CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 34(j) OF THE COURT'S RULES

No. 22-5176

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

END CITIZENS UNITED PAC,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

APPELLANT'S BRIEF

Adav Noti (D.C. Bar No. 490714)
Kevin P. Hancock
CAMPAIGN LEGAL CENTER ACTION
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200
anoti@campaignlegalcenter.org
khancock@campaignlegalcenter.org

Counsel for Plaintiff-Appellant

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiff-Appellant End Citizens United PAC hereby certifies as follows:

(a) Parties and *Amici*. End Citizens United PAC was the plaintiff in the district court and is Appellant in this Court.

Pursuant to Circuit Rule 26.1, End Citizens United PAC certifies that it has no parent companies and no publicly held company with a 10% or greater ownership interest. End Citizens United PAC is a political action committee whose mission is to rid politics of big money and protect the right to vote by working to elect reform-oriented politicians, pass meaningful legislative reforms, and elevate electoral issues in the national conversation.

The Federal Election Commission was the defendant in the district court and is Appellee in this Court, but has not appeared in either.

(b) Rulings Under Review. Plaintiff-Appellant appeals the April 18, 2022 memorandum opinion and order of the U.S. District Court for the District of Columbia (Kelly, J.), denying plaintiff's motion for default judgment and dismissing the case for lack of subject matter jurisdiction. The district court's memorandum opinion is unpublished but is available at 2022 WL 1136062 and is reproduced in the Appendix at App. 41.

(c) Related Cases. The ruling under review has not previously been before this Court or any other court. There are no related cases pending in this Court or any other court of which counsel are aware.

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GLOSSARY OF ABBREVIATIONS

DACA	Deferred Action for Childhood Arrivals
ECU	End Citizens United PAC
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
PAC	Political Committee
RNC	Republican National Committee

INTRODUCTION

In May 2019, End Citizens United PAC ("ECU") filed an administrative complaint with the Federal Election Commission ("FEC" or "Commission") alleging that then-President Donald Trump's campaign committee had violated federal campaign finance law by soliciting funds for a super PAC aligned with the former President's campaign in excess of the limits imposed by the Federal Election Campaign Act ("FECA" or the "Act").

Based on the complaint, the FEC's nonpartisan Office of General Counsel recommended that the Commission find reason to believe that the alleged violation had occurred. A majority of the five Commissioners who participated in the agency's consideration of the complaint agreed and voted to pursue the matter. But because two Commissioners ("the controlling Commissioners") voted against a reason-to-believe finding, the agency fell short of the four affirmative votes required to launch an investigation, and ultimately dismissed the complaint.

Circuit precedent—and black-letter administrative law—require Commissioners who vote against pursuing an administrative complaint contrary to the recommendation of the agency's General Counsel to offer a contemporaneous explanation of their decision. But the controlling Commissioners failed to do so when the FEC dismissed ECU's complaint, or in the weeks thereafter. Indeed, ECU waited until the final day allowed by statute, sixty days after the administrative

dismissal, to file this action challenging the administrative dismissal—yet, when ECU filed its complaint in the district court, the controlling Commissioners had still released no explanation for their votes. Only *after* ECU initiated this suit—and over two months after the underlying dismissal—did the controlling Commissioners purport to explain their reasoning in a brief statement of reasons ("the Statement").

The question in this case is whether the controlling Commissioners' belated Statement—issued after ECU filed this action, and after the statutory deadline for ECU to do so—can not only be considered by a reviewing court but can also, by purporting to invoke the agency's prosecutorial discretion, strip that court of jurisdiction to adjudicate a pending case. Decades of precedent applying FECA, as well as fundamental principles of administrative law, answer firmly in the negative.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal from a final order of the U.S. District Court for the District of Columbia under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9). The district court exercised jurisdiction over the case under 28 U.S.C. § 1331 and 52 U.S.C. § 30109(a)(8)(A). ECU timely filed this appeal on June 16, 2022, within sixty days of the district court's memorandum opinion and order entered April 18, 2022, which disposed of all of ECU's claims in this action.

ISSUES PRESENTED

1. On judicial review, the FEC must defend its actions using contemporaneous explanations of its reasoning, rather than *post hoc* rationalizations. The Commissioners who voted, contrary to the FEC's General Counsel's recommendation, to dismiss ECU's administrative complaint offered no explanation of their decision for months, until after this action was filed. Did the district court err in relying on the Commissioners' Statement to determine that it lacked jurisdiction to review the dismissal?

2. FEC action is arbitrary and capricious, and thus contrary to law, where the Commissioners responsible for that action fail to adequately explain the rationale for their decision. The Commissioners who elected to dismiss ECU's administrative complaint notwithstanding the agency's General Counsel's recommendation to investigate the matter offered no contemporaneous explanation of their reasoning. Was the resulting dismissal of ECU's administrative complaint contrary to law?

STATUTES AND REGULATIONS

All applicable statutory and regulatory provisions are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

A. FECA's Hard-Money Source and Amount Restrictions

Congress enacted FECA in response to the Watergate scandal and the "deeply disturbing" reports from the 1972 federal elections of contributors giving large amounts of money to candidates "to secure . . . political quid pro quo[s]." *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam). To "limit the actuality and appearance of corruption resulting from large individual financial contributions," *id.* at 26, FECA restricts the sources and amounts of contributions made "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A)(i). For example, individuals may contribute no more than $2,900 per election to a federal candidate, and $5,000 per year to a political committee. *See id.* § 30116(a)(1)(A). Political committees generally may contribute no more than $5,000 per election to a candidate. *Id.* § 30116(a)(2)(A). Some entities, such as corporations and unions, are prohibited from contributing any amount to federal candidates. *Id.* § 30118. Money subject to FECA's limits is often called "[f]ederal funds" or "hard money." *Emily's List v. FEC*, 362 F. Supp. 2d 43, 46 n.1 (D.D.C. 2005).

