IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. DAVID LEWICKI, and VLADIMIR SHKLOVSKY, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 24-cv-2505-ABJ

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO THE DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs identified a scheme to pass $5 million through various intermediaries in a series of structured transactions to influence the federal Senate elections in Georgia. The money passed through at least one organization apparently set up for no other purpose than to launder these funds while hiding their source, and within days a significant portion was deposited with a super PAC that spent the money on campaign ads. The rest passed through transactions apparently structured to evade triggering reporting obligations that would have revealed this source while still using the funds to influence the Senate elections. To this day, and despite federal law requiring the disclosure of anyone who contributes over $200—never mind a sum 25,000 times larger—that may earn "post-election special favors," *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), the source of these funds remains unknown.

That is because the Federal Election Commission ("FEC" or "Commission") failed in its duty to "vigilant[ly] enforce[e]" federal laws against the use of conduits to hide the source of contributions. *Republican Nat'l Senatorial Comm. v. FEC*, 609 U.S.___, 2026 WL 1868932 (2026) (leaving "vigilant enforcement" of earmarking rules one of the few remaining bulwarks against corruption). It refused to investigate the conduit scheme over its General Counsel's recommendation. It did so with no apparent contemporaneous justification. It did so, it asserts, by misinterpreting the applicable legal standards. And, as Plaintiffs demonstrate in their opening brief, it did so "contrary to law." 52 U.S.C. § 30108(a)(8)(C).

In defense, the FEC has little to say. First, it pleads for special deference but simply misstates authority. Second, as to the absence of a contemporaneous explanation, the FEC misdirects and simply ignores the salient indisputable fact: nothing in the record explains why the six commissioners—or even the four necessary—voted to close the file on July 3, 2024. Third, the FEC does not defend the analysis in the *post hoc* statement of three commissioners, pretending the statement says other than it does, but the statement speaks for itself and conclusively demonstrates the three commissioners imposed two a-textual limitations on the conduit law, committing legal error.

The Commission rejected its General Counsel's recommendation and ignored the evidence and the law, depriving Plaintiffs of their legal right to know the source of $5 million used to influence their vote. Because the dismissal was contrary to law, Plaintiffs respectfully urge this Court to declare the Commission's actions unlawful and remand to conform consistent with the Federal Election Campaign Act ("FECA").

ARGUMENT

I. The Dismissal is Contrary to Law Even if it Was "Sufficiently Reasonable"

A dismissal is contrary to law if "'the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA]'" or if "'the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion.'" *CREW v. FEC*, 209 F. Supp. 3d 77, 85 (D.D.C. 2016) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)).[1]

Although courts previously deferred to the Commission's statutory interpretations as part of the *Chevron* framework in analyzing the first prong, *see Orloski*, 795 F.2d at 16 (citing *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843 (1984)); *see also, e.g., CREW v. FEC*, 316 F. Supp. 3d 349, 367 (D.D.C. 2018), the Supreme Court has ended that practice, *see Loper Bright Enter. v.*

[1] Although the D.C. Circuit sitting en banc asked for briefing on *Orloski*'s continuing vitality, the FEC did not suggest abandoning it there. *See* Appellee's En Banc Brief, *End Citizens United v. FEC*, 22-5277 (D.C. Cir. Dec. 20, 2024), *available at* https://perma.cc/J7LX-FAG2. *Orloski* remains the law of the circuit and "district judges, like panels of [the D.C. Circuit], are obligated to follow controlling circuit precedent until either [the Circuit], sitting en banc, or the Supreme court, overrule[s] it." *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). Nor would *Orloski*'s displacement impact the results here: in *Orloski*'s absence, the Administrative Procedure Act would compel vacatur of the agency's dismissal.

Raimondo, 603 U.S. 369, 412 (2024) (overruling *Chevron*). Although *Loper*'s impact on the Commission's regulatory interpretation remains indeterminate, deference is not warranted here even under the pre-*Loper* framework. *See* Pls. Mot. 31–32.[2] Accordingly, under *Orloski*'s first prong, the Court reviews the dismissal for legal error without deference.

As to the second prong, although arbitrary and capricious review is often "deferential," *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015), *see, e.g., Hagelin v. FEC*, 411 F.3d 237, 242–43 (D.C. Cir. 2005) (reviewing Commission's factual conclusions deferentially for substantial evidentiary support), an agency's failure to provide a timely explanation is *per se* arbitrary and capricious, *Ohio v. EPA*, 603 U.S. 279, 292 (2024); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[E]ven pursuant to this deferential standard of review, an agency must articulate an explanation for its action."). Accordingly, on the issues before the court, there is no deference.

The FEC ignores this settled precedent and begs for special privilege: asking that its actions, alone among federal agencies, to be upheld if they are "sufficiently reasonable." FEC Br. 15. Putting aside the fact that a failure to timely explain and a misinterpretation of the law are hardly "sufficiently reasonable," the FEC simply relies on outdated precedent: *FEC v. Democratic Senatorial Campaign Committee ("DSCC"),* 454 U.S. 27 (1981), in which the Supreme Court stated any agency's interpretation of law would be upheld if "sufficiently reasonable," *id.* at 39. That decision was incorporated into the *Chevron* framework which governed judicial review for the next four decades. *See Chevron*, 457 U.S. at 843 n.9 (incorporating *DSCC*, 454 U.S. 27, to support deferential review of agency's interpretation of law); *see also CREW*, 316 F. Supp. 3d at

[2] The FEC "failed to address" this point in its opposition and so has "conceded" it. *Buggs v. Powell*, 293 F. Supp. 2d 135, 141 (D.D.C. 2003).

367. That is until the Supreme Court overruled it in 2024. *See Loper Bright*, 603 U.S. at 412; *see also e.g.*, *Campaign Legal Center v. FEC*, No. 24-cv-2585, 2025 WL 1768099, at *7 (D.D.C. June 26, 2025) (stating deference to the FEC's interpretation of its regulations, but not statutes, survives *Loper*).[3] In the wake of *Loper*, the Court's duty is clear: "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the law." *Loper Bright*, 603 U.S. at 413.

This case warrants no deference. If the Court finds the dismissal was without a contemporaneous explanation, the dismissal is "arbitrary and capricious," *Ohio*, 603 U.S. at 292: there is nothing to which the agency could defer. Similarly, if the Court decides, under *de novo* review, that the "agency has [not] acted within its statutory authority," then the dismissal was contrary to law. *Loper Bright*, 603 U.S. at 413.

II. The Absence of a Contemporaneous Explanation Renders the Dismissal Arbitrary and Capricious

On July 3, 2024, six commissioners, two more than the four required by law, decided to "close the file" on Plaintiffs' complaint. AR00343; 52 U.S.C. § 30106(c) ("All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission"); *see also* FEC, Commission Directive 10(E)(3) (Dec. 20, 2007), *available at* https://perma.cc/8Q5X-QREN ("Any principal or secondary motion that exercises a duty or power of the Commission under the Act ... shall require four votes for approval."). Although the Commission previously deadlocked on June 25, 2024 on its General Counsel's recommendation to open an investigation, AR00339–41, that deadlock was itself without effect because "a deadlock will give rise to a dismissal only if a majority of

[3] Even before this overruling, three commissioners' statutory interpretation warranted no deference as it was "not law." *Common Cause*, 842 F.2d at 449 & n.32; *see United States v. Mead*, 533 U.S. 218, 226–27 (2001) (only agency pronouncements with "force of law" warrant deference).

