**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

HERITAGE ACTION FOR AMERICA,

*Plaintiff*,

*v.*

FEDERAL ELECTION COMMISSION, *et al.*,

*Defendants*.

Civil Action No. 1:22-cv-01422 (CJN)

**PLAINTIFF'S REPLY IN SUPPORT OF**
**CROSS-MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The FEC's response confirms that it has nothing but pretextual reasons for concealing its voting records and statements of reasons in terminated enforcement matters. The FEC claims that the Commissioners had merely not gotten around to closing its files for over a year, but in truth three Commissioners have schemed to conceal the FEC's dismissals of administrative complaints for the purpose of triggering citizen suits against respondents on the false premise that the FEC had not acted on those complaints. The Commission tries to evade judicial scrutiny of its bad faith and improper behavior mostly by regurgitating the meritless arguments in its motion to dismiss. It also attempts in vain to moot this case by belatedly releasing additional information—in response to this lawsuit—that the Commission concealed from the courts and public for over a year. And by complaining about the lack of record evidence about its own concealment efforts, the FEC confirms the need for discovery to complete the record, expose the true reasons for the concealment policy to judicial review, and examine the Commission's bad faith and improper behavior. If this Court does not grant summary judgment in Heritage Action's favor outright, it should accept the FEC's invitation to complete the record by authorizing discovery and then grant summary judgment to Heritage Action. Either way, the FEC cannot be allowed to wash its hands of its manipulation of the Judiciary. Sunlight and transparency are the appropriate disinfectants for this remarkable situation.

## ARGUMENT

### I. THE FEC'S RESPONSE CONFIRMS THE NEED FOR DISCOVERY DUE TO THE COMMISSION'S BAD FAITH AND IMPROPER BEHAVIOR.

Heritage Action explained in its motion for summary judgment that the Court can decide this case on the merits, "even though the FEC has not yet filed an administrative record," because "the FEC has released the file in MUR 7516," "which would be the administrative record." Pl.'s

Combined Mem. in Opp. To Defs.' Mot. to Dismiss & in Supp. of Pl.'s Cross-Mot. for Summ. J. 28 n.3, Dkt. No. 20-1 (Cross-Mot.). In response, the FEC repeatedly insists that the Court cannot grant summary judgment to Heritage Action because the factual record about the concealment policy is incomplete. *See* FEC's Opp. to Pl.'s Mot. for Summ. J. 1–2, Dkt. No. 26 (Opp.) ("failed to provide evidence," "little more than speculation," and "not come close to offering facts"); *id*. at 11 ("no record evidence"); *id.* at 17 ("lack of factual support"); *id*. at 23 ("[b]arebones assertions"); *id.* at 37 ("[l]acking a developed factual record in this proceeding"); *id.* ("failed to identify, let alone prove with record evidence"); *id.* at 39 ("facts that are not present here"); *id.* at 42 ("without anything resembling the evidence required to support that relief"); *id.* at 43 ("[l]acking any facts"); *id.* at 44 ("record in this case falls far short of the particular facts needed").

The FEC's complaint about the completeness of the factual record is ironic considering that the Commission has been *concealing* pertinent facts from the courts, parties, and the public for well over a year. For example, the FEC grumbles that Heritage Action has not identified the other victims of the FEC's concealment policy, including detailed information about the seven other Matters Under Review (MURs). *Id.* at 1, 7 n.7, 11, 21, 23, 36, 39, 42. But the FEC itself has *known* all of the details about these matters because it *redacted* the identifying information from the Commissioners' Statement Regarding Concluded Enforcement Matters. Dkt. No. 20-2, at 1. And it has now released that identifying information in any event. Exhibit A, attached. The FEC has no basis to fault Heritage Action for the completeness of the factual record when the Commission has been concealing material facts from the Court on the basis of an unfounded assertion of privilege. The FEC "may not use privilege as a tool for manipulation of the truth-seeking process" because "privilege cannot at once be used as a shield and a sword." *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 145–46 (D.C. Cir. 2015) (cleaned up).