B. FECA's Soft-Money Ban

Because FECA defines a contribution as anything of value given for the purpose of influencing a *federal* election, the law initially left unregulated any

money ostensibly donated for other purposes. *See, e.g.*, *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 546 (D.C. Cir. 2019). Such unregulated donations became known as "[n]onfederal funds" or "soft money." *Emily's List*, 362 F. Supp. 2d at 46 n.2. To close this loophole, Congress amended FECA in 2002 to ban federal candidates and others from using soft money in connection with their election campaigns. *See Libertarian Nat'l Comm.*, 924 F.3d at 546.

As relevant here, FECA's soft-money ban provides that no federal "candidate, individual holding Federal office . . . [or] agent of a candidate or [officeholder]" may "solicit . . . [or] direct . . . funds in connection with an election for Federal office . . . unless the funds are subject to the [Act's hard-money] limitations, prohibitions, and reporting requirements." 52 U.S.C. § 30125(e)(1); *accord* 11 C.F.R. §§ 300.60, .61. Congress intended this soft-money ban to prevent candidates from engaging in "winks, nods, and circumlocutions to channel money in favored directions." *Shays v. FEC*, 414 F.3d 76, 106 (D.C. Cir. 2005).

C. Super PACs

A political committee ("PAC") is any group of persons whose major purpose is the nomination or election of a federal candidate and that has contributed or spent at least $1,000 to influence a federal election. 52 U.S.C. § 30101(4)(A). "Super PACs" are a type of political committee that, unlike other PACs, are "permitted to fundraise largely uninhibited by FECA's source [and amount] restrictions . . . so

long as they make exclusively independent expenditures and do not coordinate with any candidate." *Campaign Legal Ctr. v. FEC*, 520 F. Supp. 3d 38, 43 (D.D.C. 2021). Because super PACs can solicit and receive "soft money"—that is, contributions in unlimited amounts and from sources (like corporations) that FECA normally prohibits—they "may not make contributions to candidates." FEC Advisory Op. 2017-10 (Citizens Against Plutocracy) at 2. Nor may candidates knowingly accept such excessive or prohibited contributions from super PACs. *See* 52 U.S.C. §§ 30116(f), 30118(a).

D. The Soft-Money Ban as Applied to a Federal Candidate's Solicitations to Super PACs

The FEC has repeatedly emphasized that, to comply with the soft-money ban, federal candidates and their agents may solicit or direct contributions to super PACs only if the solicitations comply with FECA's source prohibitions and contribution limits. *See, e.g.*, Advisory Op. 2011-12 (Majority PAC) at 1 (permitting federal candidates to appear at super PAC fundraisers "so long as they restrict any solicitation they make to funds subject to the limitations, prohibitions and reporting requirements of the Act"); Advisory Op. 2015-09 (Senate Majority PAC) at 7 (acknowledging that FECA prohibits agents acting on behalf of candidates from soliciting nonfederal contributions to super PACs). A candidate or her agent may comply with FECA's requirements by displaying "a clear and conspicuous written notice . . . that the solicitation . . . does not seek funds in excess of" federal limits or

from prohibited sources. 11 C.F.R. § 300.64(b)(2)(ii); *cf.* Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24375, 24380 (May 5, 2010) ("The Commission concludes that any solicitation that is not limited either by its express terms or otherwise (such as through a clear and conspicuous oral statement or written notice) risks being understood as soliciting donations in amounts and from sources prohibited under the Act . . . .").

E. The FEC's Administrative Complaint and Enforcement Process

"Any person . . . may file a complaint with the Commission" alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). After reviewing the complaint, any responses thereto, and the nonpartisan Office of General Counsel's recommendations, the Commission then votes whether to find "reason to believe" that the subject of the complaint committed a violation. *Id.* § 30109(a)(2). A decision to find reason to believe, which requires four affirmative votes, does not trigger any penalties; rather, it initiates further investigation by the FEC. *See id.*; Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007) (reason to believe requires that "the available evidence . . . is at least sufficient to warrant conducting an investigation").

Following a reason-to-believe investigation, and after considering input from the agency's General Counsel and the complaint's respondent, the FEC determines

whether there is "probable cause to believe that [the respondent] has committed . . . a [FECA] violation." 52 U.S.C. § 30109(a)(3)-(4). If four Commissioners vote to find probable cause, the agency may seek civil penalties either through a conciliation agreement with the respondent or in federal court. *Id.* § 30109(a)(4)-(6).

If, at any stage, fewer than four Commissioners vote to proceed, the agency may vote to dismiss the complaint. *See, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). If that dismissal is contrary to the General Counsel's recommendation, the "declining-to-go-ahead Commissioners" must issue a statement of reasons explaining their decision "at the time when a deadlock vote results in an order of dismissal." *Id.*

"Any party aggrieved" by dismissal of its complaint may seek review in the U.S. District Court for the District of Columbia within sixty days. 52 U.S.C. § 30109(a)(8). For the FEC to defend such a lawsuit, at least four Commissioners must vote to authorize the defense. *See id.* §§ 30106(c), 30107(a)(6). The court "may declare that the dismissal . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days." *Id.* § 30109(a)(8). Should the agency fail to comply with such an order, "the complainant may bring . . . a civil action to remedy the violation." *Id.* § 30109(a)(8)(C).

