UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 22-35 (CRC) OPPOSITION TO MOTION AND REPLY IN SUPPORT OF MOTION

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR DEFAULT JUDGMENT AND REPLY IN SUPPORT OF MOTION FOR A VOLUNTARY REMAND

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INTRODUCTION

Defendant Federal Election Commission ("FEC" or "Commission") hereby opposes plaintiff Citizens for Responsibility and Ethics in Washington's ("CREW") Motion for Summary Judgment or Default Judgment and writes in support of its Motion for Voluntary Remand. The Court should decline to grant either summary or default judgment to CREW on its claim alleging that the Commission's decision to dismiss Matter Under Review ("MUR") 7465 was "contrary to law[.]" The Commission is permitted to oppose the entry of final judgment in this case notwithstanding the clerk's ministerial entry of default. Moreover, deciding the merits of CREW's contrary to law claim is unnecessary, and indeed inappropriate, where the Commission's explanation conveying its interpretation of FECA or its analysis applying that interpretation is absent. A controlling statement of reasons deemed untimely prevents the Court from conducting the "contrary to law" analysis FECA commands. Instead of addressing the merits of CREW's claim, the Court should grant the Commission's request for voluntary remand of the case back to the agency for reconsideration and to issue a timely explanation for its ultimate decision in MUR 7465. Such an approach lies squarely within this Court's broad discretion to issue remands to agencies, entails no cognizable prejudice to CREW considering that its contrary to law claim cannot be reviewed because the Commission's explanation was deemed untimely pursuant to intervening Circuit case law, and best preserves the Court's and parties' resources by providing the most expeditious path to ultimately resolve this case. Accordingly, the Court should deny CREW's Motion and grant the FEC's Motion for Voluntary Remand.

BACKGROUND

I. THE FEC AND FECA'S ADMINISTRATIVE ENFORCEMENT PROCESS

The FEC is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 ("FECA" or the "Act"). *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. FECA permits any person to file an administrative complaint with the Commission alleging a violation of the statute. 52 U.S.C. § 30109(a)(1). If at least four members of the Commission vote to find "reason to believe" a FECA violation has occurred, the Commission must notify the respondent of the alleged violation and its factual basis, and the agency then ordinarily investigates the allegations or pursues conciliation with the respondent. *Id.* § 30109(a)(2).

After an investigation, the FEC Office of General Counsel ("OGC") may recommend that the Commission find there is "probable cause" to believe FECA has been violated. 52 U.S.C. § 30109(a)(3). Respondents are entitled to file a responsive brief, *id*., and OGC prepares a report to the Commission with further recommendations, 11 C.F.R. § 111.16. If the Commission dismisses an administrative enforcement matter, FECA provides that the administrative complainant may seek judicial review in this District pursuant to 52 U.S.C. § 30109(a)(8)(A). Defense of such cases may only be authorized through an affirmative vote of four or more members of the Commission. 52 U.S.C. §§ 30106(c), 30107(a)(6).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Matter Under Review 7465, Freedom Vote, Inc.

On August 8, 2018, Citizens for Responsibility and Ethics in Washington ("CREW") filed an administrative complaint with the FEC, designated MUR 7465, alleging Freedom Vote had

violated FECA by failing to register and report as a political committee. Admin. Compl., MUR 7465, Freedom Vote, Inc. (Aug. 8. 2018), https://www.fec.gov/files/legal/murs/7465/ 7465_01.pdf. On July 25, 2019, the Commission adopted by a vote of 4-0 the recommendation of the Office of General Counsel ("OGC") to find reason to believe Freedom Vote violated the Act. Vote Certification (" Cert."), MUR 7465, Freedom Vote, Inc., (July 29, 2019), https://www.fec.gov/files/legal/murs/7465/ 7465_16.pdf. The Office of General Counsel proceeded with an investigation of the allegations of plaintiff's administrative complaint and compiled a record of various materials, including formal responses of MUR respondents, business and financial documents and communications of Freedom Vote, deposition testimony, and other documents.

Based on this record and relevant factual and legal analysis, the General Counsel's Brief recommended the Commission find probable cause to believe Freedom Vote violated 52 U.S.C. §§ 30102, 30103, and 30104(a), (b), and (g)(2) by failing to organize, register, and report as a political committee. Gen. Counsel's Br., MUR 7465, Freedom Vote, Inc., (Sept. 20, 2021), https://www.fec.gov/files/legal/murs/7465/7465_27.pdf. Freedom Vote submitted a written response to the General Counsel's Brief on October 5, 2021, and the Commission held a Probable Cause Hearing on the matter on October 14, 2021.

On November 9, 2021, the Commission considered a motion to find probable cause that Freedom Vote violated the relevant provisions of FECA, which failed by a 3-3 vote, having not garnered four necessary votes in the affirmative. Cert, MUR 7465, Freedom Vote, Inc., (Nov. 9, 2021), https://www.fec.gov/files/legal/murs/7465/7465_33.pdf. That same day, the Commission held a vote on whether to dismiss the matter pursuant to the Commission's prosecutorial discretion. This motion similarly garnered a 3-3 vote and did not pass. *Id*. The

Commission then voted 4-1 to close the file. *Id*. The Commission subsequently sent letters to CREW, the administrative complainant, and respondents notifying those parties of the MUR's disposition and file closure. On March 7, 2022, the group of three Commissioners who declined to find probable cause and thus controlled the outcome in this case, then-Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III (the "controlling Commissioners"), issued a Statement of Reasons explaining their decision. Statement of Reasons, MUR 7465, https://www.fec.gov/files/legal/murs/7465/7465_40.pdf.