In all events, there is an obvious answer to the FEC's ostensible concern about the completeness of the factual record—granting Heritage Action's motion for discovery. By the FEC's own admission, the administrative record is "incomplete." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019). Granting Heritage Action's motion for discovery would complete the administrative record and allow the Court to review the true basis for the FEC's concealment policy. As Heritage Action explains in its discovery motion (incorporated by reference here), the FEC has engaged in bad faith and improper behavior by:

**(1)** concealing its actions dismissing administrative complaints to convey the misimpression that it has not acted on those complaints;

**(2)** departing from longstanding policy and precedent;

**(3)** intentionally defaulting and ignoring court orders;

**(4)** intentionally triggering citizen suits in order to avoid judicial review of the agency's decisionmaking and to defy D.C. Circuit precedent;

**(5)** possibly coordinating with administrative complainants, including CLC, to engage in collusive litigation in this district;

**(6)** closing the file in MUR 7516 only after CLC filed the citizen suit; and

**(7)** creating a mismatch between the FEC's stated reasons and the public record.

Discovery would also assist the Court in assessing the FEC's convenient argument that this case is now moot. Claiming that the Commission has now closed the files in all of the MURs that Heritage Action identified as being subject to the concealment policy, the FEC argues "that plaintiff's claims will soon be mooted." Dkt. No. 27 at 1. But as Heritage Action explains in its discovery motion, closing the files only *after* citizen suits have been filed is merely additional evidence of the FEC's bad faith and improper behavior. Indeed, the FEC is reaping the rewards

of its concealment policy because citizen suits have already been filed against Heritage Action and other conservative groups and candidates on the false premise that the FEC never acted on the relevant administrative complaints. Now, by closing all of the files all at once in response to this litigation, the FEC is trying to escape judicial review of its misconduct. As Heritage Action has explained, *see* Cross-Mot. 16–20, the concealment policy is ongoing because the FEC has not acknowledged—much less disavowed—that policy. Nor does the FEC reveal whether other conservative groups and candidates are at imminent risk of citizen suits because the FEC is still concealing records by keeping the files open in unknown matters. And of course the FEC offers no assurance that—in the future—it will always publicly release its voting records and statements of reasons after a complaint fails to garner four Commissioner votes, including in complaints lodged against Heritage Action. As explained in the discovery motion, Heritage Action intends to seek information in discovery that will be relevant to the Court's assessment of mootness, including (1) whether the FEC is still concealing its voting records and statements of reasons in unknown administrative matters involving conservative groups and candidates and (2) whether the Commission intends to continue applying its concealment policy in future administrative matters involving conservative groups and candidates.

Finally, the FEC's contention that the Court should deny Heritage Action's motion for summary judgment because Heritage Action did not file a separate statement of material facts is too cute by half. Opp. 17. As Heritage Action already explained, "the file in MUR 7516" can serve as "the administrative record" here. Cross-Mot. 28 n.3. And Local Rule 7(h)(2) exempts "cases in which judicial review is based solely on the administrative record," because "the Court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record." Comment to LCvR 7(h). That rule obviously

refers to APA cases, including this one. *See Ctr. for Sci. in the Pub. Int. v. FDA*, 74 F. Supp. 3d 295, 299 (D.D.C. 2014) ("Because this case falls under the APA, it can be fairly interpreted as one that does not require a separate statement of material facts."). The FEC's argument thus "confuse[s] a summary judgment motion under Rule 56 and a review of an agency action under the Administrative Procedure Act." *NYC C.L.A.S.H., Inc. v. Carson*, No. CV 18-1711 (ESH), 2020 WL 4286824, at *4 (D.D.C. July 25, 2020). Heritage Action would nevertheless be pleased to file a separate statement of material facts if the Court would find it helpful.

## II. THE FEC'S ATTEMPTS TO AVOID JUDICIAL REVIEW OF THE CONCEALMENT POLICY ARE MERITLESS.

The FEC's summary-judgment brief mostly repeats the arguments in its motion to dismiss, which the Court should deny for the reasons Heritage Action has already given, and which Heritage Action incorporates by reference. Cross-Mot. 12–28. Aside from these meritless points, the FEC puts a new spin on an old argument that the D.C. Circuit has already seen and rejected. Although the FEC contended in its motion to dismiss that FECA provides an "adequate" alternative remedy to the APA, Dkt. No. 17 at 26 (citing 5 U.S.C. § 704), it now shifts to arguing that FECA—specifically, 52 U.S.C. § 30109(a)(8)(A)—strips this Court of jurisdiction over this APA challenge, Opp. 18–20. This new strategy fares no better.