Interpreting this judicial review provision, a recent decision of this Court held that FEC dismissals are nonreviewable where they are "based even in part on

[prosecutorial] discretion." *Citizens for Resp. & Ethics in Wash. v. FEC* ("*New Models*"), 993 F.3d 880, 882 (D.C. Cir. 2021), *petition for reh'g filed*, No. 19-5161 (June 23, 2021); *see also Citizens for Resp. & Ethics in Wash. v. FEC* ("*Commission on Hope*"), 892 F.3d 434, 439-41 (D.C. Cir. 2018).[1]

II. Factual Background

ECU is a political committee whose mission is to rid politics of big money and protect the right to vote by working to elect reform-oriented politicians, pass meaningful legislative reforms, and elevate electoral issues in the national conversation. App. 6. In service of this mission, ECU engages in a variety of political activities, including supporting candidates whose policy agendas are aligned with its mission. App. 6. During the 2020 election, ECU endorsed Joe Biden for President and contributed over $1.1 million in fundraising and expenditures to the presidential race, including independent expenditures, direct contributions, and bundled small-donor contributions to candidates. App. 6. This engagement, fundraising, and spending all occurred in political opposition to Donald J. Trump for President, Inc. ("the Trump Campaign")—the former President's campaign committee—and its aligned super PAC, America First Action. App. 6.

[1] To differentiate between cases brought by Citizens for Responsibility and Ethics in Washington against the FEC, this brief refers to each case by the name of the respondent in the underlying administrative matter.

On May 9, 2019, ECU, together with two other complainants, filed an FEC complaint against the Trump Campaign. App. 48-56. The complaint alleged that a recent Trump Campaign statement had solicited and directed soft money to America First Action in violation of 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61. App. 55 ¶ 16.

As detailed in the administrative complaint, the Trump Campaign's statement came days after media reports that an organization calling itself the "Presidential Coalition" had used its connections with President Trump to fundraise while spending only a trivial amount on the political causes it claimed to support. App. 49 ¶ 2. In apparent response to these reports, the Trump Campaign on May 7, 2019, issued a statement entitled "Trump Campaign Statement on Dishonest Fundraising Groups." App. 49-50 ¶ 3. The statement condemned the "deceptive[]" use of the President's name, and asserted that only five entities were "approved" or "authorized" by President Trump or the Republican National Committee ("RNC"): the Trump Campaign, the RNC, two joint fundraising committees with the RNC, and America First Action. App. 49-50 ¶ 3. The statement described America First Action as an "approved outside non-campaign group . . . run by allies of the President," and "a trusted supporter of President Trump's policies and agendas." App. 49-50 ¶ 3.

The administrative complaint explained that the Trump Campaign—as reasonably understood in context and acting as President Trump's agent—recommended that supporters contribute to the America First Action and guided them to do so, by designating America First Action as one of five "approved" or "authorized" groups and contrasting those groups collectively with a disapproved, allegedly dishonest fundraising organization. App. 52-55 ¶¶ 8-16. The statement thus solicited and directed contributions to the super PAC. App. 52-55 ¶¶ 8-16. Because the statement did not include any restriction or disclaimer that the Trump Campaign sought only donations that complied with FECA's requirements, it violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61. App. 52-55 ¶¶ 8-16.

Career attorneys in the FEC's nonpartisan Office of General Counsel reviewed ECU's complaint, along with the Trump Campaign's response and all other available evidence, and recommended that the Commission find reason to believe that the Trump Campaign violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61 by soliciting soft-money contributions for America First Action. App. 60-61.[2] In reaching this recommendation, the General Counsel's Report explained that the Trump Campaign's "statement as a whole contain[ed] a clear message recommending that the reader contribute to the authorized and approved *fundraising*

[2] The General Counsel's Report on ECU's complaint also addressed a separate administrative complaint not at issue here. *See* App. 58-61.

organizations and not contribute to other groups." App. 83. Accordingly, "the statement, as a reasonable person would understand it in its context, constitute[d] a recommendation to contribute to [America First] Action and thus [was] a solicitation." App. 83-84. The Report therefore rejected the Trump Campaign's contention that the statement "merely provid[ed] the identity of an appropriate recipient, without any attempt to motivate another person to contribute." App. 82 (quoting Trump Campaign administrative filing) (alteration in original). The Report further explained that, because "[t]he Trump Committee's solicitation included no disclaimer or restriction of any kind limiting the solicitation to federal funds," the General Counsel "recommend[ed] that the Commission find that there is reason to believe that the Trump Committee violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61." App. 85.

On April 20, 2021, the Commission voted 3-2 (with one Commissioner not voting) on a motion to approve the General Counsel's recommendation and find reason to believe that the Trump Campaign violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61. App. 86-87. Although three Commissioners voted in favor of the motion and only two voted against it, the motion failed for lack of four affirmative votes. *See* 52 U.S.C. § 30109(a)(2). Two days later, the Commission voted to "[c]lose the file" on Plaintiff's administrative complaint, thereby dismissing it. App. 90-91.

The two controlling Commissioners who voted to reject the General Counsel's recommendations did not issue a statement of reasons to explain their decision at the time. One Commissioner who voted to accept the recommendations issued a statement of reasons concluding that "referring to [America First Action] as an 'approved' group in the context of fundraising is a clear message recommending that the reader contribute to the authorized and approved fundraising organizations and not contribute to other groups." App. 94.

On June 25, 2021—four days *after* Plaintiff filed this action, and four days after the deadline for filing any action challenging the complaint's April 22 dismissal—the two Commissioners who had voted to reject the General Counsel's recommendations issued a four-page statement of reasons purporting to explain their decision. App. 95-98; *see* 52 U.S.C. § 30109(a)(8)(B) (requiring petitions for review be filed within sixty days of dismissal). According to the Statement, the two Commissioners had voted to reject the General Counsel's recommendation as a matter of prosecutorial discretion, asserting that the FEC could better spend its resources elsewhere and that finding reason to believe a violation occurred would have created a "likelihood of a successful and costly legal challenge." App. 97-98. The Commissioners argued that the Trump Campaign's statement did not clearly amount to a solicitation; that a reasonable person "would not have likely understood it as a request for contributions"; and that undertaking an enforcement action would

raise constitutional questions. App. 97-98. The Commissioners also suggested that the Trump Campaign's statement could be read as a warning against fraudulent fundraising groups, and that "[s]uch warnings should be encouraged, not chilled." App. 98.