B. The Current Lawsuit

On January 6, 2022, CREW filed this action alleging the Commission's dismissal of the administrative complaint in MUR 7465 was contrary to law. (Pl.'s Compl. for Injunctive and Declaratory Relief ("Compl.") (Doc. No. 1).) When the Commission considered whether to authorize defense of this case as required by statute, the vote for such authorization did not receive the required four affirmative votes and failed. Cert., *CREW v. FEC*, No. 22-35 (Feb. 15, 2022), https://www.fec.gov/resources/cms-content/documents/fec_cert_02-18-2022.pdf; 52 U.S.C. §§ 30106(c), 30107(a)(6). The Clerk entered an Entry of Default on March 29, 2022. (Default, Mar. 29, 2022 (Doc. No. 5).) Shortly thereafter, CREW propounded on the FEC requests for production of documents ("RFPs") on April 20, 2022, and filed a motion to compel the FEC to produce the administrative record and respond to the previously issued requests for production on June 8, 2022. (Pl.'s Mot. to Compel FEC to Produce the Administrative Record and Respond to Reqs. for Production and Pl.'s First Reqs. for Production, Jun 8, 2022 (Doc. Nos. 6, 6-1).) On February 8, 2023, the Court issued an order denying the motion to compel "given the likelihood that the Court lacks jurisdiction to review the FEC dismissal challenged in the complaint" and ordered plaintiff to show cause why the

case should not be dismissed under *CREW v. FEC* ("New Models"), 993 F.3d 880 (D.C. Cir. 2021). (Minute Order Feb. 8, 2023.) On October 30, 2023, the Court changed course and determined it could not decline jurisdiction to review the instant dismissal in light of the intervening D.C. Circuit decision in *End Citizens United v. FEC*, 69 F.4th 916 (D.C. Cir. 2023) ("*ECU*"). (Minute Order Oct. 23, 2023.) That Order permitted the Commission to oppose CREW's motion to compel. (*Id.*)

As indicated in the parties' November 13, 2023 Consent Motion, and later in the November 9, 2023 Certification released on January 12, 2024, FEC counsel was authorized to appear for the limited purpose of providing the administrative record and agreed with CREW to do so by December 12. (FEC's Consent Mot. to Set Schedule and Extend Time, Nov. 13, 2023 (Doc. No. 13).) The Commission then supplied the certified 1,847-page administrative record and later stipulated to the inclusion of 397 additional pages of documents as part of the record. (Stip. and Joint. Mot. as to the Contents of the Administrative Record and Pending Mot. to Compel (Doc. Nos. 18-19).) Despite this production, CREW did not withdraw its motion to compel and continued to seek records reflecting "Commissioners' discussions of and rationale for" its reason to believe, probable cause, and prosecutorial discretion votes apart from vote certifications and statements of reasons.

The Court denied CREW's motion to compel on May 10, 2024, issuing a Memorandum Opinion and Order (Doc. No. 28) (the "Opinion") that determined that CREW was not entitled to discovery outside the scope of the administrative record in this case, and that the record does not include the privileged materials and subject matter plaintiff sought. The Court's Order further directed the parties to confer and file a joint status report by May 24, 2024, "proposing next steps in this proceeding." (Opinion at 20.) On May 24, 2024, the parties filed a joint

status report noting that the FEC planned to file the instant motion for a voluntary remand, while CREW planned to file a motion for summary judgment and a motion requesting attorneys' fees. The Court then set a briefing schedule for the FEC's motion for a remand and CREW's motion for summary or default judgment. (Minute Order May 28, 2024.)

The FEC filed its Memorandum of Points and Authorities in Support of its Motion for Voluntary Remand (the "Remand Motion" or "Remand Mot.") on June 11, 2024. (Doc. No. 33.) CREW filed its combined Motion for Summary Judgment or Default Judgment and Opposition to the FEC's Motion for Voluntary Remand ("Motion" or "Mot.") on July 2, 2024. (Doc. No. 36.)

ARGUMENT

I. THE FEC MAY OPPOSE THE ENTRY OF FINAL JUDGMENT IN THIS CASE

CREW's Motion makes the extraordinary claim that, despite plaintiff's eight months of silence on the issue and the order of this Court authorizing this briefing, the FEC should not be permitted to take *any* action in this proceeding until the entry of judgment against the agency is set aside. In its Motion, CREW alleges that "the FEC has not sought to set aside the default or suggested it could have good cause to do so, *cf.* Fed. R. Civ. P. 55(c), and accordingly cannot oppose judgment or, for that matter, present any other matter to this Court[.]" (Mot. at 13.) But that claim is not only wrong, it is a distraction. A ministerial default does not require the Court to close its eyes to any briefing or argument the FEC might file, and would be particularly inappropriate here, as the FEC has actively litigated this case since November of last year and is seeking a voluntary remand that obviates the need for any final judgment at this time.