Commissioners separately votes to dismiss the complaint." *45Committee v. FEC*, 118 F.4th 378, 382 (D.C. Cir. 2024). While the Court may presume that the July 3 decision to dismiss was "due to [the] deadlock," *DCCC v. FEC*, 831 F.3d 1131, 1132 (D.C. Cir. 1987), the record contains no other contemporaneous evidence of the rationale for that deadlock that the commissioners understood on July 3 would support a dismissal. There is no contemporaneous record of the reasons the three deadlocking commissioners gave to the full Commission to reject the General Counsel's recommendation, or in-record contemporaneous evidence about the nature of the disagreement as understood by any of the remaining three commissioners about why that disagreement warranted dismissal at the time they provided that necessary and decisive fourth vote to dismiss. *See* 52 U.S.C. § 30106(c). There is no indication what issue any of these three thought precluded a "path forward that would garner four votes," or what disagreement they sought to submit to judicial review by dismissing. 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' 9 (Mar. 2, 2022), https://perma.cc/3KED-EMRA ("Weintraub Statement"). The absence of any contemporaneous rationale that could justify the decision at the time it was made—the Commission's July 3 executive session—renders the dismissal arbitrary and capricious. *Ohio*, 603 U.S. at 292.

The FEC nevertheless pleads for special powers unavailable to any other agency. The FEC first claims that it need only justify its actions by the time it chooses to make its decision "effective." FEC Br. 17–19. Perhaps aware that runs contrary to binding precedent, the FEC next argues that waiting thirty days to permit a subset of commissioners—not the four needed to dismiss—to make up a reason in a *post hoc* statement is "reasonable." FEC Br. 20–27. That plea, however, is also foreclosed by precedent.

"The *post hoc* rationalizations of the agency … cannot serve as a sufficient predicate for agency action." *Dep't of Homeland Sec. v. Regents of the U. of Cal.*, 591 U.S. 1, 23 (2020) (quoting *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)). Rather, agencies must rely on their "contemporaneous explanations," *id.*, ones that show the "an agency action [is] the product of reasoned decisionmaking," to survive arbitrary and capricious review, *Fox v. Clinton*, 684 F.3d 67, 74–75 (D.C. Cir. 2012); *Ohio*, 603 U.S. at 292 (same); *End Citizens United PAC ("ECU") v. FEC*, 69 F.4th 916, 923 (D.C. Cir. 2023) (same); *Tourus Recs., Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2021) ("fundamental 'requirement of administrative law'" that an agency "'set forth its reasons' for [its] decision[s]"). The record here reveals no justification that could have been in the mind of the at least four necessary commissioners who decided to close the file on July 3. Accordingly, as the action is unexplained, the dismissal was contrary to law. *Orlsoki*, 795 F.2d at 161.

A. The Decision, Not Its Eventual Effective Date, Requires a Contemporaneous Explanation

To ensure an agency has engaged in reasoned decision-making, courts review the record "before the [decisionmakers] at the time [they] made [their] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085 (D.C. Cir. 1996). Courts may "have before [them] neither more nor less information than did the agency when it made its decision." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997). The Commission here decided to dismiss Plaintiffs' complaint on July 3, when six commissioners voted to close the file. The FEC, however, argues that the Court may consider materials that were not before the Commission at that point of decision because the commissioners decided on July 3 to make their vote effective thirty days later. FEC Br. 17–19. But binding precedent makes clear that the agencies may not manufacture *post hoc* rationales after they have decided to commit to an action merely by delaying the implementation date of their act.

An agency action is final and explanation is due when it "mark[s] the 'consummation' of the agency's decisionmarking process," and the agency reaches a decision "from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). That recognizes that an agency's action is final even if the legal consequences are postponed. *See id.* (consequences "*will* flow"); *Humane Soc'y of the U.S. v. U.S. Dep't of Agric.*, 41 F.4th 564, 571 (D.C. Cir. 2022) ("[A] duly prescribed rule is law even if it sets a future effective date."); *Nat'l Treasury Emps. Union v. FLRA*, 712 F.2d 669, 671–72, 674 (D.C. Cir. 1983) (delay of effective date did not render action non-final for purposes of review because agency action is final if "only implementation of that decision remains").[4] The fact that the commissioners here chose to delay the consequences for their action does not alter the fact that the July 3 vote was the consummation of their "decision making process." *Bennett*, 520 U.S. at 177. No further deliberations were contemplated or required, and the record reveals none occurred.

The FEC nevertheless contends that decision-making process remained open until the "effective" date of the dismissal. FEC Br. 17–18. But even assuming the Commission could, within those thirty days, "reverse course, revise, or come to [a] consensus," FEC Br. 17, that would not render their decision-making process incomplete as no further approval was needed before their decision had effect. "The mere possibility that an agency might reconsider … does not suffice to make an otherwise final agency action nonfinal." *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *Nat'l*

[4] The FEC suggests a different rule applies to rulemaking because they "have 'future effect,'" *see* FEC Br. 26, but cites nothing to support this distinction. Nor does it make sense: the FEC's entire argument is that it need not have a contemporaneous rationale for its vote because its vote had a future effect. The Supreme Court also rejected the FEC's distinction. *See Regents*, 591 U.S. at 23 n.3 (rejecting contention that "contemporaneous explanation requirement applies only to agency adjudications, not rulemakings"); *see also Camp v. Pitts*, 411 U.S. 138, 143 (1973) (examining agency adjudication to discern if it was supported by a "contemporaneous explanation of the agency decision").

Env't Dev. Ass'ns Clean Air Project v. EPA, 752 F.3d 999, 1006 (D.C. Cir. 2014) ("An agency action may be final even if the agency's position is 'subject to change' in the future."); *N.R.D.C. v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (agency action is final and subject to challenge "as long as the interim decision is not itself subject to further consideration by the agency").[5] The possibility of reconsideration, whether at an indeterminate time or within a time frame set by agency, is irrelevant. *See Wheeler*, 955 F.3d at 75 (EPA's announced "prepar[ations] to undertake notice-and-comment rulemaking" to displace "interim" rule did not render interim rule nonfinal). The possibility of future revision does not cure an earlier decision reached without reasoning. Once the Commission voted to close, the agency was committed to an action that would impact Plaintiffs' legal rights, its decision was final, and its contemporaneous explanation was set.

The FEC nevertheless contends that Plaintiffs were not injured until they were informed of the closure on August 2, and therefore commissioners were free to manufacture reasons for the vote until that point. FEC Br. 18–19. But the point at which Plaintiffs are aggrieved is not the relevant deadline. Rather, reasoned decision-making requires an agency have, at the point of its decision, a reason for so deciding. It would hardly constitute reasoned decisionmaking for the agency to roll dice to commit itself to action, and then to manufacture a *post hoc* justification for that result, simply because they do so before agency staff tell anyone about it.

[5] The FEC cites no authority that would permit the Commission to reconsider a vote to close and does not clarify how that would occur. Would it require a new four-vote majority? What if here the three commissioners, the ones not joining the *post hoc* statement, decided not to close the file after seeing it. Could they prevent dismissal by withholding their support at that point, as they could before the vote to close? Would they have any opportunity for "self-correction" to ensure the explanation accurately reflect their decisive vote to close? *Cf. ECU*, 69 F.4th at 920 (contemporaneous explanations required so as to permit an "opportunity for self-correction"). And what if the Commission undergoes a personnel change during the thirty-day period? The absence of any details to this proposal demonstrates the suggestion of revision is simply the convenient litigating position of counsel, not an accurate description of the Commission's procedures.