III. Proceedings Below

ECU filed this action under 52 U.S.C. § 30109(a)(8) on June 21, 2021, in the U.S. District Court for the District of Columbia, challenging the dismissal of its administrative complaint as contrary to law. App. 14. June 21 was the sixtieth day after the FEC's April 22 dismissal of the underlying complaint, and thus the final day on which ECU could seek review of the dismissal. App. 90-91; *see* 52 U.S.C. § 30109(a)(8)(B).

The FEC failed to appear, and the Clerk of Court entered default against the agency on September 15, 2021. App. 17.

On October 18, 2021, in light of the Commission's ongoing failure to appear, ECU moved for default judgment. App. 18-22. Pursuant to Federal Rule of Civil Procedure 55(d), which requires a movant for default judgment against a federal agency to "establish[] a claim or right to relief," the motion explained that ECU has standing as a political competitor of the administrative respondents to challenge the underlying dismissal, App. 27-29, and that the dismissal was contrary to law because the controlling Commissioners had failed to offer a valid contemporaneous

explanation of their decision to dismiss the case contrary to the General Counsel's recommendation, App. 29-33. In particular, the motion argued that the Statement was an impermissible *post hoc* rationalization of the dismissal that was not properly before the district court. App. 29-33.

On April 18, 2022, the district court denied ECU's motion and dismissed the case for lack of subject matter jurisdiction. App. 40. The court first agreed that ECU has standing to challenge the underlying dismissal. App. 43 n.3. It then concluded that the Statement was a proper basis for judicial review, notwithstanding the fact that the controlling Commissioners did not issue it until after ECU had filed this suit, because it was issued by the controlling Commissioners themselves and did not contradict any earlier explanations for the dismissal, and because the controlling Commissioners might simply offer the same reasoning if the court were to grant ECU's motion and remand the matter. App. 43-46. It further ruled that, because the controlling Commissioners purported to dismiss the complaint as an exercise of prosecutorial discretion, the dismissal was unreviewable, and, as a result, the court lacked subject matter jurisdiction over ECU's claim. App. 47. The court then dismissed the case *sua sponte*. App. 47.

SUMMARY OF ARGUMENT

The Court should reverse the district court's denial of ECU's motion for default judgment because that ruling rests on a series of legal errors.

First, in concluding that ECU's contrary-to-law claim was nonreviewable, the district court wrongly relied on the Statement belatedly issued by the controlling Commissioners more than two months after the underlying administrative dismissal—and after ECU filed this suit on the last possible date permitted by FECA. Precedent makes clear that this Statement was a *post hoc* rationalization not properly before the district court: this Circuit's decisions mandate that the controlling Commissioners in an FEC dismissal release a *contemporaneous* statement of reasons explaining their decision, and the long-delayed Statement does not satisfy that requirement. This contemporaneous-explanation requirement also follows from ordinary principles of administrative law, which preclude agencies from relying during judicial review on rationales developed long after the underlying decision has been made and litigation has begun. Indeed, this case illustrates the important purposes advanced by these doctrines—including promoting reasoned decisionmaking, providing guidance for the public and the parties, and facilitating orderly judicial review—and disserved by the district court's reasoning. Because the Statement falls within the prohibition on *post hoc* rationalizations, it was not properly before the district court and so cannot preclude review of the underlying administrative dismissal.

Moreover, the district court's justifications for exempting the Statement from this prohibition miss the mark. That the Commissioners themselves issued the

Statement does not render it a proper basis for review: As the Supreme Court has emphasized, "the problem [with *post hoc* rationalizations] is the timing, not the speaker." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). And the fact that the Statement offers "the only explanation the[controlling] Commissioners have ever offered for their decision," App. 44, is precisely the problem, not an excuse for those Commissioners to contrive a new rationale in the future. Finally, the possibility that the controlling Commissioners might simply offer the same reasoning after remand does not make that remand pointless—a court "cannot know" how an agency will respond if given another chance to consider ECU's complaint, *FEC v. Akins*, 524 U.S. 11, 25 (1998), and, in any event, remand serves to enforce the values advanced by the contemporaneous-explanation requirement. In short, the district court erred as a matter of law in treating the Statement as a part of the record on review and, accordingly, was wrong to conclude that it blocked review of the underlying administrative dismissal.

Second, even if the district court had been correct to consider the Statement, it would not follow that the court lacked jurisdiction to adjudicate ECU's claim, as "reviewability [under FECA] is not a jurisdictional issue." *Campaign Legal Center & Democracy 21 v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (per curiam). Dismissal for lack of subject matter jurisdiction was therefore inappropriate.

Third, because the Statement was not properly part of the record on review, the district court erred by failing to conclude that the underlying administrative dismissal was contrary to law—and, therefore, in denying ECU's motion for default judgment. Because the controlling Commissioners voted to dismiss ECU's administrative complaint contrary to the recommendation of the agency's General Counsel, both case law applying FECA and ordinary principles of arbitrary-and-capricious review required them to validly explain their reasoning. They failed to do so. The controlling Commissioners' action was thus necessarily contrary to law. Because the district court had jurisdiction over this action and ECU established the unlawfulness of the challenged FEC action, ECU was entitled to default judgment.

STANDARD OF REVIEW

This Court "review[s] *de novo* a dismissal for lack of subject matter jurisdiction." *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 498 (D.C. Cir. 2018) (quoting *United States ex rel. Oliver v. Philip Morris USA Inc.*, 826 F.3d 466, 471 (D.C. Cir. 2016)). "In so doing, [the Court] 'must accept the factual allegations in the complaint as true.'" *Id.* (quoting *Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867, 871 (D.C. Cir. 2002)). Moreover, although this Court reviews the decision whether to grant a default judgment for abuse of discretion, "'[a] district court . . . necessarily abuse[s] its discretion if it base[s] its ruling on' an error of law." *Fraenkel v. Islamic Republic of Iran*, 892 F.3d 348, 356 (D.C. Cir. 2018) (quoting *Cooter & Gell v. Hartmarx*

Corp., 496 U.S. 384, 405 (1990)); *accord Escalante v. Lidge*, 34 F.4th 486, 492 (5th Cir. 2022).

