IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. DAVID LEWICKI, **VLADIMIR SHKLOVSKY,** Plaintiffs, v. **FEDERAL ELECTION COMMISSION,** 1050 First Street, N.E. Washington, D.C. 20463, Defendant.	Civil Action No.

<u>COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF</u>

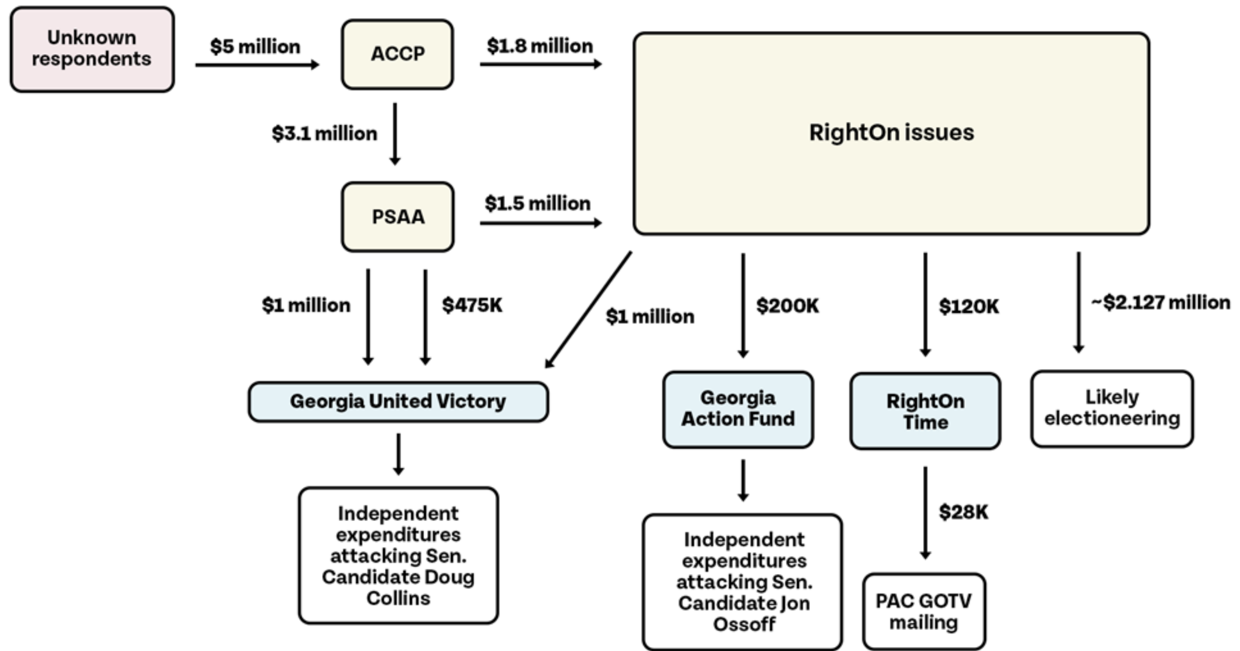
1. Rev. David Lewicki and Vladimir Shklovsky (together, "Plaintiffs"), two Georgia voters, bring this action for injunctive and declaratory relief against the Federal Election Commission ("FEC" or "Commission") under the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), 52 U.S.C. § 30109(a)(8)(C), challenging as arbitrary, capricious, an abuse of discretion, and contrary to law the dismissal by the FEC of their administrative complaint identifying a scheme to launder approximately $5 million through dark money entities to influence the 2020 federal Senate elections in Georgia.

2. As set out in their amended administrative complaint, approximately $5 million from an unknown source or sources was laundered through a series of entities before being distributed to three registered federal political committees and an ostensible social welfare organization, each of which used the funds to influence federal elections. These transactions bore the hallmarks of unlawful conduit contributions—transactions structured to hide the true source of the contributions that would otherwise be reported by the federal political committees.

Alternatively, assuming the transfers did not constitute conduit transfers, they nevertheless qualified the entities as political committees subject to disclosure.

3. In particular, Plaintiffs alleged approximately $5 million was first passed through an ostensible social welfare nonprofit, American Coalition for Conservative Policies ("ACCP"), before being split and passed between two additional ostensible social welfare nonprofits, Policies, Solutions, and Action for America ("PSAA") and RightOn Issues, and ultimately spent on electioneering by three independent expenditure-only political committees (aka "Super PACs") and by RightOn Issues. Plaintiffs alleged these transactions bore indicia of conduit contributions. Where the specific date for a transfer could be determined, they indicated receipts were quickly converted into distributions. For example, PSAA received the entirety of its 2020 funding from ACCP and began converting those funds into political committee contributions within three days, and RightOn Issues's contributions were also made over a short period of days. Further, two of the entities, ACCP and PSAA, share the same treasurer and reported to the IRS they shared an address, were founded within weeks of each other, have few if any other activities other than the transfers at issue here, and shut down after those transfers completed. The transactions also appeared to have been structured to evade public reporting that would easily reveal their major purpose, subjecting them to disclosure obligations. The funds were also all eventually used for the same electioneering purposes: to influence the 2020 Georgia Senate elections, and they were given to political committees with overlapping personnel among themselves or the contributing entities.