What's more, the FEC is wrong about the event that injures Plaintiffs. Although the August 2 notice told them about the impact on their rights, it was the July 3, 2024 vote to close that terminated their rights to administrative relief. The sixty-day clock to challenge the FEC's dismissal runs from the date of the vote to close, not from the date of notice. *See Jordan v. FEC*, 68 F.3d 518, 519 (D.C. Cir. 1995) (FECA's clock ran from date of vote to dismiss, not notice, so plaintiff's suit was untimely). It is the vote to "clos[e] the file" that "terminates proceedings." *Doe, 1 v. FEC*, 920 F.3d 886, 871 n.9 (D.C. Cir. 2019). It is that vote which impacted Plaintiffs' legal rights, and it is that vote which must be explained by the record before the Commission at that time.

End Citizens United PAC ("ECU") v. FEC follows this precedent. *Cf.* FEC Br. 17. *ECU* precludes the consideration of any statement by an FEC commissioner to explain a dismissal that arises after "a deadlock vote results in an order of dismissal." *ECU*, 69 F.4th at 920. It not only precluded statements that arise after a dismissal becomes effective, or after a party is notified. Rather, it said an explanation must predate the "order of dismissal." *Id.* The Commission orders case closures through successful majority votes. *See* 52 U.S.C. § 30106(c). The fact that the terms of an order specify a later "effective" does not render the order nonexistent. The order existed here on July 3, when four commissioners voted in its favor. That is the date the earlier "deadlock vote result[ed] in an order of dismissal," *ECU*, 69 F.4th at 920, it is the date of the "Commission's decision not to proceed," *id.*, the last point for an "opportunity for self-correction," *id.*, and thus the date by which a contemporaneous explanation was due, *id.*

ECU relied on *Department of Homeland Security v. Regents of University of California* to reach its decision. *See ECU*, 69 F.4th at 921–22 (citing *Regents*, 591 U.S. 1 (2020)). In that case, the Court concluded that a memorandum by the Secretary of Homeland Security could not explain an earlier decision to terminate an immigration enforcement program. *Regents*, 591 U.S. at 23.

Appropriately focusing on the date of the decision to terminate rather than the date by which that decision became effective, the Court held that the new memorandum would only be timely if the agency made "a new decision," *id.* at 21, one for which the memorandum would then be contemporaneous; *see also id.* at 23 ("Requiring a new decision before considering new reasons promotes 'agency accountability.'"). Absent from the opinion is any suggestion that agency could supply a new rationale if that prior decision had a later effective date.

In face of this precedent, the FEC asserts that a district court decision, *CREW v. FEC*, No. 22-cv-3281, 2023 WL 614887, at *7 (D.D.C. Sept. 20, 2023), is to the contrary, *see* FEC Br. 18, but it mischaracterizes the case. There, an intervenor asserted that the FECA's sixty-day clock began on the date of a deadlocked reason-to-believe vote. *See CREW*, 2023 WL 6141887, at *6. The court rejected that argument because it recognized that a "deadlocked reason-to-believe vote … on its own, does not suffice" to dismiss a case. *Id.* at *7; *accord 45Committee*, 118 F.4th at 382. Because the vote does not dismiss the case, it does not terminate the Commission's confidentiality requirements and thus does not permit notice. *CREW*, 2023 WL 6141887, at *8. In this context, the court noted that CREW could not be "aggrieved" by a vote it was forbidden from knowing about. The case did not state, however, that parties are not aggrieved by majority votes to dismiss that, unlike deadlocked votes, do terminate proceedings.

Binding precedent is clear: to ensure an agency engaged in "reasoned decisionmaking," *ECU*, 69 F.4th at 923; *Regents*, 591 U.S. at 16, courts review the agency's explanation that is contemporaneous with the decision—the one that explains why the agency committed to this action—not one only contemporaneous with the effective date of the action.

B. The *Post Hoc* Statement Fails to Cure the FEC's Error

For the same reasons that a post-decision explanation is not timely simply because it predates a purported effective date, an explanation is untimely even if it is manufactured with a "short time" after the decision point. *Cf.* FEC Br. 24. Whether a statement is created two months, thirty days, or one day after a vote, it could not have been "before the [decisionmaker] at the time [they] made [their] decision." *Overton Park*, 401 U.S. at 420; *cited by ECU*, 69 F.4th at 922; *James Madison*, 82 F.3d at 1095 (same). This provides a "bright line" rule. *cf.* FEC Br. 21.[6] "[T]o review more than the information before the [decisionmaker] at the time [they] made [their] decision risks [courts] requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations." *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). That is why the D.C. Circuit rejected a *post hoc* statement in *ECU*, and the FEC cannot distinguish that case here.

a. Though Courts Look to the "Controlling Commissioners," They Must Provide an Explanation Contemporaneous to the Majority's Decision to Close

The law requires agencies to rely on their contemporaneous explanations—those that are part of the record before their decisionmakers when they commit to their decision—because only those sorts of explanations contributed to "reasoned decisionmaking" and provide an "opportunity for self-correction." *ECU*, 69 F.4th at 923 (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988)). The decisionmakers must have before them the basis for their action, both so that they can correct that statement to ensure it reflects their true intentions, and to permit the decisionmakers to change course once they see the justification that is to be offered.

The concern is paramount at the FEC, an agency which works under the "apparent fiction" that permits a subset of commissioners of an otherwise bipartisan agency to articulate the basis of a bipartisan majority's vote to dismiss. *CREW v. FEC*, 892 F.3d 434, 437–38 (D.C. Cir. 2018).

[6] Though the district court in *CREW*, 2023 WL 6141887, pondered "just how 'contemporaneous' a 'contemporaneous' statement must be," *id.* at *12 (cited by FEC Br. 21), it did so only in the absence of party briefing on the point, *see id.* at *13, because the admissibility of a commissioner's statement was not relevant to the motion to dismiss before it.

Given the fact that, at the bipartisan agency, a "dismissal" is often "due to [a] deadlock," *DCCC*, 831 F.2d at 1132, looking to the deadlock's ardent defenders to articulate the disagreement provides a sensible short cut that can enable "meaningful judicial review," *Common Cause*, 842 F.2d at 449, but only if that statement accurately reflects the thinking behind the agency action on review: the majority vote to dismiss, *see* 52 U.S.C. § 30109(a)(8)(C) (majority dismissals, not non-majority deadlocks, are the subject of review).

Although this fiction stems from cases commanding an explanation from the "controlling commissioners," those cases do not contemplate the possibility that this statement would postdate the vote to close or that it would not be available to the full Commission, never mind command that practice. *Cf.* FEC Br. 19; *see, e.g., FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (requiring commissioners voting against probable cause and deadlocking agency to "provide a statement of their reasons for so voting," but not addressing the timing of that statement); *cf. DCCC*, 831 F.2d at 1135 (remanding to permit "the Commission or the individual Commissioners" to issue an explanation). The courts simply never sanctioned that possibility. *See ECU*, 69 F.4th at 923.

Nor did courts confer this power to provide this non-majority subset of commissioners time to articulate a new explanation that is "less likely to be second-guessed by the courts." *Cf.* FEC Br. 24. That is not "reasoned decisionmaking," *cf. id.*: the process by which a majority of the Commission comes to decide on a course of action and commit to it. Rather, a post-vote statement, particularly one of less than the majority that voted, is no more than the development of a "convenient litigating position" that is prohibited. *ECU*, 69 F.4th at 922. That there may be justifications that present the strongest defense in court is irrelevant unless those justifications actually caused the majority to vote to dismiss.

