https://perma.cc/YPF2-7CT2>. Freedom Vote was registered as a section 501(c)(4) tax-exempt social welfare organization and was established in Ohio in 2010. *Id.* ¶ 2. The FEC designated the matter MUR 7465.

27. Specifically, CREW’s complaint alleged Freedom Vote spent more than \$1 million in the summer of 2016 to make and air a television advertisement expressly advocating

the defeat of Ohio United States Senate candidate Ted Strickland, titled “Third Largest.” Ex. 1 ¶¶ 32–37 (ad asserted Strickland “lost jobs,” that he “want[ed] to bring his job-killing policies to Washington,” and stated “we can’t afford more lost jobs” superimposed over image of U.S. Capitol; disclaimer said only “paid for by Freedom Vote”). CREW alleged this advertisement was an independent expenditure, and that Freedom Vote failed to file the required disclosure reports with the FEC. *Id.* ¶¶ 42–48. CREW further alleged the communication did not include the required disclaimers, in violation of the FECA and FEC regulations. *Id.* ¶¶ 49–50.

28. CREW’s complaint further alleged Freedom Vote failed to register and report as a political committee in violation of the FECA and FEC regulations. *Id.* ¶¶ 51–67. CREW alleged Freedom Vote’s actions qualified it as a political committee as early as 2014 and no later than 2016. *Id.* ¶¶ 19–41, ¶¶ 51–67. In particular, CREW alleged that Freedom Vote made more than \$1,000 in expenditures in 2014, 2015, and 2016, satisfying the FECA’s statutory test. *Id.* ¶ 19, 32–37, 53–56. CREW further alleged that Freedom Vote’s major purpose in these years was to elect or defeat federal candidates, as exhibited by the public statements of an advisor to Freedom Vote and the fact that its spending on electioneering was more than 50% of its total expenditures each year. *Id.* ¶¶ 19–41, 57–64.

29. Based on CREW’s complaint, the OGC recommended the Commission find reason to believe Freedom Vote failed to organize, register, and report as a political committee. *See* First General Counsel’s Report 25, MUR 7465 (Freedom Vote), July 1, 2019, <https://perma.cc/8A8D-3D34>. The OGC also recommended finding the “Third Largest” ad failed to include the required disclaimer. *Id.*<sup>1</sup>

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<sup>1</sup> In the alternative, the OGC recommended finding that, if Freedom Vote was not a political committee, that it nonetheless failed to report the “Third Largest” ad as an independent

30. On July 25, 2019, the Commission unanimously voted to find reason to believe Freedom Vote failed to organize, register, and report as a political committee and include the required disclaimer on its “Third Largest” ad. The Commission also unanimously voted to approve compulsory process. Certification, MUR 7465 (Freedom Vote), July 25, 2019, <https://perma.cc/YW4X-JQTY>.

31. CREW learned of these developments in late 2019, after it sued the FEC over its failure to act on CREW’s complaint. *See CREW v. FEC*, 19-cv-1650 (D.D.C.). As FEC matters are confidential until closed, CREW had been unaware of the FEC’s actions. CREW agreed to dismiss its complaint in reliance on the FEC’s representation that matters were proceeding expeditiously.

32. In light of the Commission’s vote, the OGC began an investigation into Freedom Vote which not only confirmed CREW’s allegations, but indeed demonstrated Freedom Vote’s violations exceeded even the amount of political spending that CREW alleged. In particular, the investigation showed Freedom Vote’s electioneering in 2014, 2015, and 2016 amounted to more than 82%, 66%, and 77% of its total spending, respectively. In total, these expenditures amounted to about 71% of Freedom Vote’s spending from 2014 through the remainder of its lifetime.

33. Additionally, the FEC’s investigation showed Freedom Vote’s spending on express advocacy in 2014 was more than previously reported or known, amounting to \$239,878. General Counsel’s Brief 10, MUR 7465 (Freedom Vote), Sept. 20, 2021, <https://perma.cc/4AAV-M9MJ>. It also showed that Freedom Vote made electioneering expenses

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expenditure. *Id.* The alternative finding is because political committees do not separately report independent expenditures, *see* 52 U.S.C. § 30104(c), but rather report them along with all of their other expenses.

in 2014 in conducting opposition research. *Id.* at 9. The investigation revealed that Freedom Vote’s Executive Director explained to a donor that Freedom Vote’s work was to make “maximum effort[s] through election day,” *id.* at 10, and that same Executive Director could not recall any non-electioneering work Freedom Vote performed, *id.* at 11.

34. Freedom Vote’s 2015 electioneering expenses were also more than previously known, amounting to \$217,539, including contributions to super PACs and research and polling on a federal candidate. *Id.* at 12.

35. Similarly, Freedom Vote’s 2016 electioneering expenses were more than previously known, amounting to \$2,987,563 in independent expenditures (including \$1.1 million on the “Third Largest” ad that Freedom Vote’s Executive Director admitted was targeted at candidate Strickland’s Senate campaign), contributions to super PACs, analytics, and polling. *Id.* at 16–17. In addition, an unknown 2016 donor to Freedom Vote stated the donated funds were for “the reelection of [U.S. Senator] Rob Portman,” Strickland’s opponent in the campaign. *Id.* at 26. Freedom Vote also informed donors that its efforts were “working” to lower candidate Strickland’s poll numbers. *Id.* at 26–27.

36. The investigation also revealed that Freedom Vote paid approximately \$23,000 to the Internal Revenue Service in 2018 to settle an investigation into whether Freedom Vote violated its section 501(c)(4) status by devoting its activities primarily to electioneering. *Id.* at 19.

