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

FEDERAL ELECTION COMMISSION'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER DECLARING THAT DEFENDANT HAS FAILED TO CONFORM TO THE COURT'S JUDGMENT

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May 28, 2025

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INTRODUCTION

The Federal Election Commission ("FEC" or "Commission") opposes plaintiff Citizens for Responsibility and Ethics in Washington's ("CREW") Motion for an Order Declaring that Defendant Has Failed to Conform to the Court's Judgment ("Motion" or "Mot.") (ECF No. 48). After this Court's March 17, 2025 Order ("Remand Order") (ECF No. 43), remanding Matter Under Review ("MUR") 7465 (Freedom Vote, Inc.) to the FEC and providing 30 days to conform, the Commission reconsidered the matter, voted whether to find probable cause that a violation occurred, voted to dismiss the matter, voted to close the file, and thereafter issued Statements of Reasons ("SOR") explaining the dismissal. This dismissal became effective on April 15, 2025, and was accompanied by a contemporaneous explanation for the Commission's action on that same date, all prior to the Court-ordered April 16, 2025 conformance deadline.

Despite the FEC's timely explanation for its actions at the moment of dismissal, plaintiff wrongly contends that the explanation of the dismissal on remand is not contemporaneous. The instant Motion posits that the controlling group of FEC Commissioners must issue its statement of reasons for dismissing an enforcement MUR at the time they vote to dismiss the matter or else the explanation is *per se* unreviewable. But that approach is both wrong on the law and fails to engage with the practical realities of how the Commission functions. While the parties agree that the Commission must offer a contemporaneous explanation for its action dismissing a MUR, it is the *dismissal* of the MUR, not the Commissioner vote, that irrevocably establishes the Commission's course. CREW's protestations notwithstanding, neither the D.C. Circuit in *End Citizens United* nor any other precedent requires the Commission to operate in a way that would severely undermine its deliberative process as a bipartisan deliberative body. The Commission's recently implemented case closure procedures are carefully tailored to both comply with the

agency's obligation to timely explain its decisions and the need to efficiently operate as a law enforcement agency, and CREW has failed to demonstrate otherwise.

Consistent with 52 U.S.C. § 30109(a)(8)(C), this Court ordered "that [the FEC] shall, by April 16, 2025, conform to the Court's order by deciding whether to dismiss Plaintiff's administrative complaint and issuing a contemporaneous, adequate explanation of its reasons for its actions." That is precisely what the Commission did. Accordingly, the Court should find that the FEC has complied with the Court's March 17 Remand Order and deny plaintiff's Motion.

BACKGROUND

A. The FEC's Initial Consideration of the Administrative Complaint

CREW filed an administrative complaint on August 8, 2018, designated by the FEC as MUR 7465, alleging Freedom Vote had violated the Federal Election Campaign Act ("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 FEC's OGC proceeded to conduct an investigation and subsequently recommended that the Commission find probable cause that Freedom Vote violated the relevant provisions of FECA. On November 9, 2021 the Commission considered a motion to find probable cause, which failed by a 3-3 vote. 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 exercise of the Commission's prosecutorial

discretion. This motion similarly failed by a 3-3 vote. *Id*. The Commission then voted 4-1 to close the file, with one Commissioner abstaining. *Id*. On December 16, 2021, the three Commissioners who voted to find probable cause, then-Commissioners Steven T. Walther and Ellen L. Weintraub, as well as Commissioner Shana M. Broussard, issued a Statement of Reasons explaining their decision. Statement of Reasons, MUR 7465, https://www.fec.gov/files/legal/murs/7465/7465_38.pdf. On March 7, 2022, the three Commissioners who declined to find probable cause and thus controlled the outcome in this case, then-Commissioner and then-Chairman Allen Dickerson, then-Commissioner Sean J. Cooksey, and Commissioner James E. "Trey" Trainor, III, issued a Statement of Reasons explaining their decision. This statement invoked the Commission's prosecutorial discretion as the controlling Commissioners' reason for not proceeding. Statement of Reasons, MUR 7465, https://www.fec.gov/files/legal/murs/7465/7465_40.pdf.

B. Judicial Review

CREW filed suit on January 6, 2022, alleging that the Commission's dismissal of MUR 7465 was contrary to law pursuant to 52 U.S.C. § 30109(a)(8). (Pl.'s Compl. for Injunctive and Declaratory Relief ("Compl.") (ECF No. 1).) Initially the Commission did not appear in this matter because authority to defend the Commission in court was not provided pursuant to 52 U.S.C. §§ 30106(c) and 30107(a)(6), and the Clerk entered an Entry of Default on March 29, 2022. (Default, Mar. 29, 2022 (ECF No. 5).) While this Court initially determined that it did not have jurisdiction to review the Commission's dismissal of MUR 7465 as an exercise of the agency's prosecutorial discretion, the Court later determined it had jurisdiction because the controlling Commissioners' explanation for the dismissal that invoked prosecutorial discretion was issued too late, and was therefore unreviewable, in light of the intervening D.C. Circuit

decision in *End Citizens United PAC v. FEC*, 69 F.4th 916 (D.C. Cir. 2023) ("*ECU*"); Minute Order, Oct. 30, 2023.