Unfortunately, the use of *post hoc* statements to develop litigating positions rather than reflect the actual explanation for the vote to close has led to statements that "come as some surprise" to the closing commissioners. Statement of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub, *In re End Citizens United PAC v. FEC* (Oct. 15, 2021), https://perma.cc/86YZ-VFXP. There, for example, a *post hoc* statement invoked prudential grounds that could have cut off judicial review if they were the actual basis of the vote to close. *See, e.g., CREW v. FEC*, 993 F.3d 880 (D.C. Cir. 2021). Precluding judicial review would certainly be "convenient." *ECU*, 69 F.4th at 922. But it apparently did not reflect the contemporaneous rationale of the commissioners who voted to close, which may include putting a specific issue before a court for the express purpose of being "second-guessed." *Compare* FEC Br. 24 *with* Weintraub Statement 9. Nor is this case of surprise a one-off. *See* Weintraub Statement 14–15 (discussing another case where deadlocking commissioners invoked "our prosecutorial discretion," but did so only in reference to "the individual discretion of the two of them" rather than describe the understanding of the majority of the Commission); Statement of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub, MUR 7465 (Freedom Vote), Dec. 16, 2021, https://perma.cc/EEF7-6MUQ (stating commissioners, including one who provided decisive vote to close, understood disagreement about the "statute of limitations" was the impetus for the deadlock, not the prudential factors that were eventually invoked by the deadlocking commissioners in a *post hoc* statement). A surprise hardly constitutes "reasoned decisionmaking." *Regents*, 591 U.S. at 16.

That is not to say, however, that statements are admissible so long as they do not exhibit "gamesmanship." FEC Br. 28. Courts must review the actual contemporaneous explanation of the agency, not those that just lack apparent bad faith. Even in the absence of a firm deadline like that imposed by the contemporaneous explanation rule, the D.C. Circuit has rejected "impropriety" as the proper metric by which to judge an agency's timeliness. *See Telecomm. Rsch. & Action Centr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("[T]he court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed."). A court reviewing an administrative record in a section 30109 case is no better positioned to adjudicate commissioners' hidden subjective motives.

Rather, courts employ the bright line rule that limits the explanation to the one "before the [decisionmaker] at the time [they] made [their] decision," *Overton Park*, 401 U.S. at 420, because only then can courts be sure there was an "opportunity for self-correction" that ensures the accuracy that "allow[s] for meaningful judicial review of the Commission's decision not to proceed," rather than reviewing what may reflect only a "convenient litigating positions," *see ECU*, 69 F.4th at 920. Such statements are also the only ones that can "guard[] against the risk that 'similarly situated parties may not be treated evenhandedly" and "enhance[] predictability of Commission decisions to future litigants," *id.*, because only statements that reflect the actual basis of the agency's act—which occurs only by majority vote—can the public accurately predict future acts, that is majority votes, of the Commission and decide whether those votes treat parties evenhandedly.

The FEC nevertheless contends that this statement does reflect the actual basis, because it reflects deliberations that aren't in the record. *See* FEC Br. 1, 17, 25–26. Yet, that wasn't sufficient for the D.C. Circuit in *ECU*, which held a *post-hoc* statement was untimely even though it too presumably (or at least purportedly) reflected confidential deliberations before the Commission that were similarly omitted from the record. *See* 69 F.4th at 919. Courts can only review materials in the administrative record, and if those records are insufficient to support the agency's judgment, it may not rely on presumptions of good faith to fill in the gaps. *See Alvarez*, 129 F.3d at 132 (agency action must be judged only by the record before the agency at the time of decision and may not consider "extraneous" materials); *Env't Def. Fund, Inc. v. Costle*, 647 F.2d 275, 284 (D.C. Cir. 1981) ("It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made."); *see also Tex. Rural Legal Aid v. Legal Serv. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991) ("[N]either party is entitled to supplement that record with litigation affidavits or other evidentiary material that was not before the agency.").

Although case law supports looking to the controlling commissioners to defend the issues that ultimately led a majority to close the file, those commissioners must do so by identifying a contemporaneous explanation that was before those majority decisionmakers at the time of their decision.

b. The Burden to Produce Contemporaneous Explanations is Low and Not Excused by Pleas of Inconvenience

In the face of this obligation to provide in record contemporaneous explanations, the FEC resorts to pleas of inconvenience, *see* FEC Br. 23, but it relies on strawmen. Nothing in this precedent or Plaintiffs' argument requires commissioners to "come to the deliberating table with a fully drafted statement of reasons." *Id.* at 24.

First, the deliberation and the vote to close need not occur on the same day: indeed, here, they were a week apart. *See* AR00339–341, AR00343. The commissioners may deliberate over the reason-to-believe vote and, if they believe the disagreement is intractable, they (or staff) may use the intervening time to memorialize those deliberations. If the commissioners required more time to articulate the basis of their deadlock, they could have delayed the vote to close until August 2, the supposed "effective" date of the dismissal, when their statements were ready.

Second, the law does not require contemporaneous explanations to be the final word. A "curt" explanation can suffice, as long as it "indicate[s] the determinative reason for the final action taken." *Camp*, 411 U.S. at 143; *accord Regents*, 591 U.S. at 21. "[T]he agency may elaborate later on that reason (or reasons) but may not provide new ones." *Regents*, 591 U.S. at 21.[7] Accordingly, rather than preparing "fully drafted statement[s]," FEC Br. 24, the commissioners (or staff) could briefly memorialize the "determinative reason[s]" in a document placed in record or include it in the certification on which the commissioners vote, or the commissioners could certify a portion of the transcript of their deliberations for release, before the Commission commits to a vote to close. *Camp,* 411 U.S. at 143. The controlling commissioners could then later elaborate on those reasons, providing their fulsome defense to aid judicial review. That is hardly a significant burden, and far less than what the Commission does when a bipartisan majority agrees on the merits of the case. *See, e.g.*, Pls.' Br. 21.

A deadlock does not alter these obligations or render them more burdensome: the commissioner need not agree on the validity of these indicative reasons for dismissal—the merits disagreements that have proven intractable or that warrant judicial review—to accept that they are the ones for which dismissal is "due." *DCCC,* 831 F.3d at 1132. Of course, it does mean the deadlocking commissioners are not given free rein to invoke whatever "convenient litigating position" they think best insulates the dismissal, *Regents*, 521 U.S. 23, but that was never their authority. What distinguishes these methods from a *post hoc* statement is not the burden they impose; it is that they permit the decision-making majority to correct the statement or alter their actions fully aware of the justification that will be invoked to defend it. They permit "reasoned decisionmaking" and

[7] As noted, the FEC cannot shoehorn its *post hoc* statement into this rule because the statement can only expand on a prior in-record explanation, not extra-record secret materials. *See supra* pp. 14–15.

provide a "contemporaneous explanation," *Regents*, 591 U.S. 16, 23, that allows for "meaningful judicial review." *Common Cause*, 842 F.2d at 449.

c. Under *ECU*, The *Post Hoc* Statement Cannot Justify the Dismissal

These fundamental principles of administrative law behind the demand for in record contemporaneous explanations is why the D.C. Circuit in *ECU* threw out a *post hoc* statement, even though it was drafted by the "controlling commissioners." 69 F.4th at 921, 922–23. That decision recognized these statements are not "contemporaneous explanation[s] for its dismissal." *Id.* at 923. They do not "contribut[e] to reasoned decisionmaking' by the Commission or provide[] 'an opportunity for self-correction' in any meaningful sense." *Id.* That decision commands the same result here.[8]

The FEC attempts to cabin *ECU's* impact to post-litigation statements, FEC Br. 27–28, but "the FEC's suggest[ion] that *ECU* applies *only* when an agency issues an explanation for its decision once litigation has begun …. is mistaken." Opinion and Order 5 n.2, *CREW v. FEC*, No. 24-cv-2505 (D.D.C. Nov. 10, 2025) (attached as Ex. D to Pls.' Mot.). Although the *ECU* court noted the statement there was particularly dilatory, it applied the general requirement for "contemporaneous explanations" which does not rely on the timing of litigation. *See ECU*, 69 F.4th at 921–22. For example, in *Regents*, applied in *ECU*, the Supreme Court considered at length what made one memorandum a *post hoc* rationale. *See Regents*, 591 U.S. at 20–24. In so doing, however, it never mentioned the date litigation started beyond its brief mention in background, never mind suggest