To start, the FEC does not seriously contend that § 30109(a)(8)(A) *expressly* divests this Court of its jurisdiction under 28 U.S.C. § 1331 and the APA. Section 30109(a)(8)(A) *only* addresses claims by administrative complainants "aggrieved by" (i) "an order of the Commission dismissing a complaint filed by" an administrative complainant or (ii) "a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed." 52 U.S.C. § 30109(a)(8)(A). Heritage Action neither is aggrieved by nor is challenging either of those things. Rather, its target is the FEC's *concealment policy—i.e.*, the Commission's "failure

to timely disclose its voting records and statements of reasons in eight terminated enforcement matters thus far." Cross-Mot. 1. While the FEC suggests that § 30109(a)(8) covers *any* "action challenging alleged FEC impropriety in handling an administrative complaint," Opp. 18, that is not the statute Congress wrote. Indeed, by that logic, a garden-variety *FOIA* action seeking the FEC's records withheld under the concealment policy would be precluded by § 30109(a)(8), but not even the FEC has gone that far. *See* FEC Mot. for Summ. J., *45Committee, Inc. v. FEC*, 1:22-cv-0502 (ABJ) (D.D.C. June 24, 2022), Dkt. No. 18.

Instead, the FEC hangs its hat on the theory that this APA challenge is "'impliedly precluded'" under § 30109(a)(8). Opp. 18. But the D.C. Circuit has repeatedly rejected this sort of implied-preclusion argument by the FEC. In *UNITY08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010), for instance, the plaintiff brought an APA challenge to an FEC advisory opinion. *Id.* at 863–64. In holding that the advisory opinion was contrary to law, the D.C. Circuit rejected the FEC's argument that "the FECA implicitly precludes direct judicial review of Commission advisory opinions, since the Act contains detailed procedural provisions but fails to provide any private right of action against the Commission except in two circumstances not implicated here," one of which was § 30109(a)(8)(A). *Id.* at 866. As the D.C. Circuit explained, while the "absence of any 'explicit statutory authority' purporting to preclude judicial review does not foreclose the Commission's preclusion claim," "it does cut against it" in light of "the general presumption in favor of reviewability." *Id.* And the D.C. Circuit observed that the fact that "Congress provided for review in circumstances that may have seemed either exceptionally compelling or at risk of being brushed off is feeble support for precluding review in a case where standard principles allow it"—especially "in contexts implicating First Amendment values." *Id.*

Similarly, in *Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996), the D.C. Circuit held that while a district court lacked jurisdiction to consider "claims under the FECA" because the lawsuit tried to bypass FECA's administrative process, *id*. at 557–59, it *did* have jurisdiction to consider the plaintiffs' constitutional and APA claims challenging the validity of an FEC regulation, *id*. at 559–61. As the D.C. Circuit explained, "[t]he FECA has no provisions governing judicial review of regulations, so an action challenging its implementing regulations should be brought under the judicial review provisions of the Administrative Procedure Act (APA)." *Id*. at 560*; see Shays v. FEC*, 414 F.3d 76, 95–96 (D.C. Cir. 2005) (describing as "weak[]" the FEC's argument that "because FECA permits judicial review to determine whether even non-enforcement decisions are contrary to law, [the plaintiffs] cannot show that no other adequate remedy in a court exists, as required for APA jurisdiction") (cleaned up); *CREW v. FEC*, 243 F. Supp. 3d 91, 105 (D.D.C. 2017) (noting "the D.C. Circuit has clearly instructed that, to the extent that Count II challenges the legal validity" of an FEC regulation, "review under the APA is proper").

In this case, Heritage Action raises no "claims under the FECA," *Perot*, 97 F.3d at 557, nor does it challenge the FEC's dismissal of CLC's administrative complaint or its failure to act on that complaint within 120 days. Rather, Heritage Action challenges the validity of *the FEC's concealment policy* under the APA, just as the *UNITY08* plaintiff challenged the validity of *the FEC's advisory opinion* under the APA and the *Perot* plaintiffs challenged the validity of *the FEC's regulation* under the APA. That Heritage Action challenges the validity of the FEC's policy as applied in the context of an administrative proceeding is immaterial. *See id.* at 560; *CREW*, 243 F. Supp. 3d at 105. If the FEC were correct that FECA precludes challenges to the validity of the FEC's policies under the APA in this context, then *Perot* would have also dismissed the APA claims challenging the validity of the FEC's regulation.