4. To assist, the Plaintiffs included the following visual summary of their allegations.



5. Notwithstanding their legal obligations to report the true source of these funds, funds were wrongfully attributed to the conduit entities, and the intermediary entities failed to fulfill their own disclosure obligations. As a result, voters, including Plaintiffs, were denied information to which they are entitled under the FECA.

6. To remedy that injury, Plaintiffs filed an administrative complaint for preliminary adjudication with the FEC and amended that complaint on November 14, 2023. The FEC assigned it the Matter Under Review ("MUR") number 8110. The FEC's expert non-partisan staff in the Office of General Counsel ("OGC") reviewed the complaint and the accused's responses and found Plaintiffs' complaint had merit, recommending the FEC investigate the possibility the transactions were unlawful conduit contributions. The FEC's OGC further recommended holding in abeyance the claims that the entities qualified as political committees pending the results of the investigation into the conduit contribution claims.

7. Notwithstanding this recommendation, the Commission deadlocked three-to-three along partisan lines on the merits of the Plaintiffs' complaint, with three commissioners judging the complaint to not raise a reason to believe a violation of law may have occurred. About one week later, on July 3, 2024, the FEC voted to close the file on the Plaintiffs' complaint, thereby dismissing the action.

8. Nearly one month later, the three commissioners who judged the complaint to lack merit issued a joint Statement of Reasons to explain the dismissal that resulted from their judgment. In that statement, the three commissioners stated that they did not believe the allegations met the threshold for finding a reason to believe a violation may have occurred. Relying on an interpretation only endorsed by a non-majority of FEC commissioners, they found the threshold imposed more than a "low evidentiary bar" that required complainants to disprove any potentially exonerating possibility, no matter how speculative. Statement of Reasons of Chairman Sean J. Cooksey and Commissioners Allen J. Dickerson and James E. "Trey" Trainor, III at 2, MUR 8110 (Am. Coal. for Conservative Policies) (July 29, 2024) [hereinafter Controlling Statement], *available at* https://www.fec.gov/files/legal/murs/8110/8110_65.pdf (rejecting judicial construction from *Campaign Legal Center v. FEC*, 646 F. Supp. 3d 57, 67 (D.D.C. 2022)). They then concluded that because Plaintiffs were unable to identify the specific dates on which approximately $3.3 million flowed from ACCP and PSAA to RightOn Issues—information not subject to public reporting and not provided by the respondents in their defense—the allegations were unmeritorious. The Controlling Statement was silent, however, on the commissioners' analysis for the remaining transfers, which included a $1 million transfer from ACCP to PSAA to a super PAC that was known to occur over a maximum of three days, and it omitted any analysis regarding Plaintiffs' political committee claims.

9. The Controlling Statement is inadequate to justify dismissing Plaintiffs' complaint. First, it post-dates the dismissal by nearly a month and thus represents an impermissible post-hoc rationalization that cannot justify a dismissal. Second, it relies on a legally erroneous heightened standard of review to adjudicate parties' pleadings contrary to binding precedent. Third, it appears to apply a legally erroneous interpretation for conduit contributions. Fourth, the analysis is arbitrary and capricious because it rejects evidence in support of Plaintiffs' allegations wholesale because Plaintiffs did not allege facts available only to respondents about the dates of certain transfers, and because it fails to provide any justification to dismiss Plaintiffs' claims with respect to nearly $1.5 million in transfers and their claims regarding the entities' political committee status. Accordingly, the FEC's dismissal is contrary to law, and Plaintiffs respectfully request this Court declare as much and remand for reconsideration, as directed by the FECA.

JURISDICTION AND VENUE

10. This Court has personal and subject matter jurisdiction over the parties pursuant to 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 702. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331, 2201(a), and 2202. Venue lies in this district under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e).

PARTIES

11. Plaintiff Reverend David Lewicki is and at all times relevant to the complaint has been a citizen of the United States and a registered voter in DeKalb County, Georgia. He voted for a U.S. Senate candidate in the primary for the 2020 Georgia federal elections, as well as the 2020 general and 2021 run off federal elections. Rev. Lewicki observed campaign

advertisements during the course of the campaign, including at least one ad produced by, or at least similar to those produced by, the respondents to the administrative complaint.