A. Legal Standard for Opposing Default Judgment

On March 29, 2024, the clerk entered a default against the FEC due to its failure to defend this action over the preceding three months when CREW commenced this action against

the agency. Default (Doc. No. 5); *see* Fed. R. Civ. P. 55(a). The clerk's authority to enter default in accordance with this rule is limited to "'those cases where entry of judgment is purely a ministerial act' and functions for 'the obvious purpose of relieving the judge of some of his less complicated functions.'" *GAG Enters., Inc. v. Rayford*, 312 F.R.D. 230, 233 (D.D.C. 2015) (quoting *Combs v. Coal & Min. Mgmt. Servs., Inc.*, 105 F.R.D. 472, 474 (D.D.C. 1984)). In contrast to the ministerial *entry* of default, however, the "decision whether to enter default judgment is committed to the district court's discretion." *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 116 (2d Cir. 2015); *see* Fed. R. Civ. P. 55(b)(2).

"The court may set aside an entry of default for good cause[.]" Fed. R. Civ. P. 55(c). In addition, "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d). "Although the decision to set aside a default lies within the discretion of the district court, our Circuit has outlined the following factors that should be taken into account: (1) whether the default was willful, (2) whether a set-aside would prejudice the plaintiff, and (3) whether the defaulting party has presented a meritorious defense." *Shatsky v. Syrian Arab Republic*, 795 F. Supp. 2d 79, 82 (D.D.C. 2011) (quoting *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 373 (D.C.Cir.1980)). In determining whether a plaintiff has suffered prejudice, delay from default alone is not sufficient. *Keegel*, 627 F.2d at 373. Instead, courts look to tangible harms that may have resulted from the delay. *See Gilmore v. Palestinian Interim Self-Government Authority*, 675 F.Supp.2d 104 (D.D.C. 2009). Tangible harms may include "'loss of evidence, increased difficulties of discovery, and an enhanced opportunity for fraud or collusion.'" *Id*. at 110. "Defendants' allegations are meritorious if they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense."

Keegel, 627 F.2d at 374 (internal quotation omitted). Ultimately, the proffered defense "need not be . . . persuasive at this stage," but must only "give the factfinder some determination to make." *Am. Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir.1996) (internal quotations omitted).

B. The Court Should Set Aside the Entry of Default Against the FEC

The Court need not decide whether to set aside the entry of default against the FEC in order to rule in favor of the FEC's Motion for Voluntary Remand and remand this matter to the FEC for further proceedings. *See infra*, pp. 21-24. Nonetheless, if the Court reaches that decision, there is manifestly "good cause" for setting aside the entry of default here. *See* Fed. R. Civ. P. 55(c).

First, a set-aside would not "prejudice the plaintiff[.]" *Keegel*, 627 F.2d at 374. CREW's brief attempt to establish prejudice relies primarily on the unsubstantiated claim that "evidence in support of CREW's claims—and evidence of the facts to which CREW is ultimately entitled—spoliate." (Mot. at 22.) However, as is often the case in litigation pursuant to 52 U.S.C. § 30109(a)(8), it is not clear that there is any dispute as to the facts in this matter, and thus no relevant evidence to spoliate. Even if there were critical facts in dispute here, and CREW points to none, there is no reason to believe any of that evidence will in fact "spoliate" with time. (*See also* Opinion at 20 (rejecting plaintiff's motion to supplement the administrative record in this case).) Moreover, "delay in and of itself does not constitute prejudice[.]" *Cap. Yacht Club v. Vessel AVIVA*, 228 F.R.D. 389, 393–94 (D.D.C. 2005) (quoting *KPS & Assocs., Inc. v. Designs By FMC, Inc.*, 318 F.3d 1, 15 (1st Cir.2003)); *see also Keegel*, 627 F.2d at 374 (stating that the fact that "setting aside the default would delay satisfaction of plaintiffs' claim, should plaintiffs succeed at trial, is insufficient to require affirmance of the denial").

Second, Rule 55 has an "implicit preference for judgments on the merits, and its cautions against default as a sanction for curable non-response or lack of diligence." *Grimes v. D.C.*, 794 F.3d 83, 92 (D.C. Cir. 2015) (citing Fed. R. Civ. P. 55 Advisory Committee Note to the 2007 Amendments). Where a party has "actively litigated the matter" following a motion to dismiss, courts will normally set aside the default. *Candido v. D.C.*, 242 F.R.D. 151 (D.D.C. 2007) (setting aside default). Here, there can be no doubt FEC has diligently participated in this proceeding since November of 2023.

Finally, default is entirely inappropriate where, as the Court has noted, there is no explanation of the agency's reasoning for the Court to assess, and thus no basis to determine that the FEC's dismissal of MUR 7465 was "contrary to law" pursuant to 52 U.S.C. § 30109(a)(8)(C). As explained *infra*, pp. 17-19, FECA's "contrary to law" standard centers on the Commission's interpretation/application of the law that led to a dismissal, which is not present since the agency's explanation was deemed untimely. Accordingly, a "contrary to law" finding and remand for the Commission to conform with that order, or else providing CREW with a private right of action, makes little sense where the Court is unable to evaluate if the Commission's legal analysis was correct and thus cannot provide the agency instructions to conform with. *Infra*, pp. 19-21. This further precludes CREW from demonstrating that the FEC's dismissal of MUR 7465 was contrary to law with "evidence" that could "satisf[y] the court." Fed. R. Civ. P. 55(d).