Because the FEC's argument is foreclosed by controlling precedent, it relies on inapposite cases from outside the D.C. Circuit. Opp. 19. In *Stockman v. FEC*, 138 F.3d 144 (5th Cir. 1998), for example, the Fifth Circuit applied the rule that the subject of an *ongoing agency investigation* generally cannot sue to enjoin that investigation. *Id.* at 154; *see FTC v. Standard Oil Co.*, 449 U.S. 232, 242–43 (1980). There, an administrative respondent sued to enjoin the FEC's ongoing probable-cause investigation after the FEC found reason to believe that an administrative complaint had alleged a violation of FECA. *Stockman*, 138 F.3d at 146–48. The Fifth Circuit held that the district court lacked subject matter jurisdiction over the respondent's suit to enjoin the FEC's ongoing investigation because the suit would interfere with the FEC's "exclusive jurisdiction" to enforce FECA by "compromis[ing] the ability of the agency to investigate and enforce the Act." *Id*. at 152, 154. In this case, by contrast, there is no possibility of disrupting an ongoing FEC investigation or interfering with the FEC's exclusive jurisdiction to enforce FECA, because the FEC dismissed CLC's administrative complaint against Heritage Action over a year ago when the reason-to-believe vote failed (and subsequently closed the file). Cross-Mot. 11; *see* Dkt. No. 20-7 (FEC file closure letter); FOIA Statement 1, 3. Accordingly, Heritage Action is not now—and never was—"under FEC investigation." *Id*. at 156.

To the extent there are any remaining doubts, nothing in § 30109(a)(8) qualifies as the sort of "'clear and convincing evidence' of congressional intent to preclude judicial review'" necessary to "overcome" "'the presumption favoring judicial review of administrative action.'" *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020). This is not a situation where "Congress simply channels judicial review" of a particular "claim to a particular court," such that courts need ask "only whether Congress' intent to preclude district court jurisdiction was fairly discernible in the statutory scheme." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) (cleaned up) (explaining why

the clear-statement rule for preclusion of judicial review of constitutional claims does not apply to a channeling statute). Rather, the FEC's position "purports to 'deny any judicial forum'" for Heritage Action's challenge whatsoever. *Id.* The FEC insists that "administrative respondent[s]" such as Heritage Action cannot challenge the FEC's concealment policy under § 30109(a)(8), and no "administrative complainants"—and certainly not the ones who may be colluding with the FEC—are going to question a scheme that redounds to their benefit. Opp. 19; *see supra* Pt. I. Thus, if the FEC evades judicial review of its concealment policy here, it will be free to continue concealing its dismissals of administrative complaints indefinitely and triggering citizen suits on false premises. In other words, this case will serve as a future roadmap for similar improper FEC action and collusive, politically-motivated citizen lawsuits that Congress never authorized.

Finally, the FEC recently informed the Court that the Commission had closed the files in all of the outstanding MURs subject to the concealment policy. Dkt. No. 27. Once the Commission reveals all of the information that it has been concealing for over a year, Heritage Action may no longer be suffering "ongoing informational injury," Cross-Mot. 14, but the release of that long-withheld information in response to this litigation does not mean that this case challenging the concealment policy is moot, *see Pub. Citizen v. Dep't of State*, 276 F.3d 634, 641 (D.C. Cir. 2002) (explaining that courts "have never allowed agencies to defeat judicial review of their [policies] by occasionally waiving them in individual cases"); *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) (similar); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 91 & n.23 (D.C. Cir. 1986) (similar). As Heritage Action explained, *see* Cross-Mot. 16–20, this case is not moot because: (1) the Court can still grant a declaratory judgment that the FEC unlawfully concealed its voting records in MUR 7516; (2) the FEC has not acknowledged—much less disavowed—the concealment policy; and, in all events, (3) the FEC cannot carry its

"formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 188–90 (2000). Without this Court's intervention, there is nothing to prevent the Commission from applying its unlawful concealment policy to any administrative complaints lodged against Heritage Action in the future, including by CLC. Because this case is not moot, the Court still has jurisdiction to review the legality of the Commission's concealment policy. The law does not require Heritage Action to wait until the FEC (and CLC) tries this scheme again.