The Office of General Counsel was subsequently authorized to appear by the Commission to provide plaintiff the administrative record. *See* Cert., *CREW v. FEC*, Civ. No. 22-35 (D.D.C.), Nov. 9, 2023, https://www.fec.gov/resources/cms-content/documents/fec-certification-11-09-2023.pdf. The Commission provided the 1,847-page administrative record to CREW on December 12, 2023 and later stipulated to the inclusion 397 additional pages of documents as part of the record. (*See* FEC's Notice of Filing and Certified List of Contents of the Administrative Record (ECF Nos. 15, 15-1); Stip. and Joint. Mot. (ECF Nos. 18-19).) On May 10, 2024, the Court resolved a dispute over the scope of the record raised in plaintiff's motion to compel—later construed as a motion to complete or supplement the record—denying CREW's request for additional materials. The Court issued a Memorandum Opinion and Order (ECF No. 28), 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.

After the parties conferred and apprised the Court of its discussions in a Joint Status Report on May 24, 2024 (ECF No. 29), the parties proceeded to dispositive briefing. The FEC moved for a voluntary remand, while CREW moved for summary or default judgment. (*See* ECF Nos. 33, 35-38, 40). Briefing on these issues concluded on July 30, 2024. On March 17, 2025, the Court issued its Remand Order and Memorandum Opinion ("Opinion" or "Mem. Op.") (ECF No. 44), finding that "Defendant's dismissal of Plaintiff's administrative complaint is contrary to law because Defendant failed to offer a timely explanation of its reasons for dismissal" and ordering that "Defendant shall, by April 16, 2025, conform to the Court's order by

deciding whether to dismiss Plaintiff's administrative complaint and issuing a contemporaneous, adequate explanation of its reasons for its actions." (Remand Order at 1.) The Remand Order also provided "that the parties shall file a joint status report by April 16, 2025, informing the Court of any agency action on Plaintiff's administrative complaint and the need for further proceedings in this case." (*Id*. at 2.)

C. The FEC's Consideration of the Administrative Complaint on Remand

On remand the Commission reconsidered the matter, now designated as MUR 7465R, in a closed executive session. On April 15, 2025, the Commission provided to CREW and administrative respondents—and published on its website—the record of its actions in this matter on remand. *See* FEC, MUR 7465R, Freedom Vote, Inc. (last visited May 27, 2025), https://www.fec.gov/data/legal/matter-under-review/7465R/. That record shows that, on March 27, 2025, the Commission declined to adopt a motion to find probable cause Freedom Vote violated the Federal Election Campaign Act by a vote of 1-2, with one Commissioner abstaining. Cert., MUR 7465R (Freedom Vote), Mar. 27, 2025, https://www.fec.gov/files/legal/murs/7465R/7465R_03.pdf. A motion to dismiss the complaint failed 3-1, not having garnered the four votes necessary for adoption. *Id*. The Commission then voted 4-0 to "[c]lose the file effective April 15, 2025." *Id.* at 2.[1]

[1] In the Commission's internal practice, a successful "'vote to dismiss'" may either indicate that the Commission is "exercising its prosecutorial discretion under *Heckler v. Chaney,* 470 U.S. 821 (1985) to dismiss matters that do not merit the additional expenditure of Commission resources" or, "[a]lternatively," that the available information "fail[s] to give rise to a reasonable inference that a violation has occurred." Federal Election Commission, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process,* 89 Fed. Reg. 19,729, 19,730 (Mar. 20, 2024). However, it is the closing of the administrative file, as a result of a vote to close the file, that actually works a termination of the administrative proceeding and, in cases where there is no conciliation agreement pursuant to 52 U.S.C. § 30109(a)(4)(A)(i) or offensive litigation pursuant to 52 U.S.C. § 30109(a)(6)(A), works

The Commission implemented new case closure procedures on April 3, 2024, which provide that the dismissal of a MUR becomes effective 30 days after the Commission Secretary certifies the Commission's vote. *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/. Those procedures set a default timeline for MUR file closure. In this case, however, the Commission voted on March 28, 2025 to close the file effective on April 15, 2025—expediting the default 30-day timeline—which enabled the public release of materials from the remanded MUR ahead of the April 16, 2025 conformance deadline established by this Court.