Throughout its history, the FEC has consistently provided courts with explanations of its decisions sufficient to allow judicial review and will do so in this case once this matter is properly remanded to the Commission and a new final decision is made. The agency should be permitted to re-evaluate this matter and issue a new decision with a contemporaneous

explanation. Like the Court, the Commission did not anticipate intervening precedent from the Court of Appeals defining what constitutes a timely explanation for a dismissal. *See End Citizens United Pac v. FEC*, 69 F.4th 916 (D.C. Cir. 2023). While it may be appropriate in some future case to reprimand the agency for not issuing a timely explanation of its enforcement decision when it does so with the full knowledge of what the Court of Appeals held in *End Citizens United*, this is not that case.

C. The FEC May Oppose Default Judgment Here and Take Any Other Action at the Discretion of the Court

While the Court should set aside the entry of default against the FEC, this step is not necessary or required to grant the FEC's Motion for Voluntary Remand. *See infra*, pp. 21-24. CREW's brief attempt to suggest that this Court must effectively ignore briefing and motions made by the FEC until the entry of default is set aside is unsupported by the caselaw, contrary to this Court's own Minute Order of May 28, 2024, and would lead to unnecessary further delay that plaintiff has expressed a strong preference for avoiding. Indeed, CREW itself acknowledged that Rule 55(d), where a court considers granting a default judgment against the government after an entry of default has occurred, "does not relieve the government from the duty to defend cases or obey the court's orders . . . [and instead] heightens the government's duty." (Mot. at 13 (citing *Payne v. Barnhart*, 725 F. Supp. 2d 113, 119 (D.D.C. 2010) (quoting *Alameda v. Sec'y of Health, Educ. and Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980))).)

CREW's two cited authorities for its position are not biding precedent but merely persuasive, coming from outside the D.C. Circuit Court of Appeals. (Mot. at 13 (citing *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996); *Cohen v. Rosenthal*, No. 3:15-cv-01043-

CHS, 2015 WL 7722391, at *2 n.2 (D. Conn. Nov. 30, 2015)).)[1] CREW cites no binding authority from the Court of Appeals or precedent supporting its position from the District of Columbia District Court, and the FEC is aware of none.

Not only are CREW's cited authorities not binding on this Court, but they are also unpersuasive and inapposite. First, neither relate to a situation where an agency is seeking a voluntary remand, as opposed to moving to dismiss a matter or oppose judgment on the merits. And these cases themselves suggest that defendants against whom default is entered may still oppose judgment against them. Indeed, in *New York Life Ins.*, 84 F.3d at 142-43, the Fifth Circuit *vacated* a summary judgment issued against the defaulted defendant because defendant counsel's mere participation in a telephone conference and conversation with opposing counsel was sufficient to entitle defendant to notice of all motions and, presumably, the opportunity to respond. *Cf. Candido*, 242 F.R.D. at 156 (courts normally set aside default where a party has "actively litigated the matter"). And in *Cohen*, 2015 WL 7722391, at *2, while the court did not permit defendant to file its motion to dismiss, the court explicitly permitted the defaulted defendant to oppose final judgment and permitted plaintiff to file a reply to that opposition.

More importantly, however, practice in the District of Columbia has been more lenient. As a general matter, this Circuit has explicitly declined to apply the more stringent standards that apply to vacating a default *judgment* to setting aside an *entry* of default. *See Cap. Yacht Club v. Vessel AVIVA*, 228 F.R.D. 389, 393 (D.D.C. 2005) ("in this circuit courts grant vacatur of default more freely than vacatur of default judgment") (citing *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980)). And in practice, courts in this District permit defaulted but active litigants to fully

[1] According to Westlaw, neither case has ever been cited by the D.C. Circuit Court of Appeals or the D.C. District Court.

participate in proceedings. For instance, in *Candido*, 242 F.R.D. at 156, it was uncontested that the plaintiff failed to file a timely answer as ordered by the court. That court nonetheless held that default judgment was inappropriate in that case, as "the objective of Rule 55 is punishment for a party's inaction." *Id.* (citing *Whelan v. Abell*, 48 F.3d 1247, 1259–60 (D.C. Cir. 1995)). That court further rejected plaintiff's claim that defendant's motion for summary judgment must be disregarded, and instead merely converted it to a motion to dismiss pursuant to Rule 12(b)(5). *Candido*, 242 F.R.D. at 158. This follows an established practice in the federal courts of permitting an opposition to a motion for default judgment to substitute for a motion to set aside an entry of default. *See Meehan v. Snow*, 652 F.2d 274, 276 (2d Cir. 1981) (per curiam) (allowing an opposition to a motion for default judgment to substitute for a formal Rule 55(c) motion to set aside the entry of a default); 10A C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2692 (3d. ed. 2006) ("[T]he federal courts often view opposition to a motion for the entry of a default judgment as a motion to set aside the default, whether or not a formal motion under Rule 55(c) has been made.") (listing cases). So here, this brief opposing default judgment, explicitly authorized by this Court, can and should be received as a motion to set aside the entry of default in this case, rather than allowing "technicalities [to] preclude the substantive resolution of [the parties'] dispute" by entering a default judgment. *Candido*, 242 F.R.D. at 156-57 (quoting *Jackson*, 636 F.2d at 835).