## III. THE FEC'S CONCEALMENT POLICY VIOLATES THE APA.

Reluctantly turning to the merits, the FEC fails to rebut Heritage Action's showing that the concealment policy is unlawful. Cross-Mot. 28–38. Instead of a robust defense on the merits, the FEC mostly falls back on deference doctrines, but neither *Chevron* nor *Auer* can save the concealment policy from the plain and unambiguous requirements of the APA, FECA, the FEC's regulations, and D.C. Circuit precedent. And in all events, the Court cannot defer to an explanation that is both pretextual and offered in bad faith.

### A. FECA And FEC Regulations Require The FEC To Disclose Its Voting Records And Statements Of Reasons.

As Heritage Action explained, the FEC violated the plain and unambiguous requirements of APA, FECA, the FEC's regulations, and D.C. Circuit precedent by failing to publicly release its voting records and statements of reasons in terminated enforcement matters. 5 U.S.C. § 555(e); 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. §§ 111.9(b), 111.20(a); *DCCC v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987); *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988); Cross-Mot. 28–37. In response, the FEC contends that concealing its records is permissible because matters are not terminated until four Commissioners agree to close the file, Opp. 23–24, but that theory is wrong at least six times over.

**1.** To start, the FEC does not meaningfully dispute that its theory would invert FECA's four-vote requirement to find "reason to believe" in order to initiate an enforcement action based on an administrative complaint. 52 U.S.C. § 30109(a)(2). Indeed, the FEC admits "that without four affirmative votes the Commission cannot proceed with an investigation," Opp. 39, and that "any 'determination' that a person has not violated the Act" must be released under FECA, Opp. 25. A complaint's failure to garner four Commissioner votes must be a "determination" "that a person has not violated this Act" because the complaint cannot move forward without four votes. *See Statement of Reasons of Vice Chair Allen Dickerson* 1 (MUR 7486) (Dec. 9, 2021), attached as Exhibit B (explaining that the FEC "had already *determined* whether there is reason to believe when, with a lawful quorum it failed to find the requisite four votes … supporting that proposition" (emphasis added)).

The FEC claims that four Commissioners must vote to close the file to reach a "determination" under FECA, Opp. 25, but 52 U.S.C. § 30109(a)(4)(B)(ii) does not tie public release to a "vote to dismiss" or a "vote to close the file," Opp. 26. Public release is instead tied to the Commission's "determination." 52 U.S.C. § 30109(a)(4)(B)(ii). The FEC's concession that a matter cannot move forward to an investigation without four reason-to-believe votes confirms that the Commission reached a "determination" on whether FECA was violated. Otherwise, the statutory default of non-enforcement (absent four votes) would be inverted. As the D.C. Circuit recently explained, FECA "specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list, which suggests that they are not included under the standard construction that *expressio unius est exclusio alterius*. A decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners." *CREW v. FEC*, 993 F.3d 880, 891 (D.C. Cir. 2021) (*New Models*). Thus, the FEC's argument that "where

four votes are unavailable for any option, nothing happens—neither an investigation nor a dismissal—until a bipartisan coalition of four commissioners can come to an agreement … is unsupported by the text of FECA." *Id.* (cleaned up). In short, the "theory that a failed reason to believe vote has no effect is simply wrong as a matter of statutory construction." Exhibit B at 2.

The FEC's attempted link between the mention of a "vote to dismiss" in FECA's expedited-action provision, 52 U.S.C. § 30109(a)(1), does not alter this fundamental structure. *See* Opp. 26. That provision simply provides an accused person with an opportunity to respond before any vote other than a straight dismissal, which would moot the need for such a response. That provision hardly suggests that a failed reason-to-believe vote, supported by a statement of reasons by the controlling Commissioners, does not terminate a matter.