The Commission released the MUR 7465R record, which includes three Statements of Reasons explaining the Commissioners' votes on April 15, 2025. Two statements, reflecting the votes of Commissioners Shana M. Broussard and Dara Lindenbaum, are dated April 9 and 10, 2025, respectively. *See* Statement of Reasons of Commissioner Shana M. Broussard, MUR 7465R (Freedom Vote), Apr. 9, 2025, https://www.fec.gov/files/legal/murs/7465R/7465R_06.pdf; Statement of Reasons of Dara Lindenbaum, MUR 7465R (Freedom Vote), Apr. 10, 2025, https://www.fec.gov/files/legal/murs/7465R/7465R_07.pdf. The third statement, explaining the votes of Chairman James E. "Trey" Trainor, III and former-Commissioner Allen J. Dickerson (the "controlling Commissioners"), is dated April 15, 2025. *See* Statement of Reasons of Vice Chairman James E. "Trey" Trainor, III, and Commissioner Allen J. Dickerson, MUR 7465R (Freedom Vote), Apr. 15, 2025, https://www.fec.gov/files/legal/murs/7465R/7465R_08.pdf.

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a "dismissal" for purposes of 52 U.S.C. § 30109(a)(8). Here, the effect of the 1-2 and 3-1 votes was to deadlock the Commission; a deadlock will give rise to a dismissal for purposes of Section 30109(a)(8) "only if a majority of Commissioners separately votes" to close the file. *Campaign Legal Ctr. v. 45Committee, Inc.*, 118 F.4th 378, 382 (D.C. Cir. 2024).

The Commission informed the Court of these developments in a Joint Status Report filed on April 16, 2025. (Joint Status Rept. at 1-2, Apr. 16, 2025 (ECF No. 46).) In that status report, the parties also informed the Court of their respective positions on the need for further proceedings in this matter, as required by the Remand Order. (*See id*. at 3.) The Commission conveyed its view that because its actions on remand "conform[ed] with" the Court's "'declaration within 30 days,'" no further proceedings were necessary. (*Id*. at 3 (citing 52 U.S.C § 30109(a)(8)(C).) The Court granted plaintiff's request for an additional 30 days to consider and present its position on further proceedings. On May 14, 2025, the parties filed another Joint Status Report, where the Commission reiterated its position and CREW explained it anticipated "filing in short order a motion seeking a declaration from this Court that the FEC's actions on remand did not conform with this Court's order." (Joint Status Rept. at 1, May 14, 2025 (ECF No. 47).) Later that day, plaintiff filed the instant Motion.

ARGUMENT

I. THE COMMISSION HAS CONFORMED WITH THE COURT'S REMAND ORDER

A. The FEC Has Reformed its Enforcement Matter Closeout Procedure to Comply with *End Citizens United*

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.'" *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020), (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). Thus, in a challenge to the FEC's dismissal of an administrative complaint pursuant to 52 U.S.C. § 30109(a)(8), "[a] statement of reasons . . . is necessary to allow meaningful judicial review of the Commission's decision not to proceed[,]" in cases where the Commission, or a controlling group of Commissioners, decides not to proceed "contrary to the recommendation of the General

Counsel." *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). Timely explanations "[e]mphasiz[e] the importance of agency accountability and meaningful judicial review[.]" *Campaign Legal Ctr. v. FEC*, Civ. No. 19-2336 (JEB), 2025 WL 315143 at *6 (D.D.C. Jan. 28, 2025) ("*Correct the Record*").

In *ECU*, 69 F.4th at 921, the D.C. Circuit Court of Appeals held that a statement of reasons "issued after the commencement of the underlying litigation and the expiration of the statutory deadline to challenge the dismissal, 52 U.S.C. § 30109(a)(8)," was impermissible *post-hoc* reasoning, and remanded the matter to the district court, with instructions to remand to the FEC for further action. The court admonished that the agency "cannot *sua sponte* update the administrative record when an action is pending in court." *Id.* (quoting *CREW v. FEC*, 892 F.3d 434, 438 n.5 (D.C. Cir. 2018)). The court further referenced "important values of administrative law," noting that "[i]t hardly 'instills confidence that the reasons given are not simply convenient litigating positions' for the Commission to withhold the basis of its decision unless and until a lawsuit is filed[.]" *Id.* at 923 (quoting *Regents*, 591 U.S. at 23).

Thus, the *ECU* court indicated that the *real* gravamen of the Commission's error in that case was its failure to issue a statement of reasons prior to the commencement of litigation against it, and indeed, after the time period for that plaintiff to commence litigation had expired. *See* 52 U.S.C. § 30109(a)(8)(B) (providing that challenges to FEC dismissals of administrative complaints must be filed "within 60 days after the date of the dismissal"); *see also Correct the Record*, 2025 WL 315143 at *7 ("The *ECU* court was motivated chiefly by a concern that the FEC's stated reasons were 'simply convenient litigating positions[.]'"). In response to that decision, the Commission took corrective action.