37. While revealing, the investigation was ultimately delayed by Freedom Vote’s failure to timely respond to the FEC’s subpoenas. The FEC served subpoenas on Freedom Vote and its Executive Director on October 15, 2019. *See* Notification to Freedom Vote, MUR 7465 (Freedom Vote), Oct. 31, 2019, <https://perma.cc/JR2D-CLW8> (referring to “attached

subpoena”); Notification to James S. Nathanson, MUR 7465 (Freedom Vote), Oct. 31, 2019, <https://perma.cc/J7NL-G9F2> (same). Shortly before that, one of the FEC commissioners resigned his seat, leaving the Commission with only three members. Three commissioners are an insufficient number to achieve quorum and permit the FEC to seek legal remedies for the disregard of the subpoenas. It was not until quorum was restored in December 2020 and Mr. Nathanson was issued a deposition subpoena that documents were finally produced. *See* Statement of Reasons of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub 6, MUR 7465 (Freedom Vote), Dec. 16, 2021, <https://perma.cc/LG9H-HPSV>.

38. Notwithstanding this obstruction, the FEC’s General Counsel notified Freedom Vote that, based on its investigation, it intended to recommend the Commission find probable cause to believe that Freedom Vote violated the FECA and FEC regulations by failing to organize, register, report, and provide disclaimers as a political committee. General Counsel’s Brief 1–2.

39. The Commission considered the General Counsel’s recommendation on November 9, 2021. Despite the conclusive evidence collected, the Commission, now with a full slate of six commissioners, deadlocked three-to-three on the vote to find probable cause to believe Freedom Vote violated the FECA. The Commission considered whether to dismiss the proceedings as an exercise of prosecutorial discretion, but declined to invoke that power.

40. Nonetheless, with proceedings unable to move forward, four commissioners, including one commissioner who voted to proceed with an investigation and voted against exercising prosecutorial discretion, voted to close the case. Only upon doing so was CREW

alerted to the fact the matter had been closed without remedy, and only then did CREW have an opportunity to seek review of the dismissal in court.

41. Shortly after the vote, the three commissioners who voted to find probable cause of a violation—including one commissioner who voted to close the case—issued a statement of reasons recounting the FEC’s investigation, the voluminous evidence amassed to support CREW’s allegations, and rejecting possible grounds for terminating the case.

42. The three other commissioners who voted to find the evidence did not give rise to a probable cause to believe a violation occurred did not issue any contemporary justification for their action for either the Commission or this Court to consider. To date, those three commissioners have not issued even a *post-hoc* explanation.

#### **PLAINTIFF’S CLAIM FOR RELIEF**

#### **The FEC’s Dismissal of CREW’s Complaint Was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law**

43. CREW re-alleges and incorporates by reference all preceding paragraphs as fully set forth herein.

44. This action is timely as it was filed within sixty days of the FEC’s closure of MUR 7465. 52 U.S.C. § 30109(a)(8)(B).

45. The FEC’s dismissal of CREW’s complaint was arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C).

46. The FEC’s general counsel amassed conclusive evidence that Freedom Vote qualified as a political committee as early as 2014 and as late as December 31, 2016, which status Freedom Vote thus continues to possess from the point of qualification through today. Notwithstanding this qualification, Freedom Vote never registered with the FEC as a political committee, nor filed the required reports, which reports continue to be due today. Nor did

Freedom Vote include required disclaimers on its communications. Moreover, Freedom Vote has never terminated its political committee status.

47. The evidence the FEC collected would itself satisfy some of Freedom Vote's disclosure obligations under the FECA if it were to be made public. Other information, such as the identity of donors, is available in the records produced to the FEC, which apparently were redacted on production, in bank records, and in documents filed with the IRS.

48. Notwithstanding the conclusive evidence and the readily available remedies, three commissioners voted to find no probable cause existed to believe Freedom Vote violated the FECA by not organizing, registering, reporting, and making disclaimers as a political committee. That vote led to the closure of this matter when another commissioner, disagreeing with her colleagues on the merits, nonetheless joined them to close the case, permitting CREW to receive notice of the FEC's actions and permitting this lawsuit to challenge that closure.

49. The FEC declined to exercise prosecutorial discretion to dismiss this matter, which exercise requires the concurrence of four commissioners.

50. The three commissioners who voted to find no probable cause provided no contemporaneous explanation of their vote for either the agency or for this Court to consider. To date, those three commissioners have not issued even a *post-hoc* explanation. The only commissioner who voted to close the file who has issued a statement has explained that the case should have proceeded and not been closed, and therefore that the dismissal she voted for was contrary to law.

51. An agency action unsupported by a contemporaneous explanation is *per se* arbitrary and capricious, and the FEC's dismissal without one is contrary to law.

52. Therefore, CREW is entitled to relief in the form of a declaration that the FEC is in violation of its statutory responsibilities under 52 U.S.C. § 30109(a)(8) and has acted arbitrarily and capriciously, abused its discretion, and acted contrary to law in dismissing MUR 7465.

**REQUESTED RELIEF**

WHEREFORE, CREW respectfully requests that this Court:

1. Declare that the FEC's dismissal of CREW's complaint in MUR 7465 was arbitrary, capricious, an abuse of discretion, and contrary to law;
  2. Order the FEC to conform to such declaration within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C);
  3. Award CREW its costs, expenses, and reasonable attorneys' fees in this action;
- and
4. Grant such other and further relief as the Court may deem proper and just.

Respectfully submitted,

/s/ Stuart McPhail

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