[8] The FEC suggests it can comply by following its new "Case Closure Procedure" which it asserts accord with *ECU. See* FEC Br. 27–29. This procedure, however, suffers from the same errors and appears only as a press release and was not adopted through notice and comment rulemaking, as would be required for it to bear any force of law. *See CropLife Am. v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003). Nor could it permit the agency to contravene the provisions of the FECA and the APA that govern judicial review, including the limit of review to contemporaneous explanations, *see CREW v. FEC*, 971 F.3d 340, 350 (D.C. Cir. 2020) (agency's regulation could not conflict with statute), and the bar on commissioners delegating their powers, 52 U.S.C. § 30106(c).

that was the determinative date. *See id.* Rather, nothing about the filing of a complaint impacts the "opportunity for self-correction" available to the agency, nor alters the agency's ability to provide "guidance." *ECU*, 69 F.4th at 920. It is not the *hoc* after which statements become *post hoc.*

In the end, the FEC cannot distinguish *ECU*. In both cases, there were records containing "additional evidence and reasoning submitted by complainants and respondents." FEC Br. 20. In both cases, there were (presumably) deliberations not contained in the record over the General Counsel's recommendations and whether to close the file. *See* FEC Br. 23–24. In both cases the agency "benefit[ed] from" any due "presumption of motivational regularity." FEC Br. 23. In both cases there were recorded deadlocked votes on the General Counsel's recommendation to find reason to believe a violation may have occurred. *See* FEC Br. 19. Yet, in both cases, the only existing explanations were in statements written after the vote to close by a nonmajority of the commissioners, those who had deadlocked the agency's merits vote. FEC Br. 19–20. Accordingly, in both cases, the statements are too late to be admissible, and the dismissal is therefore contrary to law.

ECU governs this case. The commissioners' statement is a *post hoc* explanation that cannot justify the dismissal. That does not portend any great burden to the Commission or significant alteration to its practices, assuming commissioners are already openly deliberating the need for dismissal through a bipartisan vote rather than merely angling for an opportunity to bypass the Commission's bipartisan structure to assert a convenient litigating position. The commissioners merely need include in the record a contemporaneous explanation of the determinative issues that motivate the required four commissioners to act: the reasons the deadlocking commissioners presented to justify their position and that convinced a separate decisive commissioner to join them and vote to close. They may expand on those reasons later. But they may not, as they do here, manufacture new reasons out of record that is silent.

C. Cases About a Question That "Differ[s] in Meaningful Ways" From the One here are Not Informative

Against this weight of authority, the FEC relies on two district court decisions that answer a question not presented here; one that "differ[s] in meaningful ways" from the one before this court, *Campaign Legal Cntr. v. FEC*, No. 19-cv-2336, 2025 WL 315143, at *7 (D.D.C. Jan. 28, 2025), *appeal filed* Feb. 12, 2025; Order and Op. 9, *CREW v. FEC*, No. 22-cv-0035 (D.D.C. Nov. 10, 2025) (attached as Ex. D to Pls.' Mot.). In those cases, the courts reviewed actions taken on remand, after courts found previous dismissals were contrary to law. *See Campaign Legal Center*, 2025 WL 315143, at *1; Op. and Order 3–4, *CREW*, 22-cv-0035. In those cases, in which the only question to be considered was whether the commissioners "repeat[ed] the previously identified shortcomings," *Campaign Legal Center*, 2025 WL 315143, at *3; *see* Op. and Order 5, *CREW*, 22-cv-0035 (concluding prior order did "not expressly demand that an explanation issue a precisely the same moment as the non-enforcement vote"), the courts concluded the post-dismissal-vote statements did not prove the agency's failure to conform, *Campaign Legal Center*, 2025 WL 315143, at *5 ("The Court thus concludes that the Commission sidestepped on remand the maladies diagnosed by this Court and the D.C. Circuit and thus conformed with the declaration that its earlier action was contrary to law"); Op. and Order at 8–9, *CREW*, 22-cv-0035 (concluding new *post hoc* statement was still earlier than previous *post hoc* statement and therefore did not "buck[] [the Court's] March [contrary to law] ruling"). That is a far cry from finding, after "'perform[ing] the kind of top-to-bottom' analysis necessary to determine whether, as a matter of law and in all cases, a statement issued" after the vote to close "is consistent with *ECU*, *Regents*, and fundamental principles of administrative law." Op. and Order 8, *CREW*, 22-cv-0035 (quoting *Campaign Legal Center*, 2025 WL 315143, at *6–7).[9]

The FEC nevertheless focuses on Judge Boasberg's attempt to "glean some important lessons from *ECU*," where he concluded the case was "motivated chiefly by a concern that the FEC's stated reasons were "'simply convenient litigating positions'" developed after suit; concerns he found inapplicable because there the case had been pending for years, both the remand vote to close and the statement occurred after litigation commenced, and all parties (including the full Commission) were aware of each other's litigating positions (including the prior justification for dismissal). *Campaign Legal Center*, 2025 WL 315143, at *7. He therefore concluded the statement did not "prejudice litigants." *Id*. Here, of course, litigation was not pending at the vote to close, but more importantly, Judge Boasberg placed too significant a weight on *ECU*'s references to the specific untimeliness of the statement there to the exclusion of the rule *ECU* applied: one that requires "contemporaneous explanations" to exist at the time of the decision to close the file. *See* 69 F.4th at 920–22 (citing cases that do not discuss or rely on the explanations relation to the timing of suit and discussing "foundational principle[s]" unconnected to litigation); *see supra* pp. 17–18. A statement issued after a vote to close, moreover, is as likely to be a "convenient litigating position" as one written after suit since neither need reflect the actual basis of the bipartisan vote to close but can instead invoke whatever issues a separate non-bipartisan non-majority think are most

[9] For example, in the *Campaign Legal Center* case, briefing on the timeliness of the statement consisted of a single footnote and a single cite to *End Citizens United* in an opening brief and a couple of pages of expansion in a reply, See Pls.' Mot. for an Order Declaring that Def. has Failed to Conform to the Remand Orders 4 n.1, *Campaign Legal Ctr. v. FEC*, 19-cv-2336-JEB (D.D.C. Oct. 30, 2024), *available at* https://perma.cc/AF3P-DAJE, Pls.' Reply in Further Support of Mot. for an Order Declaring that Def. has Failed to Conform 9–12, *Campaign Legal Ctr. v. FEC*, 19-cv-2336-JEB (D.D.C. Dec. 13, 2024), *available at* https://perma.cc/W8UU-AEQT, hardly the briefing necessary for the court to carry out this analysis.

likely to prevent "second-guess[ing]." *See* FEC Br. 24, 28. The statement in *ECU,* after all, was issued "four days after ECU filed its lawsuit," *ECU*, 69 F.4th at 919, prior to service of the complaint, and before any substantive briefing. The "prejudice" it caused was not its manufacture after suit, but its potential departure from the actual reasoning of the bipartisan majority of the Commission that had voted to close. *Cf.*, *Campaign Legal Center*, 2025 WL 315143, at *7.

These two district court decisions about a meaningfully different question do not support the FEC's attempt here to rely on a *post hoc* statement nor contravene binding circuit and Supreme Court authority that preclude its consideration.