In April of last year, the Commission adopted a new policy explicitly "intended to bring the Commission into compliance with the 2023 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *End Citizens United PAC v. FEC* (Case No. 22-5176)." *See* Case Closure Procedures, *supra* p. 6. Under the revised procedures, when the Commission formally votes to close an enforcement matter, that action is effective 30 days after the Commission Secretary certifies the Commission's vote. Disposition letters are sent to administrative complainants, such as plaintiffs here, after the 30 days have elapsed and the file is closed, simultaneous with the public release of the file.

Because a case that is dismissed is not dismissed for purposes of 52 U.S.C. § 30109(a)(8) until the administrative file is closed, *see supra* n.1, this means that the dismissal becomes effective at the same time as the reasons for the dismissal are provided to the complainant, the respondent(s), and the public. In a deadlock case, this procedure ensures that the agency's decision is explained "'at the time when a deadlock vote *results in* an order of dismissal.'" *ECU*, 69 F.4th at 921 (quoting *Common Cause v. FEC*, 842 F.2d 436, 449) (D.C. Cir. 1988) (emphasis added). It further ensures that "[a]dministrative complainants will have a full 60 days from the day they are notified of the case's outcome to determine whether to seek judicial review of the Commission's actions under 52 U.S.C. § 30109(a)(8), as they will be notified on the day the file officially closes." *See* Case Closure Procedures. This new policy thus "instills confidence that the reasons given are not simply 'convenient litigating positions'; and it advances 'the orderly functioning of the process of review.'" *ECU*, 69 F.4th at 922-23 (quoting *Regents*, 591 U.S. at 23; *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986)). During the 30 days between the vote certification and the closing of the file, the Commission may come to a consensus (or at least a majority) after an initial split; reverse course entirely; or correct errors. As the only court to

evaluate the dismissal of a MUR pursuant to the FEC's Case Closure Procedures has acknowledged, this means that the statements of reasons in a deadlock case "are indeed contemporaneous" with its merits decision (or lack thereof). *Correct the Record*, 2025 WL 315143 at *7 (citation omitted).

B. The Commission Issued a Contemporaneous Statement of Reasons by Following Its Case Closure Procedures, Which Are Lawful and Reasonable

Here, the Commission's dismissal of MUR 7465R complied with both the Court's Order and its obligation to issue a timely and contemporaneous explanation for its action. Consistent with its recently adopted Case Closeout Procedures, the Commission promptly reconsidered MUR 7465R on remand, held an inconclusive and split vote on the merits of CREW's administrative complaint, and voted to dismiss the complaint effective April 15, 2025, expediting the default 30-day timeline after the Commission Secretary certified the vote consistent with its new policy developed to respond to *ECU*, *see supra* p. 6. Indeed, in light of the Court's Order requiring an update from the parties by April 16, in this case the Commission shortened the normal 30-day period to make the dismissal effective 18 days after the Commission Secretary certified the Commission's vote on March 28. This resulted in a timely, contemporaneous explanation of the dismissal that the Commission highlighted in the parties' April 16 Joint Status Report. *See supra*, pp. 5-7. The Commission's adherence to these procedures provided CREW with 60 days from the date it was notified of the agency's decision and reasoning to determine whether to challenge the agency's dismissal in court, separate and apart from its right to challenge the agency's actions on remand as it has done here. This process complies with both the letter and the spirit of *ECU* by providing a timely explanation for dismissal that eliminates the potential for procedural gamesmanship, such as explaining a dismissal only after that

dismissal is challenged in court in order to serve as a "convenient litigating position[.]" *Compare Correct the Record*, 2025 WL 315143 at *7 *with ECU*, 69 F.4th at 923.

Nonetheless, CREW's Motion takes an extreme position, going well beyond the Circuit's holding in *ECU*, to argue essentially that in every case the Commissioners must come to the deliberating table armed with fully written statements that would be operative immediately in the event of a split vote. (*See* Mot. at 5-9 (arguing the Court may review *only* those explanations that "existed" at the time the Commissioners *cast their votes*, rather than when the effect of those votes, if not changed, becomes finally operative).) This is incorrect and is contradicted by the precise language used by the *ECU* court to define the Commission's obligations. In *ECU*, the controlling Commissioners' statements were not released until more than 60 days after the effective date of the Commission vote to close the file and after the plaintiffs had already commenced their suit challenging the dismissal, as they were required to do within 60 days of the dismissal pursuant to 52 U.S.C. § 30109(a)(8)(B).[2] The D.C. Circuit held that statements of reasons must be issued not "'at the time when a deadlock vote'" occurs, but when "'a deadlock vote *results in an order of dismissal*.'" *ECU*, 69 F.4th at 921 (quoting *Common Cause v. FEC*, 842 F.2d at 449) (emphasis added).[3]

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[2] Indeed, the facts of the original dismissal in this case were similar, as the controlling Statement of Reasons was released after the commencement of CREW's lawsuit, a fact this Court relied upon here in reaching its determination that the Commission's dismissal was contrary to law. (*See* Mem. Op. at 7.)