Finally, the Court should permit the FEC to oppose CREW's Motion and otherwise fully participate in this litigation because to do otherwise would reward plaintiff's gamesmanship. CREW provides no explanation for why, under CREW's theory, the FEC may oppose its motion to compel and its motion to supplement the administrative record, file a Joint Status Report, and file its Motion for Remand but may not oppose plaintiff's Motion. Nonetheless, the FEC has

taken all of these actions over the past several months without the matter of the entry of default being raised by CREW or the Court. CREW further failed to raise the issue when the parties conferred prior to their recent Joint Status Report issued May 24, 2024. For CREW to implicitly consent to, and in fact urge, the FEC's full participation in this case for *eight months* only to suggest that the FEC is not permitted to file an opposition to its motion for final judgment *despite the Court's order providing for that opposition*, (Minute Order of May 28, 2024,) is the kind of practice that this Court should use its ample discretion in this matter to reject. *See In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("at some point acceptable tactics may degenerate into 'sharp practices' inimical to a healthy adversary system"); *Elec. Priv. Info. Ctr. v. Nat'l Sec. Agency*, 87 F. Supp. 3d 223, 236 (D.D.C. 2015) (disallowing fees where party engaged in "sharp practice of extending and then withdrawing settlement offers").

II. THE DISMISSAL BELOW WAS NOT CONTRARY TO LAW

The scope of the parties' current dispute is narrow, and centers on whether this Court must grant the claim in CREW's complaint, and thus make a "contrary to law" finding, before ordering remand. *See* 52 U.S.C. § 30109(a)(8)(C). Following the D.C. Circuit's opinion in *End Citizens United*, this Court's application of that decision to the instant case, and this Court's denial of CREW's motion to compel discovery, the FEC has agreed to provide CREW with the outcome it seeks: a remand so that the Commission may reconsider the matter and issue a timely explanation for its ultimate decision. Yet, CREW refuses to take yes for an answer, and instead urges that this Court must resolve its claim by issuing a contrary to law finding pursuant to 52 U.S.C. § 30109(a)(8)(C).

The Court should reject CREW's attempt to secure a premature final judgment. First, the Court has ample discretion to remand this matter back to the FEC without resolving CREW's contrary to law claim. Second, the Commission's admittedly untimely *explanation* of its

dismissal of MUR 7465 provides this Court with no basis to determine that the Commission's legal and factual analysis underlying that dismissal was improper, and thus there is no basis to conclude that the dismissal itself was "contrary to law." And for this same reason, any remand to the Commission would necessarily lack instructions as to how the FEC might "conform" with the Court's order. A "contrary to law" finding is neither necessary nor proper under the circumstances and should be reserved for if and when the Commission issues a final decision on remand and issues a timely explanation for that decision for the reviewing court to assess, if appropriate.

A. Remand to the FEC Does Not Require a Contrary to Law Finding

Courts routinely grant voluntary remands to agencies, *see infra*, pp. 21-24, and such remands do not require that the court find any fault with the remanding agency's conduct. The court has "broad discretion to grant or deny an agency's motion to remand." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (per curiam) (citing *Limnia, Inc. v. Dep't of Energy*, 857 F.3d 379, 381, 386 (D.C. Cir. 2017)). "[E]ven if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position." *Util. Solid Waste Activities Grp.*, 901 F.3d at 436 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)).

FECA makes no exception to these well-established principles of administrative law, as this Court has recognized. In its opinion denying CREW's motion to supplement the administrative record the Court explained that

> the circuit's practice has been to order remand of the case to the FEC 'with instructions to the Commissioners to explain coherently the path they are taking.' *DCCC*, 831 F.2d at 1133. Indeed, as recently as *ECU*, the Circuit held that another possible stand-in for the controlling Commissioners' statement of reasons—the FEC's 'failed [prosecutorial discretion] vote'—was not 'a substitute for [a contemporaneous] statement' and ordered the district court to remand the case to

> the agency 'for further action.' 69 F.4th at 921, 924; *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ('[I]f the reviewing court [] cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.').

(Opinion at 14.)

CREW does not contest these basic principles, namely that federal agencies routinely request voluntary remands without admitting error and that such requests are routinely granted. Instead, CREW seeks to litigate the merits of its administrative complaint, (Mot. at 14-17), despite the Court's clear admonition that there is an "absen[ce of] an explanation" for this Court to evaluate, and the Court cannot "assess whether the agency acted contrary to law" without a valid statement of reasons. (Opinion at 14 (citing *DCCC*, 831 F.2d at 1132 (requiring an explanation by the Commissioners for the FEC's stance to evaluate Commission action.)).) CREW insists that, based upon its review of the record, that "judgment in favor of the FEC is not possible[,]" which "leaves the Court with a single conclusion: that the dismissal was arbitrary and capricious[.]" (Mot. at 17-18 (internal citations omitted).)