ARGUMENT

I. The District Court Had Subject Matter Jurisdiction to Review the Underlying Dismissal.

The district court erred in concluding that it lacked subject matter jurisdiction to review the dismissal of ECU's administrative complaint. The court reasoned that, because the Statement purported to exercise the FEC's prosecutorial discretion to dismiss ECU's claims, the dismissal was unreviewable under *New Models* and, therefore, the court lacked jurisdiction. App. 47; *see New Models*, 993 F.3d at 882. But this analysis rests on two independent legal errors. *First,* the district court erred by treating the Statement as relevant to its review, rather than as a *post hoc* rationalization not properly before the court, which could not render the underlying administrative dismissal unreviewable. *See New Models*, 993 F.3d at 885 (barring review only where statement of reasons before court relies on prosecutorial discretion). *Second,* even if the Statement *were* properly before the district court, its reference to prosecutorial discretion would not affect the court's jurisdiction because "reviewability [under FECA] is not a jurisdictional issue." *Campaign Legal Center*, 952 F.3d at 356. For both these reasons, the district court had jurisdiction to adjudicate this action.

A. The dismissal is reviewable because the belated Statement is a *post hoc* rationalization that was not properly before the district court.

1. The Statement is an impermissible *post hoc* rationalization for the dismissal.

The controlling Commissioners' Statement cannot insulate the dismissal of ECU's administrative complaint from review because it is a *post hoc* rationalization that was not properly before the district court. Under FECA, Commissioners must explain administrative dismissals contrary to the General Counsel's recommendation through contemporaneous statements of reasons, *see Common Cause*, 842 F.2d at 449; an explanation issued months after litigation has begun does not meet this requirement. As this case demonstrates, the contemporaneous-explanation requirement "serves important values of administrative law," *Regents*, 140 S. Ct. at 1909, that the district court's conclusions would contravene. As a result, the district court erred in considering the *post hoc* Statement and in relying on it to hold the underlying administrative dismissal unreviewable.

Longstanding circuit precedent requires that judicial review of FEC action be based on *contemporaneous* statements of reasons by the Commissioners explaining their reasoning. Thus, when a group of controlling Commissioners determines not to proceed with an administrative complaint against the recommendation of the FEC's General Counsel, they must explain their reasoning "*at the time* when a deadlock vote . . . results in an order of dismissal." *Common Cause*, 842 F.2d at 449

(emphasis added); *see, e.g.*, *Commission on Hope*, 892 F.3d at 438 n.5. Consistent with this approach, the *Commission on Hope* court declined to consider a statement of reasons issued by a Commissioner in connection with an FEC dismissal several months after the agency's action and after judicial review of the agency's decision had begun. *See* 892 F.3d at 438 n.5. In so doing, the court emphasized that "[a]n agency cannot *sua sponte* update the administrative record when an action is pending in court." *Id.*[3] The controlling Commissioners in this case similarly sought to belatedly "update the administrative record" by releasing the Statement months after the dismissal and after ECU initiated this action. Indeed, like the statement in *Commission on Hope*, the Statement in this matter was not released until after FECA's sixty-day deadline for seeking review had expired. And so, as in *Commission on Hope*, the *post hoc* Statement did not meet the requirement that Commissioners explain their actions "at the time" of the underlying dismissal, *Common Cause*, 842 F.2d at 449, and was not properly before the district court. It therefore cannot render the administrative dismissal unreviewable.

The contemporaneous-explanation requirement under FECA accords with well-established administrative law, which does not permit courts to consider *post*

[3] As the district court noted, *see* App. 45 n.4, the Commissioner in question was not "controlling" with respect to the underlying dismissal, *see* 892 F.3d at 438 n.5. But nothing in *Commission on Hope*'s reasoning turned on that point; rather, the court stated the prohibition on *post hoc* rationalizations in categorical terms. *See id.*

hoc rationalizations when reviewing agency actions. "It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Regents*, 140 S. Ct. at 1907 (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)); *see, e.g.*, *AT&T Info. Sys., Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (declining to consider explanation for agency action developed after judicial review action had begun). *Regents*, for instance, held that a memorandum issued by the Secretary of Homeland Security purporting to offer further justifications for the agency's earlier decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program was not properly before the Court because it contained rationales not included in the agency's original explanation of the decision and was issued long after the challenged decision had been made and litigation had begun. *See Regents*, 140 S. Ct. at 1904, 1907-10. Like the DACA memorandum, the Statement in this case gave a new rationale for the controlling Commissioners' votes—in the district court's words, "the only explanation the[] Commissioners have ever offered for their decision," App. 44—and was first released by the agency months after the dismissal at issue and after ECU filed this action. As in *Regents*, then, the agency's *post hoc* rationalization of its action was not properly before the court. Accordingly, the controlling Commissioners' purported invocation of the FEC's prosecutorial discretion could not affect the dismissal's reviewability or the court's jurisdiction.

In rejecting this conclusion, the district court took issue with the fact that ECU "pointed to no case in which a court declined to consider the only explanation provided by the 'controlling Commissioners' . . . simply because it was not provided at the time they voted." App. 45. But that formulation both understates the controlling Commissioners' delay in issuing the Statement and unduly narrows the universe of relevant precedents. The controlling Commissioners failed to release the Statement not merely at the moment they cast their votes, but at any point for months thereafter, until after any challenge to the dismissals, including the instant case, would have had to be filed. That courts do not appear to have ruled on this precise factual scenario in the past speaks to the particularly egregious nature of the controlling Commissioners' delay in releasing the Statement; it does not provide a reason to disregard the numerous precedents, both in the context of FECA, *see, e.g.*, *Commission on Hope*, 892 F.3d at 438 n.5, and elsewhere, *see, e.g.*, *Regents*, 140 S. Ct. at 1907-10; *AT&T*, 810 F.2d at 1236, declining to consider *post hoc* rationales for agency action.