[3] The Commission did not appear before the Court of Appeals in *ECU*, and the D.C. Circuit appointed amicus counsel. *ECU*, 69 F.4th at 918, 920. Because that court did not benefit from agency briefing, it understandably did not address the practical impacts of its decision on agency enforcement proceedings or competing legal requirements implicated by its decision.

CREW's argument further relies on the false premise that the Commission's decision-making process is complete upon the vote to dismiss.[4] (*See* Mot. at 7-8.) Even assuming that by voting to dismiss "the Commission commit[s] itself to a course of action[,]" (Mot. at 8), that course of action *can be altered*. That means the dismissal vote, prior to becoming effective on the file closure date, is not final and is, in fact, "subject to further consideration by the agency." (*Contra* Mot. at 7 (citing *Nat. Res. Def. Council v. Wheller*, 955 F.3d 68, 78 (D.C. Cir. 2020).) The dismissal vote, therefore, does not reflect "an unalterable decision" for which "only implementation of that decision remains." (*Contra* Mot. at 7 (citing *Nat'l Treasury Emps. Union ("NTEU") v. FLRA*, 712 F.2d 669, 671-72, 674 (D.C. Cir. 1983).) Although the Commission's decision to dismiss will result in final agency action if no further action occurs by the file closure, Commissioners nevertheless remain free to break the deadlock, if possible, correct errors, or change course. *See Correct the Record*, 2025 WL 315143 at *8 (citing FEC's Opp'n to Pls.' Mot. for an Order Declaring that Def. has Failed to Conform to the Remand Order, Civ. No.

[4] Plaintiff's Motion appears to intimate that the Commission must explain its vote *to close the administrative file*, not the substantive vote on the merits. (*See* Mot. at 8 ("To ensure that the justification a Court will review accurately reflects the understandings behind the majority that voted to close the file, it is necessary that that same majority review and, if necessary, revise the record of that justification.").) However, it is entirely unclear what standards a court should apply to determine if a vote to "close the administrative file" is contrary to law pursuant to 52 U.S.C. § 30109(a)(8). Moreover, CREW provides no reason for this Court to overturn longstanding precedent providing that, in a deadlock case, courts review the controlling group of Commissioners' reasons for dismissal, which refers to the substantive vote on whether the Commission should proceed with enforcement. *See DCCC v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (conducting contrary-to-law review based on the FEC "failing to follow its General Counsel's recommendation [to find reason to believe] and, instead, dismissing the complaint"); *CREW v. FEC*, Civ. No. 22-3281 (CRC), 2023 WL 6141887 at *15 n.17, (D.D.C. Sept. 20, 2023). The longstanding precedent makes sense, because where a majority has voted procedurally to close the file in an otherwise deadlocked matter, the reasoning of the members of that majority (who otherwise voted to proceed on the merits) as to why they voted to close the file will simply be that the case was deadlocked on the merits – thus begging the question that only review of the controlling group's reasons can answer.

19-2336 (JEB), (ECF No. 94))) (assuming that the 30-day period between the vote and the vote's formal effective date allows the Commission to come to consensus (or at least a majority) after an initial split, reverse course entirely, or correct errors, explanations that are adopted at the end of this period "are indeed contemporaneous" with the FEC's merits decision). Only on the date where the file closes—the precise moment when the dismissal is effective—does the action become an "unalterable decision," *NTEU*, 712 F.2d at 674, that represents the "consummation of the agency's decisionmaking process" from which "legal consequences flow[.]" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). It is at the time of the file's closure, then, that the controlling statement of reasons becomes operative. The two occur precisely contemporaneously, and release to parties and the public occurs that very day.

Because the Commission adhered to its Case Closure Procedures in this case, themselves a reasonable and carefully tailored response to the Court of Appeals' decision in *ECU*, the Commission complied with this Court's Order to issue "a contemporaneous, adequate explanation of its reasons for its actions." (Remand Order at 1.)

C. The Only Court to Consider the Dismissal of an Administrative Complaint Pursuant to the Commission's Case Closure Procedures Determined that the Agency's Explanation Was Timely and Consistent with *End Citizens United*

To date, the only court to consider the timeliness of the Commission's explanation for a dismissal of a MUR pursuant to the Commission's 2024 Case Closure Procedures has upheld that explanation as timely. *See Correct the Record*, 2025 WL 315143 at *6-*8.[5] There, the Court remanded the case to the Commission on September 30, 2024; the Commission voted to dismiss the matter on October 10, setting forth a dismissal that became effective 30 days later. *See id.* at

[5] CREW's Motion contains two limited citations to this decision, but it does not acknowledge the court's holding in that case or explain its relevance to the instant Motion.