However, CREW's line of reasoning is based entirely on the mistaken premise that the Court must reach a "conclusion" at all. A federal agency's ability to request a voluntary remand without admitting fault applies with equal force to the FEC. Although FECA provides that the court "may" remand a matter to the FEC when the court determines the agency acted "contrary to law," 52 U.S.C. § 30109(a)(8)(C), this is not the sole basis for remand to the FEC. *See* Remand Order, *DCCC v. FEC*, Civ. No. 86-2075 (SS) (D.D.C. Dec. 3, 1987) (Remand Mot. Exh. 1 (Doc. No. 33-1)) (remand without "contrary to law" finding); Remand Order, *Kean for Congress Committee v. FEC*, Civ. No. 04-07 (JDB) (D.D.C. Feb. 15, 2005) (Remand Mot. Exh. 2 (Doc. No. 33-2)) (same).

CREW mistakenly argues that remand for "additional investigation," *Tourus Recs., Inc. v. DEA*, 259 F.3d 731, 738 (D.C. Cir. 2001) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)), "is the remedy commanded by the FECA, which provides that after a court declares a dismissal was contrary to law, a remand to the agency for new action in conformity with the declaration within thirty days" and thus "exclusive means for vindicating rights under the Act." (Mot. at 18.) If that were true, the court-ordered remands in *DCCC* and *Kean for Congress Committee*, issued without contrary to law findings under § 30109(a)(8)(C), would have been improper. Moreover, CREW's urged approach defies a long line of administrative law precedent in this Circuit that affords broad discretion to courts to remand to agencies generally. *See Util. Solid Waste Activities Grp.*, 901 F.3d at 436. Contrary to CREW's assertion, that FECA provides for remand following a contrary to law finding does not render it the only avenue for remand.

CREW relies on a number of authorities to establish the uncontested principle that an agency must provide reasons for the decisions it makes, (*see* Mot. at 15-18), but these authorities are inapposite here because none assessed an untimely explanation of agency action. In *Tourus Records, Inc.*, the agency issued a letter deemed "not a statement of reasoning, but of conclusion," which the court deemed to not "articulate a satisfactory explanation." 259 F.3d at 737-38. However, the Court found the administrative record included other contents sufficient to permit judicial review and thus remand was unnecessary. *Id*. at 739-40. *Roelofs v. Sec'y of Air Force* similarly did not concern untimely explanations by the Air Force review boards at issue, it simply "prepared no statement of findings and offered no explanation for its decision," and seemingly had no intent to ever do so. 628 F.2d 594, 596 (D.C. Cir. 1980). Despite this intransigence, the Court remanded without making an arbitrary and capricious finding, noting

"[i]t cannot be assumed that a remand to provide a statement of grounds" would serve no purpose. *Id*. at 601. CREW's remaining authorities similarly did not address an untimely explanation for an agency decision. *See FEC v. Rose*, 806 F.2d 1081, 1087-90 (D.C. Cir. 1986) (FEC not liable for fees under Equal Access to Justice Act where agency's position was substantially justified); *Ohio v.* EPA, No. 23A349, 603 U.S. __, 144 S.Ct. 2040, 2024 WL 3187768 (June 27, 2024) (reviewing EPA's extensive and timely explained federal implementation plan); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1346 (D.C. Cir. 2014) (timely explanation of decision by TSA rejected for failure to include adequate detail). In sum, none of this case law on which CREW relies supports the proposition that an agency's untimely explanation is necessarily "arbitrary and capricious," *Tourus Recs.*, 259 F.3d at 737, nor "contrary to law" as defined by FECA. *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

B. A Contrary to Law Finding Would Be Particularly Inappropriate Here

This Court's prior discussion suggesting an inability to assess CREW's contrary to law claim, (Opinion at 13-14), reflects a key principle that the Commission must have explained its stance on the merits of plaintiff's administrative complaint in order for the Court to "intelligently determine whether the Commission is acting 'contrary to law.'" *Democratic Cong. Campaign Comm. v. FEC* ("*DCCC*"), 831 F.2d 1131, 1132 (D.C. Cir. 1987). In *DCCC*, the D.C. Circuit reversed the lower court only "insofar as it rule[d] dispositively on the merits of DCCC's complaint," *id*. at 1133, by "[h]aving found that the FEC's dismissal of the DCCC's complaint was contrary to law." *Democratic Cong. Campaign Comm. v. FEC*, 645 F. Supp. 169, 174 (D.D.C. 1986). It justified that narrow reversal on the notion that the Commission should have "further opportunity to set its precedent in order so that it, and not a court of review, will serve as primary decisionmaker in the area Congress has committed, initially, to the FEC's charge."

DCCC, 831 F.3d at 1133. Here, if the Court were to issue a "contrary to law" judgment without assessing the FEC's reasons for dismissing MUR 7465, this would deprive the agency of its role as the "primary decisionmaker" precisely as Congress intended.

A "contrary to law" inquiry pursuant to FECA is well-defined and necessarily requires an assessment of the agency's reasoning. "The FEC's decision is 'contrary to law' if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act . . . or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. The lack of a timely explanation for the Commission's decision here means it has not described its reasoning conveying an interpretation of the Act, or its analysis applying that interpretation, for the Court to evaluate. Far from "an attempt [to] evade final judgment," (Mot. at 27), the Commission insists on the grant of a voluntary remand, *infra* pp. 21-24, so that this Court has a proper basis to evaluate the agency's rationale for its ultimate determination on MUR 7465.