Moreover, the requirement for a *contemporaneous* explanation of the agency's decision "serves important values of administrative law," *Regents*, 140 S. Ct. at 1909; *see Common Cause*, 842 F.2d at 449—values that accepting the *post hoc* Statement would undermine.

First, as the district court acknowledged, App. 45, "[r]equiring a statement of reasons by the declining-to-go-ahead Commissioners at the time . . . of dismissal . . . contributes to reasoned decisionmaking by the agency" by "ensur[ing] reflection and creat[ing] an opportunity for self-correction." *Common Cause*, 842 F.2d at 449; *see Regents*, 140 S. Ct. at 1909. Producing a statement of reasons long after the controlling Commissioners decided not to pursue a complaint—as in this case—does not offer this opportunity for "reflection" and "self-correction." *Common Cause*, 842 F.2d at 449. Instead, it amounts only to an exercise in rationalizing a predetermined course of action.

And this concern about the quality of the Commission's reasoning is particularly pressing in this case, where the explanation eventually offered in the Statement seems to have been written with a particular eye towards the already pending litigation. "[T]here is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment' . . . when it appears that the interpretation is nothing more than a 'convenient litigating position,' or a '"*post hoc* rationalizatio[n]" advanced by an agency seeking to defend past agency action against attack.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (second alteration in original) (first quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997); then quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); and then quoting *Auer*, 519 U.S. at 462); *see Regents*, 140 S. Ct. at 1909.

Here, this Circuit's near-complete deference to invocations of prosecutorial discretion, *see, e.g.*, *New Models*, 993 F.3d at 882, makes the Statement's reference to prosecutorial discretion the ultimate "convenient litigating position," *Christopher*, 567 U.S. at 155 (quoting *Bowen*, 488 U.S. at 213); *see also* Supplemental Statement of Reasons of Comm'r Ellen L. Weintraub at 1, MUR 7784 (Make America Great Again PAC, *et al.*) (July 14, 2022), https://www.fec.gov/files/legal/murs/7784/7784_44.pdf (noting three Commissioners' frequent reliance on prosecutorial discretion to preclude review since *Commission on Hope*).

Indeed, far from ensuring the opportunity for "self-correction" the contemporaneous-explanation requirement is meant to provide, *Common Cause*, 842 F.2d at 449, permitting Commissioners to wait to learn if their decision to dismiss a complaint will be challenged in court before issuing a statement of reasons would risk nullifying FECA's primary mechanism for *any* correction of faulty Commission decisionmaking: judicial review. *See* 52 U.S.C. § 30109(a)(8). The district court's reasoning would allow every group of controlling Commissioners responsible for a dismissal to wait for the statutory sixty-day deadline for filing a petition for review to elapse. *See id.* § 30109(a)(8). If the administrative complainant chose not to seek review within the statutory period, the controlling Commissioners could then issue a statement of reasons without risk that even its purely legal conclusions would be reviewed by a court. If the complainant did seek review, the

Commissioners could purport to invoke the agency's prosecutorial discretion, potentially rendering the dismissal unreviewable. *See New Models*, 993 F.3d at 882. In short, *Common Cause*'s requirement for a contemporaneous explanation of FEC dismissals advances the goal of "reasoned decisionmaking," 842 F.2d at 449; the district court's approach impedes it.

Second, requiring that judicial review be based on a rationale issued "at the time . . . of dismissal"—unlike accepting one issued after litigation has begun—"enhance[s] the predictability of Commission decisions for future litigants." *Id.*; *see Regents*, 140 S. Ct. at 1909 ("Requiring a new decision before considering new reasons promotes 'agency accountability' by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority." (citation omitted) (quoting *Bowen*, 476 U.S. at 643)). If Commissioners can produce statements of reasons after lawsuits are filed, they have little incentive to explain their views proactively or in cases where litigation seems unlikely, resulting in less guidance for the public and future parties before the agency. While the district court disregarded this concern because the controlling Commissioners did eventually produce the Statement in this particular case, App. 45, a system in which administrative complainants like ECU must sue the agency to learn the reasons for their complaints' dismissals will less frequently inform the public about agency views—and certainly will not provide that information promptly enough to enable

"parties and the public [to] respond fully *and in a timely manner*," *Regents*, 140 S. Ct. at 1909 (emphasis added). Moreover, such a system limits the usefulness of any explanation eventually produced by the Commission: Given the strong incentives for *post hoc* rationalizations and pretext created by the district court's reasoning, parties and the public could have little "confidence that [any] reasons [eventually] given are not simply 'convenient litigating positions.'" *Id.* (quoting *Christopher*, 567 U.S. at 155). The district court's reasoning therefore disserves the informational purposes of the contemporaneous-explanation requirement.

Third, the contemporaneous-explanation requirement "is necessary to allow meaningful judicial review," *Common Cause*, 842 F.2d at 449, while accepting *post hoc* rationalizations "upset[s] 'the orderly functioning of the process of review,' forcing both litigants and courts to chase a moving target," *Regents*, 140 S. Ct. at 1909 (citation omitted) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). The belated issuance of even a genuine rationale disrupts the review process—as this case illustrates. Because the controlling Commissioners did not issue the Statement until after the statutory deadline for seeking review of the underlying dismissal, ECU was forced to file this action to protect its rights without knowing the Commissioners' reasoning. Permitting the FEC to place potential litigants in this position wastes judicial resources by requiring administrative complainants to file speculative suits challenging unexplained dismissals, creating a "moving target" that

impedes orderly judicial review. *Id. Post hoc* rationalizations like the Statement thus disrupt the review process and disserve judicial economy.