**2.** Relatedly, the FEC claims that a "determination" means final decision, Opp. 25, but the Commission does not meaningfully dispute that a vote failing to garner the support of four Commissioners to enforce an administrative complaint represents final agency action under *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Nor does it address the caselaw cited by Heritage Action that the possibility of reconsideration does not render a final order nonfinal or that final agency action does not necessarily mean the last order in a proceeding. Cross-Mot. 31. As Heritage Action explained, controlling precedent, Commissioner statements, the FEC's Enforcement Manual, and common sense confirm that the failure to garner four votes to enforce a complaint represents final agency action, especially where (as here) a statement of reasons has been included in the matter file. Cross-Mot. 30–31.

While the FEC relies on *Doe 1 v. FEC*, 302 F. Supp. 3d 160 (D.D.C. 2018), to contend otherwise, that case is easily distinguishable. Opp. 38. *Doe 1* involved a failed reason-to-believe vote as to one of several recommendations by the general counsel, accompanied by a vote to pursue

conciliation that eventually terminated the FEC proceedings and triggered § 111.20(a)'s disclosure requirement. 302 F. Supp. 3d at 163, 172–73. It did not address a situation where, as here, the FEC disposed of every allegation and the controlling Commissioners also filed a statement of reasons explaining their decision not to find reason to believe.

**3.** Moving on from FECA, the FEC twists the text of its own regulation to argue that a failed reason-to-believe vote does not "terminate" enforcement matters. Opp. 28. As Heritage Action explained, 11 C.F.R. § 111.20(a) equates "find[ing] no reason to believe" and "otherwise terminat[ing] its proceedings." *See* Cross-Mot. 30. The FEC does not and cannot explain that equation, instead spending pages of its brief contending that a "finding" must mean a "dismissal" and that both require four Commissioner votes. Opp. 28–31. That reading ignores the word "otherwise" in the regulation and the FEC's own view "that final Commission action on all compliance matters shall be made public." FEC, *Amendments to FECA; Regulations Transmitted to Congress*, 45 Fed. Reg. 15,089 (Mar. 7, 1980). Thus, from the beginning, the FEC has considered "mak[ing] a finding of no reason to believe" as both explicitly *final* agency action and action requiring public disclosure.

The FEC's reliance on 11 C.F.R. § 5.4 is likewise misplaced. That provision merely requires release of Commissioner opinions following a vote to close an enforcement file. It does not provide that the FEC can *only* release Commissioner opinions following a vote to close an enforcement file. Section 5.4 thus does nothing to the observation of three Commissioners that "a vote to close the file, while welcome and administratively convenient, is legally immaterial." Cross-Mot. 32 (quoting Statement Regarding Concluded Enforcement Matters 3).

**4.** On top of that, the FEC does not acknowledge, let alone grapple with, controlling D.C. Circuit precedent treating split votes on whether to find reason to believe as "deadlock dismissals."

*E.g.*, *Common Cause*, 842 F.2d at 448–49. Nor does it acknowledge that the D.C. Circuit rejected CREW's argument "that four commissioners must concur not only in enforcement actions, but also in nonenforcement actions" because a "decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners." *New Models*, 993 F.3d at 891. Instead, the FEC now relies on a statement by Commissioner Weintraub, Opp. 32–33, attacking the D.C. Circuit's decision in *New Models* as "deeply flawed," "off the rails," "absurd and damaging," *Statement of Commissioner Ellen L. Weintraub On the Opportunities Before the D.C. Circuit in the* New Models *Case To Re-Examine* En Banc *Its Precedents Regarding "Deadlock Deference"* 1 (Mar. 2, 2022) (Weintraub Statement). Until the D.C. Circuit changes the law, a deadlock dismissal remains a "dismissal," whatever Commissioner Weintraub thinks on the subject.