III. The Three Commissioners' Explanation Rests on Misinterpretations of Law that the FEC Does Not Attempt to Defend

Leaving aside the untimeliness of the statement and assuming it accurately describes the basis of the dismissal, it still fails to establish that dismissal was not contrary to law. In relevant part, it relies on "impermissible interpretations" of law, *Orloski*, 795 F.2d at 161: it shows three commissioners deadlocked the agency due to their interpretation of the FECA's ban on conduit contributions in 52 U.S.C. § 30122 to exclude (1) any conduits that passed through an "independent" intermediary, and (2) any conduits that were achieved by reimbursement.

For its part, the FEC does not attempt to defend these interpretations, but pretends that they don't exist. Yet the FEC cannot ignore the text of the statement which shows (1) the commissioners explicitly cited a disagreement over the operative legal standard to treat the supposed independence of an intermediary as a determinative factor that excluded transfers through it from the reach of the conduit statute, and (2) they treated even the possibility that a conduit was achieved by reimbursement to similarly put it outside the statute's reach. The analysis deployed showed this was no mere weighing of facts, but reflects the commissioners' understanding of the statute's scope. It shows how they interpreted the law. Because their interpretations are not borne by the statute, the dismissal supposedly resting on them is contrary to law.

A. The Three Commissioners Relied on a Lack of Apparent Control to Dismiss the Complaint, Misinterpreting the Statute

The federal rules against the use of conduits to hide the identity of donors are "broad." *United States v. O'Donnell*, 608 F.3d 546, 552–53 (9th Cir. 2010) (52 U.S.C. § 30112 "ensure[s] the complete and accurate disclosure of the contributors who finance federal elections"). One way a conduit contribution can be made is by "earmark[ing] or otherwise direct[ing] [funds] through an intermediary or conduit." 52 U.S.C. § 30116(a)(8); *see also Nat'l Republican Senatorial Comm.*, 2026 WL 1868932, *10 (stating it is "difficult to conjure up realistic scenarios" where donors pass funds through an intermediary "in a way that does not also violate … earmarking regulations"). This includes not only conduits carried out by the means of an agent wholly controlled by the source, but any "arrange[ment]" that permits a donor to make a contribution while keeping their names off disclosures. *See O'Donnell*, 608 F.3d at 551. That includes situations where a donor solicits an independent party to carry out the scheme, *id.* at 555, or just "suggests" recipients use the contribution to influence elections, *United States v. Whittemore*, 776 F.3d 1074, 1079 (9th Cir. 2025), and even situations where the intermediary or a third party solicits the donor, *see United States v. Hsia*, 176 F.3d 517, 521 (D.C. Cir. 1999). It does not require control.

Yet that is exactly what the controlling commissioners read the statute to require: intermediaries to be entities wholly "control[ed]" by "mastermin[d]" sources, ones that act only "at the direction of" these sources and never on their own. *See* AR00348–350. The FEC attempts to waive off these statements as "announc[ing] a rule requiring [no] more than what plaintiffs themselves set forth: evidence that the true contributor influenced the conduit, directly or indirectly, to make a contribution in the true contributor's name." FEC Br. 37. But the FEC does so only by ignoring the commissioners' own words and wrongly equating statutory language with the language they employed.

First, the statement evinces an interpretation on the statute that requires control. It stated the controlling commissioners were rejecting the General Counsel's recommendation to open an investigation over a "disagreement with the legal standard." AR00350. The General Counsel, in line with prior administrative practice and case law, had found that "§ 30122 is sufficiently broad to encompass situations involving something less than an explicit directive from the true source regarding the use of the contributed funds." AR00267 (citing *Whittemore*, 776 F.3d at 1080). Rejecting that legal standard, the controlling commissioners stated that, under their interpretation, a conduit claim not only needs a directive, but in fact "*require[s]* … evidence of control." AR00348 (emphasis added). To underscore their interpretation, they stated three times that they understood a conduit claim to require an intermediary act "at the direction" of the source, AR00347, AR00348, AR00350, *i.e.*, words they construed to mean to operate under the control of the source, AR00348; *see also, e.g.*, *United States v. Ying Lin*, No. 15-cr-601(S-2)(DLI), 2018 WL 3416524, at *3 (E.D.N.Y. 2018) (equating acting "at the direction of" another as being "under the control" of that other).

Their interpretation is further demonstrated by the analysis that follows from it. It rejects Plaintiffs' claims because the commissioners believed one intermediary, RightOn Issues, was "clearly-independent" and not a "mere passthrough" of a "mastermin[d] … shadowy 'true contributor.'" AR00359–60. In support of that conclusion, they noted RightOn Issues had "received more than two million dollars in completely unrelated contributions from third parties." AR00359. That evidence may show that RightOn Issues was not wholly controlled by "mastermin[d]" true sources. AR00348. But that is relevant only if one interprets the statute as limited to intermediaries wholly controlled by the source. It has no bearing on the question whether an intermediary "[gave] money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) ...." 11 C.F.R. § 110.4. The controlling commissioners relied on this fact, however, because they interpreted the statute to require it, and that's what they meant by "at the direction of" another.

Second, the controlling commissioners' interpretation is a far cry from "what [P]laintiffs themselves set forth." FEC Br. 37. Consider *Whittemore*, the case the General Counsel cited to establish the standard that the controlling commissioners rejected. There, a donor made an "unrestricted gift" and only offered a "suggestion" on how it was to be used. 776 F.3d at 1079. That donor provided an "instruction" that earmarked the funds, 11 C.F.R. § 110.6(b)(1), that resulted in all or part of their funds being used to make contributions, 11 C.F.R. § 110.4. Yet the intermediaries did not act "at the direction of" the source, nor did the source exercise any "control" over them. *See Whittemore*, 776 F.3d at 1079–80 (rejecting contention state must prove intermediary acted as "bailee"). Under the controlling commissioners' test, this transaction would not be covered, while under a correct interpretation it would be.

The controlling commissioners' interpretation would result in different results in other cases. An independent entity that agrees to receive and then contribute funds to a political committee in exchange for part of the funds is making a contribution in the name of another if it is reported as the sole source, *see* Conciliation, MUR 6920 (ACU) Nov. 3, 2017, https://perma.cc/2YKK-W6RG, but it would still be an "clearly independent" entity that would put it outside the controlling commissioners' analysis. Similarly, an intermediary who solicits a donor is engaging in a conduit contribution, even though it is the intermediary, not the source, who is the "mastermin[d]." *Compare Hsia*, 176 F.3d at 521 *with* AR00350.

The controlling commissioners' interpretation would also render 11 C.F.R. § 110.6(d)(1) a dead letter. If an intermediary exercised its own "direction or control" over the use of funds, then it is not acting "at the direction of" the source and are not under the source's control. According to the controlling commissioners then, a transaction covered by 11 C.F.R. § 110.6(d)(1) would not be a conduit at all. Rather than reporting this intermediary along with the source, as the regulation requires, the controlling commissioners' interpretation would treat only the intermediary as the source.