Precedent and basic principles of administrative law, with good reason, dictate that the Statement was not properly before the district court. The controlling Commissioners' *post hoc* invocation of prosecutorial discretion therefore cannot bar review.

2. The district court's reasons for considering the Statement are unpersuasive.

The district court offered three basic arguments for considering the Statement notwithstanding its belated issuance. *See* App. 44-45. None justifies deviating from the "foundational" rule against *post hoc* rationalizations. *Regents*, 140 S. Ct. at 1907 (quoting *Michigan*, 576 U.S. at 758).

First, the district court's observation that the Statement was issued by the Commissioners themselves, rather than through "an argument of counsel or an affidavit submitted in connection with litigation," App. 44, does not remedy the Statement's *post hoc* nature. "While it is true that the [Supreme] Court has often rejected justifications belatedly advanced by advocates, [it] refer[s] to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker." *Regents*, 140 S. Ct. at 1909; *see also* App. 44 (acknowledging that the bar on *post hoc* rationalizations applies not only to arguments made by counsel or in litigation filings but also to "bases for agency

action that differ from the ones provided originally" or "rationales developed in litigation to justify the decision" (internal quotation marks omitted)). The *Regents* Court, for example, declined to consider a memorandum purporting to offer new rationales for the decision to rescind DACA even though it was issued by the relevant agency head, the Secretary of Homeland Security, because the Secretary produced it significantly after the decision was made and litigation had begun. *See id.* at 1904, 1907-10. Similarly, in this case, the controlling Commissioners issued an entirely new explanation for their decision long after the dismissal and after ECU filed this action. App. 90-91, 98; *see also* App. 44 (noting that the Statement "is the only explanation these Commissioners have ever offered for their decision"). The fact that the controlling Commissioners issued the *post hoc* Statement does not render it any more a proper basis for judicial review than the Secretary's memorandum in *Regents*.

Further, whoever its authors, the Statement appears hardly any less litigation-driven than "an argument of counsel or an affidavit submitted in connection with litigation." App. 44. FEC Commissioners, including the controlling Commissioners here, are aware of ongoing litigation involving the agency and periodically issue statements in response to that litigation. *See, e.g.*, Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey & James E. "Trey" Trainor, III Regarding Freedom of Information Act Litigation 1 (2022), https://www.fec.gov/

resources/cms-content/documents/Statement-re-FOIA-Litigation-6.28.2022-Dickerson-Cooksey-Trainor.pdf. And, as discussed above, *see supra* at 25, the broad deference afforded invocations of prosecutorial discretion by the controlling Commissioners on judicial review renders the Statement's reliance on that discretion such a "'convenient litigating position'" for "'defending past agency action against attack'" that "there is reason to suspect that the [Statement] 'does not reflect the agency's fair and considered judgment.'" *Christopher*, 567 U.S. at 155 (first quoting *Bowen*, 488 U.S. at 213; then quoting *Auer*, 519 U.S. at 462; and then quoting *id.*). Indeed, another FEC Commissioner recently suggested that a subset of the agency's members, including the controlling Commissioners in this case, routinely "play[] their prosecutorial discretion trump card" in order to "bulletproof their blocking of . . . enforcement matter[s]" from judicial review. Supplemental Statement of Reasons of Comm'r Ellen L. Weintraub, *supra*, at 1 (noting that bloc including controlling Commissioners in this case has cited prosecutorial discretion nearly two-thirds of the time when rejecting FEC's General Counsel's recommendation to investigate complaint). The Statement's apparent litigation motivation provides further reason to enforce the prohibition on *post hoc* rationalizations here.

Second, the district court mistook the problem for the solution in relying on the fact that the Statement "is the only explanation these Commissioners have ever offered for their decision, so it does not contradict any justification expressed

elsewhere." App. 44. Agencies may not "offer post-hoc rationalizations where no [contemporaneous] rationalization exists." *AT&T*, 810 F.2d at 1236 (declining to consider agency submission meant to explain decision for which no contemporaneous explanation existed); *see also, e.g.*, *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) ("[Any] new materials [offered by an agency to explain a decision on review] should be merely explanatory of the original record and should contain no new rationalizations."). The fact that, as the district court recognized, the controlling Commissioners failed to offer *any* contemporaneous explanation of the dismissal, App. 44, means simply that: The dismissal is unexplained for purposes of judicial review. *See AT&T*, 810 F.2d at 1236. It does not give those Commissioners a blank slate on which to write a new explanation at a later date. *See id.* Otherwise, agencies would have perverse incentives to remain silent about their decisions until after any legal challenges are filed and the challengers' arguments are previewed, so as to avoid limiting the responses they might offer to those challenges.

That the belated Statement is "the only explanation the[controlling] Commissioners have ever offered for their decision," App. 44, places this case outside the "limited exception" to the *post hoc* rationalization prohibition that allows agencies occasionally to "supplement the administrative record" on judicial review to clarify or amplify a rationale already included in the record, *AT&T*, 810 F.2d at

1236. Under that exception, this Court has sometimes considered materials developed by an agency after a challenged decision was made that "contain[] 'no new rationalizations'" and are "'merely explanatory of the original record.'" *Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 464 (D.C. Cir. 2016) (quoting *Costle*, 657 F.2d at 464); *see also, e.g.*, *Consumer Fed'n of Am. & Pub. Citizen v. U.S. Dep't of Health & Hum. Servs.*, 83 F.3d 1497, 1506-07 (D.C. Cir. 1996) (permitting agency declarations that "'merely illuminate reasons obscured but implicit in the administrative record,'" but rejecting a submission that "offer[ed] an entirely new theory" for the agency's action (quoting *Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996))).