**5.** The FEC also relies on MURs that are easily distinguishable to support its contention that it has long required a vote to close the file for the records to be released. *Compare* Opp. 27 & nn.4–6, *with* Cross-Mot. 6 (quoting Statement Regarding Concluded Enforcement Matters 5). As the FEC's own descriptions of those matters confirms, they involved multiple claims or multiple respondents such that a failed reason-to-believe vote as to one claim or one respondent of course did not resolve the entire MUR. In other words, those votes were not final because they were interlocutory. *Cf.* Fed. R. Civ. P. 54(b) (absent judicial certification, an order "adjudicat[ing] fewer than all the claims or the rights and liabilities of fewer than all the parties" in a case presenting "more than one claim for relief" or "multiple parties" is not a final judgment). Here, by contrast, where that single vote resolved the sole claim as to the sole respondent, the FEC had no excuse for concealing its final decision. And if anything, the many examples of MURs where the FEC failed to find reason to believe and then immediately voted to dismiss and close the matter file

underscores how starkly the Commission has departed from past practice without acknowledgement or explanation.

**6.** Finally, the FEC seeks to have it both ways when it argues that "three Commissioners may not establish Commission policy" in an attempt to discredit the public statements of the controlling Commissioners. Opp. 39. That is exactly what the three Commissioners who are voting to conceal the vote records and statements of reasons in terminated matters are doing. By improperly seeking to hold matters open indefinitely, those three Commissioners are effectively ensuring that private plaintiffs can supplant the FEC's primary enforcement role and bring "citizen" suits directly against administrative respondents. Frustrated by the fact that they cannot get the fourth vote necessary to pursue an enforcement action themselves, these three Commissioners are outsourcing their jobs to the courts by pretending a matter remains open within the agency. FECA, FEC regulation, and controlling precedent foreclose this concealment scheme.

### B. Litigation Counsel's *Post Hoc* Explanations Are Not Entitled To Deference.

Because text and precedent cut sharply against it, the FEC falls back on deference to its "reasonable" interpretation of the law. Opp. 24. But no deference is due because the statutes and regulations are neither ambiguous nor silent on the question at issue in this case, as the D.C. Circuit held in *New Models*. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (no deference to agency interpretation where statute is not ambiguous); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (no deference to agency interpretation where regulation is not ambiguous). After this Court "has resorted to all the standard tools of interpretation," these statutes and regulations are certainly not "genuinely ambiguous," for the reasons Heritage Action has explained. *Kisor*, 139 S. Ct. at 2414; *see Chevron*, 467 U.S. at 843 n.9; *see also Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring in the judgment) ("If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best

interpretation," and thus "will have no need to adopt or defer to an agency's contrary interpretation"); Cross-Mot. 28–37; *supra* Part III.A. But even assuming that this is one of those vanishingly small cases where there is a genuine ambiguity in the statutes and regulations, deference to counsel's interpretations advanced in this litigation would not be warranted.

**1.** The *Chevron* framework does not even apply to the FEC's interpretation of FECA advanced by agency counsel in this litigation because counsel's interpretation was not made through the FEC's exercise of any authority "carrying the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013) ("[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."). Indeed, the FEC did not advance *any* interpretation of FECA at all when it secretly declined to close the files, let alone do so through any public process—*i.e.*, rulemaking, formal adjudication, or another action with the force and effect of law. *See id.* at 227 (agency interpretation is entitled to *Chevron* deference only when "promulgated in the exercise of [] authority" carrying the force and effect of law).

This agency silence is unlike the typical FEC case, whereby the Commission's interpretation of FECA is advanced through an agency action carrying the force and effect of law and articulated in a controlling bloc of Commissioners' statement of reasons or General Counsel's report, which is normally entitled to deference. *See DCCC*, 831 F.2d at 1134; *In re Sealed Case*, 237 F.3d 657, 670 (D.C. Cir. 2001) ("The deference afforded to [the FEC's] interpretation of either a statute or a regulation presupposes that the interpretation is presented as part of notice-and-comment rulemaking or at least a reasoned decision-making process."). The FEC thus puts the cart before the horse by assuming that the *Chevron* framework applies to the interpretations advanced here.

And even if the Commission could somehow hurdle the demands of *Mead*, the Court may not defer to the post hoc interpretation of FECA advanced by the FEC's litigation counsel in this case. *See City of Kansas City. v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991) ("In whatever context we defer to agencies, we do so with the understanding that the object of our deference is the result of agency decisionmaking, and not some *post hoc* rationale developed as part of a litigation strategy."). Indeed, counsel offers no evidence that this interpretation even represents the authoritative view of the Commission. *See Sealed Case*, 237 F.3d at 670 ("Choices made by FEC attorneys—without the Commission's ratification or acceptance—do not stand as the authoritative interpretation of the agency requiring deference."). In fact, the FEC appears to be defending the views of a lone Commissioner who believes D.C. Circuit precedent should be overruled, *see* Opp. 32–33; Weintraub Statement 2–3, 9–16; *supra* Part III.A.4 Plainly, the views of one Commissioner that admittedly conflicts with controlling precedent and does not represent the authoritative position of the FEC is not entitled to deference.