*6. The court-ordered conformance deadline was October 30, and the Commissioners released statements of reasons on November 5 and 6. *See id*. Although the controlling statement of reasons there was released *after* the statutory conformance period elapsed (unlike here), the court nevertheless found that "the Statements of Reasons are indeed contemporaneous" and concluded "that the FEC's conformance with the contrary-to-law declaration was timely." *See id.* at *7. The court recognized that although the "*ECU* court, after all, did not explain just how contemporaneous a contemporaneous statement must be to be considered timely," the FEC following its Case Closure Procedures demonstrates conformance because it results in explanations that "reflect the Commissioners real-time thinking about why they found no reason to believe a violation had occurred." *Id*. (citations omitted).

In reaching its conclusion that the Commission's explanation for its dismissal was timely, the *Correct the Record* court determined that concerns that motivated the *ECU* court are largely inapplicable *in the context of a remand*. In particular, the *ECU* court was concerned that the controlling statement of reasons there came so long after the dismissal—indeed, after the litigation began—that the court was "motivated chiefly by a concern that the FEC's stated reasons were '"simply convenient litigating positions"' . . . to withhold the basis of its decision unless and until a lawsuit is filed." *Id*. at *7 (citing *ECU*, 69 F.4th at 923 (quoting *Regents*, 591 U.S. at 23)). The FEC's Case Closure Procedures alleviate this problem by ensuring that statements of reasons are released at file closure, providing administrative complainants with the full 60 days allotted by statute to determine whether to file suit under 52 U.S.C. § 30109(a)(8). *See supra*, Part I.A. Thus, the court concluded that any "concern that the FEC will strategically adopt *post hoc* rationalizations that prejudice litigants . . . does not apply with the same force

here[,]" especially where the disputed issue is the explanation's timeliness, not its content. *Correct the Record*, 2025 WL 315143 at *7.

The *Correct the Record* court's reasons for distinguishing *ECU* in the context of a remand apply squarely here, given that the timeliness of the Commission's explanation for its dismissal of MUR 7465 was directly at issue in prior briefing before this Court and, of course, was the basis for this Court's remand. The Commission was on ample notice that CREW might challenge the Commission's dismissal of MUR 7465R on the basis that its explanation for that decision was untimely, and there is no risk that the *reasons* provided for that dismissal are "'simply convenient litigating positions[.]'" *Id*. at *7 (citing *ECU*, 69 F.4th at 923 (quoting *Regents*, 591 U.S. at 23)). The D.C. Circuit has explained that "[w]hat constitutes conformance . . . necessarily turns on the kind of Commission action the contrary-to-law plaintiff was entitled to compel by bringing her contrary-to-law suit. And what the plaintiff can compel is the action whose nonperformance by the Commission 'aggrieved' her." *45Committee, Inc.*, 118 F.4th at 390. Because the Court remanded MUR 7465 solely on the basis of the FEC's failure to issue a timely explanation for its dismissal and did not reach the merits of that dismissal, review is limited to whether the Commission issued a timely explanation of its dismissal of MUR 7465R. (*See* Remand Order at 1 (making a contrary to law finding with respect to the original controlling Commissioners' statement's timeliness).)

The legal mistake identified by this Court's Remand Order has been remedied, and thus the Commission conformed with the Remand Order by issuing the controlling Statement of Reasons on April 15, 2025, the file closure date, consistent with its Case Closure Procedures. *See supra* Part I.B. In light of "the regime that FECA, the FEC, and the D.C. Circuit have

fashioned, the Court must conclude that the FEC has timely conformed." *Correct the Record*, 2025 WL 315143 at *8.

D. CREW's Extreme Position Would Substantially Undermine the FEC's Enforcement Procedures and Intended Function as a Bipartisan Deliberative Body

The Commission's new Policy strikes a careful balance by providing room for discussion and deliberation among the agency's multi-member and bipartisan leadership while also ensuring the timely resolution of enforcement proceedings and timely explanations for these actions. The Commission's standard practice is to provide for 30 days from the Commission Secretary certifying the Commission's vote (or shorter if agreed upon by the Commission, as here) before the dismissal of a MUR becomes effective, a period in which, in a deadlock case, the Commissioners will normally articulate and explain their reasons for dismissal, though remaining free to reconsider their prior votes and take subsequent votes to reverse course entirely. If there is no subsequent vote to change course, the statements of reasons are released and become operative at precisely the same time the "deadlock vote results in an order of dismissal." *ECU*, 69 F.4th at 921. The dismissal vote does not "*result in an order of dismissal*" until the file closure occurs. *Id.* (emphasis added). This approach is not only consistent with the law, it promotes open and meaningful deliberation, while also providing Commissioners with a reasonable amount of time to articulate their views on the merits which a court will review, if challenged.