Indeed, the FEC's legal reasoning is a necessary component of the court's inquiry pursuant to 52 U.S.C. § 30109(a)(8)(C). "[J]udicial review under the 'contrary to law' standard is available for nonenforcement decisions that turn entirely on the Commission's legal interpretation." *Citizens for Resp. & Ethics in Washington v. FEC*, 993 F.3d 880, 892 (D.C. Cir. 2021) ("New Models"); *see also id.* at 894 ("In other words, for either of the alternative conditions articulated in *Orloski* to apply, the Commission must have based its dismissal decision squarely on its legal interpretation.") Accordingly, a contrary to law finding denotes that the Commission's interpretation of the Act or its related analysis was incorrect. *See, e.g., Campaign Legal Ctr. and Democracy 21 v. FEC*, 952 F.3d 352, 356-58 (D.C. Cir. 2020) (assessing the controlling Commissioners' analysis of FECA's straw donor and political

committee provisions). The controlling Commissioners' statement of reasons is a prerequisite to evaluating and deciding a contrary to law claim because that statement "is intended to explain why those commissioners saw no reason to believe [or probable cause] a violation occurred, and thereby aid the reviewing court to 'intelligently determine whether the Commission is acting contrary to law.'" *Campaign Legal Ctr. v. FEC*, No. 22-5336, 2024 WL 3335909, at *4 (D.C. Cir. July 9, 2024) (citing *DCCC*, 831 F.2d at 1132); *see also Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (A statement of reasons . . . is necessary to allow meaningful judicial review of the Commission's decision not to proceed."). CREW's own interpretation of the administrative record, (Mot. at 14-17), is no substitute.

FECA's judicial review provision underscores the need to assess the Commission's legal and factual reasoning by providing that the reviewing court can order the Commission to "conform with such declaration within 30 days[,]" failing which the complainant may file a citizen suit to "remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C). However, a lack of an explanation for the agency's action necessarily means that there will be no reasoning to which the agency can conform. It is uncontested that the FEC's untimely explanation is the only basis on which the Court could fault the agency at this time, but the FEC could only "conform with such declaration" by issuing a timely explanation for its original decision, certainly impossible more than three years since that dismissal without reconsidering the matter. Moreover, if the Court further determined that the FEC did not "conform . . . within 30 days" CREW would be entitled to a private right of action predicated on the allegations contained in its administrative complaint without the Court ever having the opportunity to assess why the Commission rejected those allegations. The Court should reject this approach and instead permit the FEC to consider the administrative complaint anew and

provide an explanation for its ultimate decision. *See DCCC*, 831 F.2d at 1132 (noting an absent explanation for FEC action and remanding to require an explanation by the Commissioners for the FEC's stance to evaluate that action.); *see also Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 265 (D.D.C. 2015) *aff'd*, 959 F.3d 1113 (D.C. Cir. 2020) (explaining that the APA requires disclosure of assumptions critical to an agency's decision to facilitate review).

In addition, CREW's assertion that a voluntary remand would bless improper behavior on the part of the Commission is completely unfounded. When the Commission reconsiders a matter on remand it is not permitted to do so for "some indeterminate time." (Mot. at 21.) Instead, the Commission is bound to act within a reasonable time based on the circumstances of the case or risks being held accountable for undue delay. *See* 52 U.S.C. § 30109(a)(8)(A) ("by a failure of the Commission to act on such complaint . . . [a party aggrieved] may file a petition with the United States District Court for the District of Columbia."). Nor will a voluntary remand signal approval of the Commission's issuing of an untimely explanation here. The scope of the Commission's obligation for its controlling group of Commissioners to submit a sufficiently contemporaneous statement of reasons explaining its dismissal is clear post-*ECU*.[2]

[2] CREW argues the controlling Commissioners "were aware of" and disregarded a "forty-year-old obligation to provide a contemporaneous explanation 'at the time when a deadlock vote results in an order of dismissal.'" (Mot. at 20 (citing *Common Cause*, 842 F.2d at 449)). But CREW meanwhile ignores that "able counsel," (Mot. at 19), appointed by the court in *ECU* capably raised arguments in support of the statement of reasons in that case nevertheless being accepted by the Court. *See ECU*, 69 F.4th at 921-23. In fact, the District Court in that case had decided to accept the controlling statement of reasons invoking prosecutorial discretion. *See End Citizens United PAC v. FEC*, 2022 WL 1136062 at *2-3 (D.D.C. Apr. 18, 2022). Accordingly, prior to the D.C. Circuit's decision, handed down in June 2023, whether the statement of reasons in this analogous case could be construed as valid was not settled. (*See* Minute Order Feb. 8, 2023.)

The FEC has since taken concrete steps to ensure the scenario is not repeated.[3]

CREW should not now be permitted to recast its original claim seeking review of the FEC's dismissal of MUR 7465 into a procedural claim challenging the agency's untimely explanation for that dismissal. After all, CREW alleges that it is "aggrieved by an order of the Commission dismissing a complaint[,]" 52 U.S.C. § 30109(a)(8)(A), not the lack of a timely explanation for that dismissal. (*See* Compl. ¶¶ 45, 52). However, if the Court does determine the Commission acted "contrary to law" on this basis, the Court should provide that the agency "conform" with this decision by reopening the matter and should not impose an arbitrary timeline for the agency to reach its ultimate decision. Under that scenario, CREW should be required to file a new lawsuit, if it so chooses, in order to challenge the ensuing final agency action once the FEC makes its final decision, as its procedural claim will have already been resolved. *See DCCC*, 831 F.2d at 1135 ("[p]arting ways with the district court" by overturning its contrary to law finding because it would have dictated the case's "ultimate outcome").