**2.** Likewise, the FEC's interpretation of its own regulations—specifically, 11 C.F.R. §§ 111.9(b) and 111.20(a)—advanced in this litigation is not entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), for several reasons.

*First*, the FEC does not advance an "official" or "authoritative" interpretation. *Kisor*, 139 S. Ct. at 2416. Here, the FEC does not and cannot point to any official statement of FEC policy that supports the interpretation it now advances. Indeed, the FEC admits that it "takes four votes to adopt an FEC policy," but can point to no authoritative position of four Commissioners construing §§ 111.9(b) and 111.20(a). Opp. 32. To the contrary, three Commissioners *dispute* the validity of the FEC's position in this case. *See* Statement Regarding Concluded Enforcement Matters 2–5. The FEC points only to the solo statement of Commissioner Weintraub, whose

position the Office of General Counsel is selectively defending over the views of three other Commissioners. Opp. 32–33; *cf. Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 627 (D.C. Cir. 2000) (explaining that "the Commission interpreted section 73.3555 as requiring de facto minority control, and it is to that decision, not to the earlier dissent, that we owe deference"). The views of a single Commissioner plainly do not represent the FEC's "official" or "authoritative" interpretations of §§ 111.9(b) and 111.20(a). *Kisor*, 139 S. Ct. at 2416.

*Second*, the FEC's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *see Kisor*, 139 S. Ct. at 2417–18. As Heritage Action has explained, the FEC's interpretation "conflicts with [its] prior interpretation" of the regulations. *Christopher*, 567 U.S. at 155. For decades, the FEC consistently treated failed reason-to-believe votes as "terminat[ions]" of enforcement matters for purposes of §§ 111.9(b) and 111.20(a). *See supra* Part III.A. The FEC's new interpretation is simply a "convenient litigating position" meant to justify three Commissioners' unseemly goal of concealing the FEC's dismissal of administrative complaints to trigger citizen suits under the false pretense that the Commission has not acted on administrative complaints. *Christopher*, 567 U.S. at 155. And the FEC's interpretation amounts to a "post hoc rationalization" with no basis in official Commission policy. *Id.*; *see supra* Parts III.A., III.B.1.

*Third*, the FEC's interpretation results in an "unfair surprise" by concealing the Commission's action and subjecting regulated parties to citizen suits. *Christopher*, 567 U.S. at 156; *see Kisor*, 139 S. Ct. at 2418. Under the Commission's longstanding policy and practice, respondents could expect administrative complaints to be promptly dismissed upon a failure to find reason to believe a violation occurred. *See* Cross-Mot. 7–8, 32–34. Yet the FEC's new interpretation of its regulations threatens to "impose potentially massive liability" by authorizing

citizen suits on false pretenses where the matter would have otherwise been dismissed by the FEC because less than a majority of Commissioners found reason to believe a violation occurred. *Christopher*, 567 U.S. at 155.

**C. The FEC's Explanation For The Concealment Policy Is Pretextual**.

A final reason that the Court cannot defer to the FEC is that the Commission has offered pretextual reasons for its concealment policy that do not reflect "fair and considered judgment." *Kisor*, 139 S. Ct. at 2417. As explained in Heritage Action's discovery motion, the FEC has offered a pretextual rationale for its concealment policy in bad faith because, among other things, there is a "significant mismatch" between the FEC's stated reasons and the public record. *Dep't of Com.*, 139 S. Ct. at 2575. The Court could not defer to the FEC's rationale until the FEC discloses the true "basis" for concealing its voting records and statements of reasons. *Id*. at 2573.

## CONCLUSION

The Court should grant Heritage Action's motion for summary judgment.

Dated: September 2, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 2, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and distribution to all registered participants of the CM/ECF System, which will serve all counsel of record.

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