In *Appeal of Bolden*, 848 F.2d 201 (D.C. Cir. 1988), for example, the court treated as part of the record on review of an agency action a memorandum developed by the agency after the legal challenge was filed, because the district court found, based on an examination of contemporaneous records, that the agency had considered the rationales given in the memorandum when making the decision. *See id.* at 207. The memorandum therefore merely "amplif[ied] the administrative record." *Id.*[4] But unlike the *Bolden* memorandum, the Statement in this case did not

[4] The legal challenge in *Bolden* was also filed before the agency finalized the decision at issue, such that the agency "was required to submit [the memorandum] after the suit had commenced," providing further grounds for including the later submission in the record. 848 F.2d at 207.

amplify or explain an existing rationale; as the district court noted, it instead provided "the only explanation the[controlling] Commissioners have ever offered for their decision." App. 44. The Statement thus "contains '[a] new rationalization[],'" *Olivares*, 819 F.3d at 464, and does not fit within this "limited exception" to the ordinary rule against *post hoc* rationalizations, *AT&T*, 810 F.2d at 1236.

Finally, the district court suggested that there was "no reason to ignore the explanation it already ha[d] before it" because, on remand, the controlling Commissioners might simply offer that same explanation again. App. 45. But the Supreme Court has rejected precisely this argument. *See Regents*, 140 S. Ct. at 1909 (noting Court's administrative law precedents "[r]equir[e] a new decision before considering new reasons"). After all, the agency *might* pursue the same course, but a federal court order remanding the matter to the agency for lack of reasoned decision-making could just as well cause the agency to reconsider its decision. *See, e.g.*, *Akins*, 524 U.S. at 25 (observing that a court may "set aside [FEC] action and remand [a] case . . . even though the agency . . . might later . . . reach the same result" because the court "cannot know" how the Commission will respond on remand). And in any event, as discussed above, requiring a "contemporaneous explanation[]" of the agency's decision "serves important values of administrative law," including enabling affected "parties and the public [to] respond fully and in a timely manner"

to agency action; ensuring that agency decisions are the products of reasoned decisionmaking and "not simply 'convenient litigating position[s]'"; and setting a clear record for judicial review, rather than "forcing both litigants and courts to chase a moving target." *Regents*, 140 S. Ct. at 1909 (third alteration in original) (quoting *Christopher*, 567 U.S. at 155). That "[e]ach of these values would be markedly undermined" by permitting *post hoc* rationalizations like the Statement, *Regents*, 140 S. Ct. at 1909, is a further reason not to credit the controlling Commissioners' belated justification for their votes, *contra* App. 45.

In sum, none of the district court's reasons for considering the Statement withstand scrutiny, and the controlling Commissioners' *post hoc* invocation of prosecutorial discretion does not insulate the dismissal from review.

B. In any event, reviewability under FECA is not a jurisdictional issue.

Even if the Statement had been properly before the district court, the controlling Commissioners' purported exercise of prosecutorial discretion would not affect the court's jurisdiction to adjudicate ECU's claim. Under FECA, "reviewability is not a jurisdictional issue." *Campaign Legal Center*, 952 F.3d at 356; *see also, e.g.*, *New Models*, 993 F.3d at 895 (affirming grant of summary judgment to Commission—rather than dismissal for lack of subject matter jurisdiction—where controlling Commissioners' invocation of prosecutorial discretion rendered FEC dismissal nonreviewable). In *Campaign Legal Center*, for

example, the controlling Commissioners who voted not to pursue a group of administrative complaints cited, among other reasons for their decision, the Commission's prosecutorial discretion. *See id.* at 355. The agency argued that this invocation of prosecutorial discretion rendered the dismissals nonreviewable—a point the plaintiffs disputed. *See id.* at 356. But the court declined to address the reviewability question, instead deciding the plaintiffs' contrary-to-law claims on the merits—a maneuver that would not have been available if the controlling Commissioners' invocation of prosecutorial discretion affected the court's jurisdiction. *See id.* That precedent governs this case: even if the district court could appropriately consider the Statement, the controlling Commissioners' reference to prosecutorial discretion would not affect that court's jurisdiction. The district court therefore erred in dismissing ECU's claims for lack of subject matter jurisdiction.

II. The FEC's Dismissal Was Contrary to Law.

Because, as the district court recognized, the Statement "is the only explanation the[controlling] Commissioners have ever offered for their decision," App. 44, the fact that the Statement was not properly before the district court necessarily renders the dismissal of ECU's administrative complaint contrary to law. *See Common Cause*, 842 F.2d at 449; *accord Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1132, 1135 (D.C. Cir. 1987).

Indeed, agency action is arbitrary and capricious—and therefore contrary to law—where the agency fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see, e.g.*, *Regents*, 140 S. Ct. at 1910-16; *see also Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (arbitrary or capricious FEC action is "contrary to law" under FECA). Here, faced with Plaintiff's well-documented administrative complaint and the FEC's General Counsel's recommendation to investigate that complaint, the controlling Commissioners voted not to pursue the matter without addressing any of the evidence or arguments before them. As in *Regents*, the Commission's failure to explain its decision renders its action arbitrary and capricious, and thus contrary to law.

CONCLUSION

For the foregoing reasons, ECU respectfully requests that this Court reverse the district court's dismissal of this case and denial of ECU's motion for default judgment.

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Respectfully submitted,

/s/ *Adav Noti*

Adav Noti (D.C. Bar No. 490714)
Kevin P. Hancock
CAMPAIGN LEGAL CENTER ACTION
1101 14th Street, NW, St. 400
Washington, D.C. 20005
(202) 736-2000
anoti@campaignlegalcenter.org
khancock@campaignlegalcenter.org

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 8,191 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

CERTIFICATE OF SERVICE

I certify that on August 3, 2022, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Adav Noti
Adav Noti