Plaintiff alleges that *ECU* requires an alternative approach where the Commission must issue a controlling statement of reasons "when a majority of the Commission *voted* on March 27, 2025, to close the file." (Mot. at 6 (citing *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)) (emphasis added).) But this suggestion that the Commissioners' explanations

must be adopted concurrently with their vote on the merits of a particular MUR creates perverse incentives that stifle potential for deliberation and reaching bipartisan consensus that FECA requires to proceed with enforcement. Indeed, CREW's approach requires that Commissioner explanations must precede the executive session that has traditionally served as the forum for internal deliberations and engagement both with agency counsel and between Commissioners. In this sense, what CREW effectively suggests is that Commissioner statements must substantially precede their final decision.

Following the file closure in MUR 7465R, three Commissioners issued a public statement further explaining why requiring statements of reasons to "be pre-written and issued at the moment the Commission votes to dismiss a complaint . . . pose[s] intractable practical difficulties and hamper[s] the Commission's ability to function as a bipartisan deliberative body." *See* Policy Statement of Vice Chairman James E. "Trey" Trainor, III and Commissioners Allen J. Dickerson and Dara Lindenbaum Concerning Enforcement Procedures at 3, (Apr. 15, 2025), https://www.fec.gov/resources/cms-content/documents/Policy-Statement-Concerning-Enforcement-Procedures-15apr2025-FINAL.pdf ("Policy Statement"). The Commission regularly meets in executive session to consider recommendations made by the Office of General Counsel in enforcement matters. At these executive sessions, Commissioners ask probing questions of OGC attorneys; articulate their own likely positions; attempt, sometimes successfully and sometimes not, to persuade their colleagues; consider their colleagues' positions; sometimes negotiate with each other over the terms of proposed actions; and, ultimately, vote on proposed courses of action – either those recommended by OGC or those proposed by Commissioners themselves. As the Policy Statement explains, those discussions often meaningfully inform the Commissioners' votes on the merits, as "[i]t is not uncommon for

commissioners to come to executive session uncertain of their vote on a given Matter and receptive to arguments made by colleagues" in deliberations that "occur contemporaneously with commissioners' voting decisions[.]" *Id*. Commissioners will sometimes ask for more time to consider the points made in these deliberations, but for many and perhaps most matters, they vote in the same session. Commissioners oversee a large docket of enforcement proceedings, alongside rulemakings, advisory opinions and other executive functions, and voting on many if not most matters in the same session in which they are considered is vital to managing the resource of Commissioner time because new complaints are always being processed. This executive session discussion and debate is the most quintessentially deliberative facet of the Commission's work. Indeed, this Court previously held that records reflecting these discussions are protected by the deliberative-process privilege. (*See* Mem. Op. and Order at 10-20, *CREW v. FEC*, Civ. No. 22-35 (CRC), May 10, 2024 (ECF No. 28).)

Where Commissioners deadlock and statements of reasons are necessary, some passage of time after the deliberation and votes is necessary for Commissioners to write if the statements are meaningfully to engage with the points and arguments raised by OGC and their contrary-minded colleagues in the executive session. *See* Policy Statement at 3. A rule requiring Commissioners to attend executive sessions with statements in hand—as plaintiff suggests—risks the appearance of Commissioners prejudging matters, inhibiting opportunity for compromise, and reducing the potential for bipartisan compromise that is necessary to proceed with enforcement under FECA.[6] To draft statements of reasons requires "engaging with

[6] The risk of Commissioners pre-judging matters is a legitimate concern that CREW itself has articulated in this case. When CREW sought privileged materials concerning the Commissioners' deliberations on votes in MUR 7465 it raised what it deemed an "alarming suggestion that . . . the commissioners *may not have deliberated at all, but rather prejudged the*

oftentimes lengthy, resource-intensive General Counsel's Reports and probable cause briefs[,]" which means statements would need be drafted far in advance of deliberations. Far from the explanation being issued by the "'agency at the time the decision was made,'" Mot. at 5-9; *James Madison Ltd.*, 82 F.3d at 1095 (quoting *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981)); *ECU*, 69 F.4th at 921, plaintiff's proposed arrangement would dictate that Commissioners' decisions long predate their votes on the matter. This would also risk moving the "Commission's 'real' decision-making . . . outside of regular order," Policy Statement at 3 (citing 11 C.F.R. § 2.4), turning Commission executive sessions into formalities consisting of pro forma readings of pre-written statements instead of meaningful deliberation on matters where there is disagreement. While deliberation is valuable in any executive agency, it has a particular value to the FEC in light of Congress' carefully-crafted scheme requiring the FEC to "decide issues charged with the dynamics of party politics" in an "inherently bipartisan" manner. *FEC v. DSCC*, 454 U.S. 27, 37 (1981); *FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993). Thus, by proposing procedures that would undermine deliberation and the opportunity for carefully reasoned explanations, CREW's approach would disincentivize agreement and directly undermine the *ECU* court's goal of ensuring "'meaningful judicial review[.]'" *ECU*, 69 F.4th at 923 (quoting *Common Cause*, 842 F.2d at 449).