To further illustrate, take one of the numerous examples of conduits commonly now used to deprive voters of the transparency to which they're entitled. *See* Pls. Mot. 16–18. A consultant approaches a wealthy donor (or corporation, or foreign nation) and asks them to contribute to help a candidate or candidates or a party in a federal election. The consultant assures this source that they can contribute without the public knowing, and do so far in excess of any contribution limit (as no one will be able to trace the funds), while the consultant will ensure benefited candidates know who to thank. The consultant may tell them there's a cost for this secrecy and that some of the funds, perhaps even 51%, will have to go to less direct forms of influence that federal law does not regulate. The consultant tells this source to make a check out, not to those candidates or that party, but to a nondescript entity, perhaps a 501(c)(4) the consultant only just set up. The source agrees, trusting the consultant and not bothering to learn the details of how this is to be accomplished. The 501(c)(4) entity is a puppet of the consultant, but the consultant's name is not on its paperwork, and it is ostensibly run by an individual whose only job is to take the consultant's orders. The 501(c)(4) doesn't spend the money itself or give all that money to a super PAC as its tax filings would then eventually reveal its sole purpose was to influence elections, and that would trigger its own reporting obligations under the FECA. Instead, the money is broken up and sent through structured transactions to other entities—some created simply for this purpose and terminated shortly after, others used by the consultants to carry out other conduits, and others with a history of other actions that can counterbalance electioneering. That ensures no single entity will report that most of its funds go to influence elections so that none will obviously trigger reporting obligations (and for any that do, they shut down and use their termination to avoid accountability). The spending entities then report these nondescript intermediaries as the source rather than the origin of the funds.

This scenario constitutes a contribution in the name of another in violation of 52 U.S.C. § 30122. The penultimate links in the chain "[gave] money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made." 11 C.F.R. § 110.4. Potentially, neither the recipients nor the intermediaries understand the scheme beyond their particular role; consultants have kept these co-conspirators in the dark to aid a defense that they did not "knowingly" participate. *See* 52 U.S.C. § 30122. Yet the source gave money, "all or any part" of which was intended to influence federal elections, with an ""designation, instruction, or encumbrance," 11 C.F.R. § 110.6(b)(1), or otherwise as part of an agreement or arrangement, that would lead to others being wrongly attributed. Federal law, properly interpreted, requires these "true contributor[s]" to be disclosed, 11 C.F.R. § 110.4, and the failure to do so results in a proscribed contribution in the name of another.[10]

Yet the commissioners' imposition of an obligation to show any entity acted "at the direction of" their controlling source would put this scenario outside the scope of the conduit statute.

[10] The consultant would, unfortunately, be outside the scope of the law as currently construed, since it applies only to the true source, the wrongfully identified source, and the recipient, but not their co-conspirators. *See FEC v. Swallow*, 304 F. Supp. 3d 1113 (D. Utah 2018).

The source only agreed to furnish the funds to influence federal elections. No one acted at its direction; it is not a "mastermin[d] ... shadowy 'true contributor.'" AR00349. Intermediaries may be acting at the direction of a consultant, but nothing observable from outside the scheme would show that, and the consultant is acting independently. Intermediaries may also be independent entities acting on their own accord, perhaps as part of an agreement that gives them a share of the proceeds. Recipients may simply be trusted beneficiaries, expected to spend the funds in the way intended without otherwise being part of the plot. No participant is acting at the direction of another controlling participant and so the commissioners' interpretation would (erroneously) exclude this scenario from the scope of the statute.

This interpretation to impose an "at the direction of" control test not only differs from the one Plaintiffs set forth, but lacks authoritative support. The controlling statement here cites only a single item in support, another prior three-commissioner statement. See AR00347 n.20 (citing Statement of Reasons of Chairman Cooksey and Comm'rs Dickerson and Trainor at 10, MUR 8082 ("Unknown Respondents"), Apr. 8, 2024, *available at* https://perma.cc/782E-KD2B ("8082 Statement")); *see also* 8082 Statement 7 (relying on intermediary's asserted "discretion" over funds to reject conduit complaint). That statement is "not law." *Common Cause*, 842 F.2d at 449 & n.32. That statement in turn only cites 52 U.S.C. § 30122 for this reading, but neither "control" nor the term "at the direction of" appear in that statute or its regulatory corollary, 11 C.F.R. § 110.4, or in any judicial authority the commissioners cite interpreting either.

The FEC suggests that a reference to *O'Donnell* in the footnote of the statement (as a parenthetical about what another three-commissioner statement cites) nevertheless supports the commissioners' reading, *see* FEC Br. 37 (citing 608 F.3d at 550–51); *see* AR00357 n.20 (citing Statement of Reasons of Vice Chairman Cooksey and Comm'rs Dickerson and Trainor 2, MUR 7464

(LZP), July 7, 2023, *available at* https://perma.cc/LFB9-TY3H ("MUR 7464 Statement")), but the FEC is doubly wrong. The cited MUR 7464 Statement does not use the "at the direction of" formulation, and so could not be citing *O'Donnell* for that basis (nor does it cite the portion of *O'Donnell* on which the FEC now relies). Further, although *O'Donnell* uses the "at the direction … of" formulation at the FEC's cited page, *see* 608 F.3d at 550–51, it does so in reciting the government's description of the events (in a case involving solicitations) and at no point interprets 52 U.S.C. § 30122 to be limited to it. Rather, *O'Donnell* explicitly notes 11 C.F.R. § 110.6 applies to intermediaries who do not act at anyone else's direction, *see* 608 F.3d at 550 n.2, meaning *O'Donnell* cannot support the controlling commissioners' interpretation, even assuming one can read the footnote in the statement to rely on it; *see also Whittemore*, 776 F.3d at 1079–80 (interpreting *O'Donnell* to extend to conduits beyond "mere intermediaries").

The FEC also identifies 52 U.S.C. § 30116 as support, FEC Br. 37, *but see SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), but again neither it nor its corollary regulation uses the term "at the direction of" another, nor does any judicial authority the commissioners cite use those words to interpret them. Rather, it provides that a conduit may occur when one "earmark[s] or otherwise direct[s]" the use of their funds. 52 U.S.C. § 30116 (emphasis added); *accord* 11 C.F.R. § 110.6(a), which is not the same as requiring one to act "at the direction" of this controlling other.

The FEC also oddly suggest that 52 U.S.C. § 30116(a)(8) is inapposite, despite citing it as a basis for the controlling commissioners' construction, because it "regulate[s] legal, disclosed conduit contributions rather than those that are illegal or disguised." FEC Br. 37. Of course, they are legal because the source is reported notwithstanding the use of the intermediary. The import of these rules is that they show a source remains the reportable original contributor even if one or more independent intermediaries is used and the failure to disclose this source results in an unlawful contribution in the name of another in violation of 52 U.S.C. § 30122. That 52 U.S.C. § 30116 deals with one specific type of conduit, ones earmarked to candidates, *see* FEC Br. 38, is irrelevant. It shows that the duty to report the sources of contributions, which both candidate committees and super PACs share, *see* 52 U.S.C. § 30104(b)(3)(A) (requiring both authorized candidate committees and all other committees to report the "each … person … who makes a contribution"), extends to those who contribute to intermediaries, including intermediaries who exercise independence and do not act "at the direction of" a source.

Moreover, the regulation specific to the FECA's conduit provision, 11 C.F.R. § 110.4(b)(1), incorporates the type of conduit described in 11 C.F.R. § 110.6. In relevant part, § 110.4 provides that "[g]iving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made" is prohibited, "*see* 11 C.F.R. § 110.6." 11 C.F.R. § 110.4(b)(1). That makes Section 110.6's coverage of conduits through independent intermediaries relevant. But since Section 110.4 is not limited to candidates, one cannot read the reference to Section 110.6 to incorporate the candidate specific limitations of that regulation, *see, e.g.*, 11 C.F.R. § 110.6(d)(1) (discussing intermediary reports applicable only to intermediaries to candidates). Rather, one must simply interpret 11 C.F.R. § 110.4 and 52 U.S.C. § 30122 to be broad enough to include, but be limited to, those sort of conduit contributions. *See O'Donnell*, 608 F.3d at 554 (acknowledging 52 U.S.C. § 30122 "overlap[s]" with 52 U.S.C. § 30116).