III. VOLUNTARY REMAND IS THE PROPER PATH FORWARD

The FEC has shown that courts in this circuit "generally grant an agency's motion to remand so long as the agency intends to take further action with respect to the original agency decision on review." (Remand Mot. at 7 (quoting *Clean Wis. v. Env't Prot. Agency*, 964 F.3d 1145, 1174 (D.C. Cir. 2020) (per curiam) (citing *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018)).) CREW does not contest this general approach, and instead urges this Court to substitute its own speculation on how the Commission will address a remand and argues it is unduly prejudiced. But a remand is appropriate, especially in the face of

[3] *See* Federal Election Commission, *FEC implements new enforcement case closure procedures* (Apr. 3, 2024) ("Case Closure Procedures"), https://www.fec.gov/updates/fec-implements-new-enforcement-case-closure-procedures/.

intervening precedent and an absence of undue prejudice to CREW. This Court should follow the general practice of allowing voluntary remands for further agency consideration for the following reasons.

First, because of the intervening precedent in *End Citizens United*, 69 F.4th at 920, the Commission provides a sound basis for a remand. In its opposition CREW speculates about the outcome of further consideration, arguing that the FEC does not "even propose to 'cure its own mistakes' on remand." (Mot. at 23.) And CREW assumes what "the FEC contemplates is simply to repeat its error" if the Court orders a remand. (*Id.*) But speculation is not a basis for denying a motion, particularly when there is an intervening precedent that has altered the decisional landscape. *Cadillac of Naperville, Inc. v. Nat'l Labor Relations Bd.,* 14 F.4th 703, 719 (D.C. Cir. 2021) (per curiam) (intervening precedent establishes a good faith basis and a lack of frivolousness justifying a voluntary remand); *see also Roelofs v. Sec'y of Air Force*, 628 F.2d 594, 601 (D.C. Cir. 1980) (it "cannot be assumed" that a remand would serve no purpose). Moreover, since consideration has to begin anew on remand, it is impossible for Commission counsel to predict an outcome as CREW prefers.

Even if the outcome on remand were clear, a remand would nonetheless be valuable and necessary because there is an "[a]bsen[ce of] an explanation" for this Court to evaluate, and the Court cannot "assess whether the agency acted contrary to law" without a valid statement of reasons. Opinion at 14 (citing *DCCC*, 831 F.2d at 1132 (requiring an explanation to evaluate Commission action); *see supra*, pp. 13-21. CREW suggests that remand is "designed to evade" review of the prior Commission decision, but that is the import of *ECU*, not the Commission's motion. The intervening precedent means there is not a reviewable rationale and unavoidably requires a remand to facilitate any necessary further review.

Second, in opposing the FEC's Motion for Remand, CREW fails to establish undue prejudice from further consideration before the agency. (Mot. at 22-24.) CREW suggests that denying a remand would conserve the Court's and parties' resources. (*Id.* at 22.) But that argument assumes that there is an existing reviewable decision before this Court now, which there is not. This Court has previously determined the earlier statement of reasons was not properly before the Court as an explanation of the controlling Commissioners' votes. (Minute Order, Oct. 30, 2023.) CREW's suggestion that its own reading of the administrative record, (Mot. at 14-17), leaves the Court with no other conclusion than that the agency's dismissal was arbitrary and capricious, (Mot. at 18), is simply incorrect. At this stage the most expeditious path and resource-preserving course is to allow for a remand and reconsideration before the agency so that there is a basis for further review if necessary. *See Clean Wis.*, 964 F.3d at 1174-75 (D.C. Cir. 2020) (preferring to remand "rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete," or "in response to intervening events outside of the agency's control," including "a new legal decision").

Faced with an absence of undue prejudice from a remand, CREW speculates and presumes the outcome below and argues it will be prejudiced "if the FEC on remand chooses to again dismiss" and then assumes that what the FEC plans to simply reissue its previous statement. (Mot. at 23.) That is prejudice from CREW's hypothetically anticipated outcome of the remand, not from the process itself, which is not properly considered by the Court. *See Clean Wis.*, 964 F.3d at 1175-76 (finding costs of remand hardly constitute "undue prejudice"). Similarly, CREW predicts the outcome under the Commission's new Case Closure Procedures and anticipates the absence of a contemporaneous explanation for review. (Mot. 24-25.) But CREW's speculation and assumptions cannot be the basis of a contrary to law determination

regarding an eventuality that has not occurred, and remand where a reviewable record is produced facilitates rather than frustrates review. Indeed, a voluntary remand is the most expeditious path to a potentially reviewable decision, and remand now, rather than further briefing in this Court, facilitates review and avoids prejudice. *See Cadillac of Naperville*, 14 Fed.4th at 719 (concluding that there was little reason to think a remand would unduly prejudice the plaintiff where a remand would provide the opportunity for further review before the agency). Since a remand is a necessity to allow a reviewable decision, this Court should grant the Commission's motion.

CONCLUSION

For the foregoing reasons, the Court should grant the FEC's Motion for Voluntary Remand and deny CREW's Motion for Summary Judgment or Default Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2024, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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