That the Commissioners do, on occasion, adopt the reasoning for their decision at the time of their vote—such as when they choose to adopt the recommendations of the Office of General Counsel or when negotiations prior to a meeting lead to consensus edits to a Factual & Legal Analysis ("F&LA")—does not undermine the very real challenges and perverse incentives

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matter." (Pl.'s Resp. to the Court's April 3, 2024 Order at 2 n.1, Apr. 10, 2024 (ECF No. 26) (emphasis added).) The Court at the time rightly rejected that characterization.

incumbent in requiring Commissioners to have a ready explanation for their vote when that vote is cast in *every* case. (*See* Mot. at 9-10.) Commissioners are most likely to adopt OGC's recommendations in the most straightforward of cases, *i.e.*, those that do not require substantial deliberation to reach consensus. That scenario is markedly different from the more challenging case where deliberation and engagement with agency counsel and other Commissioners in executive session may meaningfully impact a Commissioner's vote, and deliberations which will be negatively impacted if Commissioners are encouraged to attend these sessions with their reasons for voting already in hand.

Moreover, when the Commissioners do split on the merits of a particular MUR, this situation differs fundamentally from that in which Commissioners adopt OGC's recommendations because in the former case there is no four-vote majority that is able to agree on the merits of the administrative complaint. In such a case, there is, by definition, no group of four Commissioners that could agree to amend OGC's proposed F&LA or otherwise endorse any document as a controlling explanation because there is no requisite four-vote majority. *See* 52 U.S.C. § 30109(a)(3); *supra* n.4. Therefore, where the Commission has "rejected or failed to follow the General Counsel's recommendation" to go forward with a case at the reason-to-believe or probable-cause threshold, the commissioners who decline to support OGC's recommendation must provide a written explanation for that decision[.]" *DCCC v. FEC*, 831 F.2d at 1135; *see also* Mem. Op. at 6. The articulation of those reasons is up to the Commissioners who vote not to proceed, and those Commissioners only; and, for the reasons described, the appropriate time for that drafting is *after* the Commission's vote. Whereas Commission F&LAs are drafted in the ordinary course of business by OGC prior to executive session, the Commission cannot know for sure *until it deliberates and votes at executive session*

whether Commissioners themselves will need to prepare statements of reasons.[7] The Case Closure Procedures' 30-day (or shorter) period prior to the effective dismissal properly ensures the ensuing statements are prepared in a timely fashion and released contemporaneously with the file closure, providing ample time for complainants to evaluate those reasons prior to commencing suit under section 30109(a)(8). *See Correct the Record*, 2025 WL 315143 at *7 (a statement of reasons issued 26 days after vote to dismiss was "within the realm of reason, in this context, to qualify as a contemporaneous rationale"). Accordingly, the Commission's actions on remand here—not CREW's proposed alternative—complies with the multifaceted, concurrent requirements of FECA and D.C. Circuit precedent, including *ECU*.

CONCLUSION

The Commission's April 2024 Case Closure Procedures comply with *ECU*'s command to provide a timely explanation of its reasoning for dismissing an administrative complaint. In this case, the Commission's adherence to those procedures on remand resulted in a contemporaneous explanation for dismissing MUR 7465R, not a *post-hoc* rationalization. The Commission's actions therefore conformed to the Court's Remand Order and 52 U.S.C. § 30109(a)(8)(C). CREW's alternative approach, requiring releasing statements of reasons at the time the

[7] CREW suggests that when the Commission deadlocks on a merits vote because it deliberates and some "intractable" disagreement arises that "warrants dismissal," the Commission should instead "memorialize their disagreement on their record without the majority adopting either side of the disagreement." (Mot. at 9.) But in every practical sense, that is what happens now – there is a vote on substance; if there is a deadlock, there is a vote to close the file; and the minority of controlling Commissioners articulates their reasoning, without the majority adopting either side. Thus, it's not clear what CREW suggests; perhaps it aims for a larger group of Commissioners (consisting of those with conflicting viewpoints on the merits) to draft a single, likely muddled statement of reasons memorializing their *disagreement* rather than the *rationale* of those electing not to proceed. In addition to the practical challenges this would pose to the Commission, such a scheme is obviously not required by *ECU*, and is highly unlikely to facilitate "'meaningful judicial review'" of agency action. *ECU*, 69 F.4th at 923 (quoting *Common Cause*, 842 F.2d at 449).

Commission votes, runs contrary to the FEC's established operations and intended functions informed by FECA. Accordingly, the Court should deny plaintiff's Motion.

Respectfully submitted,

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May 28, 2025

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2025, I served on the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as registered ECF users, through the Court's ECF system.

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