Closely reading 11 C.F.R. § 110.4 further rejects the controlling commissioners' interpretation. That provision states that a name of another contribution occurs whenever a contributor "giv[es]" anything of value, "all or part of which was provided to the contributor by another person." Absent in that formulation is any requirement that the contributor act at the direction of this other person or that this other person exercise any control. Simply using the funds they provided is enough. Of course, that source must be a "contributor," 11 C.F.R. § 110.4, someone who "make[s] a contribution," 52 U.S.C. § 30122, which the FECA defines as something given "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A). The original source must therefore provide some type of "designation, instruction, or encumbrance," *see* 11 C.F.R. § 110.6, or give as part of some kind of "arrang[ment]," *O'Donnell*, 608 F.3d at 556, that indicates the purpose of the transfer, but the intermediary need not "act at [their] direction." Rather, the rules provide that promising to give or "[g]iv[ing] money or anything of value" to another with any kind of "designation, instruction, or encumbrance," including a "suggestion," or pursuant to any "solicit[ation]," "arrange[ment]," or "agree[ment]," resulting in "all or any part" of the funds being contributed to "influenc[e] any election for Federal office," will result in a contribution "in the name of another" unless that original source is disclosed by the reporting recipient, regardless of what "direction or control" the intermediary exercised. *See* 52 U.S.C. §§ 30101(8)(A), 30122; 11 C.F.R. §§ 110.4(2)(i), 110.6(b)(1), (d); *Whittemore*, 776. F.3d at 1080 (9th Cir. 2015); *O'Donnell*, 608 F.3d at 551, 556.

The FEC pretends that the controlling commissioners did not interpret the FECA's ban on conduit contributions to require "control," but does so only by ignoring the statement's plain text and the fact that the commissioners treated an intermediary's potential independence as decisive. By rejecting the General Counsel's legal standard, one which accurately reflected the broad scope of the conduit statute to cover transfers where the intermediary does not act "at the direction of" a source, the controlling commissioners interpreted the statute erroneously. Accordingly, to the extent that the dismissal here was based on the misinterpretation, it was contrary to law.

B. The Three Commissioners Treated as Decisive the Possibility of a Reimbursement Rather than Immediate Advance, Misinterpreting the Statute

The FEC takes a similar tact to defending the controlling commissioners' exclusion of reimbursements from the statute: pretending they did not. FEC Br. 34. But once again the controlling commissioners' statement shows that they understood reimbursements to be beyond the reach of the statute. It was only in so doing could their observation that the evidence did not foreclose a reimbursement prove decisive. But that is not what the law provides, as the FEC admits.

In rejecting Plaintiffs' claims, the controlling commissioners stated that "there is no evidence… whether ACCP gave [its] money *before* or *after* RightOn Issues made its contribution to the three Super PACs." AR00349 (emphasis added). "Nor is there any evidence," they continued, "that PSAA gave $1,500,000 to RightOn Issues *before* RightOn Issues contributed to the Super PACs." *Id.* (emphasis added). The controlling commissioners stated that the mere possibility that these funds came after the contributions caused the complaint to "fall[] apart." *Id.* There is no way to read this language other than that the controlling commissioners thought that the possibility that funds could come "after" the super PAC contributions put them beyond the reach of the statute. In other words, they interpreted the statute to exclude reimbursements.

That fits with the only description of the standard in the controlling statement: that 52 U.S.C. § 30122 "reaches so-called 'straw donor' arrangements: where A gives a contribution to B with the intention that B *immediately transfer* those funds to C …." AR00347 n.20 (emphasis added) (citing MUR 7464 Statement). Absent from that formulation is the possibility that A provides B the funds after B makes the contribution.

Attempting to fill in this gap, the FEC says that the support cited, another three-commissioner statement, itself mentions the possibility of conduit by reimbursement and treats the quoted language a gloss that courts "typically" affirm. FEC Br. 35 (quoting MUR 7464 Statement 2).

Notably, in MUR 7464, the transfers occurred by "advanc[e]" of "seed[]" funds rather than reimbursement, 7464 Statement 3, so there was no opportunity for the commissioners to consider the statute's application to reimbursements. Regardless, they assiduously avoided repeating either of these comments in the statement here defending this dismissal. The omission of reimbursements here simply reiterates what is plain from their analysis: they treated the possibility that funds came by reimbursement as decisive because they interpreted the statute to exclude them.

Attempting to salvage this legal error, the FEC pretends the controlling commissioners merely considered whether the "timing of the transfers" were sufficiently probative. FEC Br. 35. But the commissioners were not faulting the complaint for identifying transfers that were so far apart as to be outside the scope the agency has typically found indicative of a conduit. Nor could they. The transfers here occurred well within that time, no more than a few months before or after the contributions to the super PACs. RightOn Issues was founded on July 2, 2020, two months before it made its three super PAC contributions in mid-September. *See* AR00137, AR00147–48. Accordingly, an advance could occur no more than a few months before these contributions. Alternatively, ACCP, PSAA, and RightOn Issues all reported the transfers on their tax forms, which covered the period ending December 31, 2020. AR00137 (citing RightOn Issues, Inc., 2020 Form 990 (Nov. 15, 2021), https://bit.ly/3DtVJyn), AR00135 (citing ACCP, 2020 Form 990 (Nov. 15, 2021), https://tinyurl.com/3hfvxzmz)), AR00136 (citing PSAA, 2020 Form 990 (Nov. 9, 2021), https://bit.ly/3DtSRl5), AR00143–144. Accordingly, if funds came by reimbursement, both ACCP and PSAA transferred funds to RightOn Issues no later than December 31, a few months after RightOn Issues made its contributions. That is within the period the FEC has previously found indicative of a conduit contribution. *See* Conciliation ¶ IV.6, MURs 7005 and 7056 (TransGas), Aug. 11, 2017, https://perma.cc/Q648-HMYU (intermediary's conduit contribution occurred two months after advance); *see also* Factual and Legal Analysis 4-5, MURs 7005, 7056 (Adam H. Victor, et al.) Nov. 14, 2016, https://perma.cc/8EH6-JZET (finding reason to believe where businessman's personal assistant contributed $2,500 to a candidate two months after receiving $2,500 from one of his businesses). And this of course ignores ACCP's transfers to PSAA, which were advanced no more than three days before the contributions there. AR00145.

The fact that the maximum temporal proximity of the transfers provided strong indicia of conduits, not a reason to reject Plaintiffs' claims, simply underscores the fact that the controlling commissioners were not weighing the time span between transfers; indeed they never mention the time span between the transfers at all. Rather, their sole focus is on whether a transfer to an intermediary could happen "before or after" the contribution, AR00349, which is relevant only if one of those categories is outside the scope of the statute. The fact they treated it as decisive, *id.*, accords with their formulation of the law here, AR00347 n.20, and shows the controlling commissioners dismissed Plaintiffs' claims in part based on the commissioners' erroneous interpretation of 52 U.S.C. § 30122 to exclude reimbursements. Because that rests on an "impermissible interpretation" of law, the dismissal is contrary to law. *Orloski*, 795 F.2d at 161.

CONCLUSION

The Commission dismissed Plaintiffs' complaint with no apparent lawful basis. The Commission voted to close the file in the absence of any in-record explanation of the disagreement that deadlocked the agency and that could support the six members' decision to terminate proceedings at the time they decided. The *post hoc* statement of a less-than-majority subset of those commissioners does not cure that failure. It is too late to be effective here, and it relies on impermissible interpretations of law. Accordingly, the dismissal was contrary to law and Plaintiffs respectfully request this Court declare as such and remand for actions in conformity within thirty days, as the FECA provides.

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Respectfully submitted,

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