12. As a citizen and registered voter, Rev. Lewicki is entitled to receive information contained in disclosure reports required by the FECA. 52 U.S.C. § 30104; 11 C.F.R. §§ 104.1–.22, 109.10. Rev. Lewicki is harmed in exercising his right to vote when an individual, candidate, political committee, or other regulated entity fails to report campaign finance activity as required by the FECA. *See FEC v. Akins*, 524 U.S. 11, 20 (1998) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) ("'political committees' must disclose contributors and disbursements to help voters understand who provides which candidates with financial support")).

13. The information contained in reports required to be filed under the FECA is useful to Rev. Lewicki. He believes transparency is a principle of a healthy democracy and uses such information to understand who may be trying to influence an official's decision-making, as well as to hold accountable anyone who may be funding unsupported attacks. The information required by law to be disclosed could impact his candidate preference. Rev. Lewicki has and expects to review news stories that discuss donors who support or oppose candidates and has and expects to discuss such matters with other voters.

14. Rev. Lewicki does not know the identity of the source of the $5 million donation to ACCP and cannot discover it through publicly available information.

15. Rev. Lewicki is harmed in his ability to exercise his own franchise in an informed manner and to share information with others, including voters, when an individual, candidate, political committee, or other regulated entity fails to report campaign finance activity as required by the FECA. *See Akins*, 524 U.S. at 21 (FECA protects the right to receive information that

would allow "others to whom they would communicate it" to evaluate candidates for public office).

16. Rev. Lewicki is further harmed when the FEC fails to properly administer the FECA's reporting requirements, limiting his ability to review and distribute campaign finance information.

17. Plaintiff Vladimir Shklovsky is and at all times relevant to the complaint has been a citizen of the United States and a registered voter in Fulton County, Georgia. He voted for a U.S. Senate candidate in the primary for the 2020 Georgia federal elections, as well as the 2020 general and 2021 run-off federal elections.

18. As a citizen and registered voter, Mr. Shklovsky is entitled to receive information contained in disclosure reports required by the FECA. 52 U.S.C. § 30104; 11 C.F.R. §§ 104.1–.22, 109.10. Mr. Shklovsky is harmed in exercising his right to vote when an individual, candidate, political committee, or other regulated entity fails to report campaign finance activity as required by the FECA. *See Akins*, 524 U.S. at 20 (quoting *Buckley*, 424 U.S. at 66–67 ("'political committees' must disclose contributors and disbursements to help voters understand who provides which candidates with financial support")).

19. The information contained in reports required to be filed under the FECA is useful to Mr. Shklovsky. Mr. Shklovsky believes the fact that a donor may attempt to hide their identity demonstrates the donor understands the importance their identity may play with potential voters. He also uses the information to understand whether officials are abusing their office in favor of donors. The information required by law to be disclosed could impact his candidate preference. Mr. Shklovsky has and expects to review news stories that discuss donors who support or oppose candidates and has and expects to discuss such matters with other voters.

20. Mr. Shklovsky does not know the identity of the source of the $5 million donation to ACCP and cannot discover it through publicly available information.

21. Mr. Shklovsky is harmed in his ability to exercise his own franchise in an informed manner and to share information with others, including voters, when an individual, candidate, political committee, or other regulated entity fails to report campaign finance activity as required by the FECA. *See Akins*, 524 U.S. at 21 (FECA protects the right to receive information that would allow "others to whom they would communicate it" to evaluate candidates for public office).

22. Mr. Shklovsky is further harmed when the FEC fails to properly administer the FECA's reporting requirements, limiting his ability to review and distribute campaign finance information.

23. Defendant FEC is the federal agency established by Congress to oversee the administration and civil enforcement of the FECA. *See* 52 U.S.C. §§ 30106(b)(1), 30107(a)(6), (9), (e).

STATUTORY AND REGULATORY FRAMEWORK

Conduit Contributions

24. The FECA and FEC regulations require reporting entities to disclose the "true source" of funds they receive. *United States v. Hsia*, 30 F. App'x 1, 1-2 (D.C. Cir. 2001); *see also* 52 U.S.C. § 30104(a), (b); 11 C.F.R. §§ 104.1, 104.2, 104.3, 104.8. Accordingly, the law bars structuring a transaction to evade this obligation by passing funds through a conduit. Specifically, the FECA provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another." 52 U.S.C. § 30122; *accord* 11 C.F.R. § 110.4(b).

25. Thus, for example, "[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. 11 C.F.R § 110.4(b)(2)(i); *see also United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010) (holding a conduit contribution "occurs when A solicits B to transmit funds to a campaign in B's name, subject to A's promise to advance or reimburse the funds to B"). A conduit contribution may be affected when funds are "earmarked or otherwise directed" by the source by means of any "designation, instruction, or encumbrance." 11 C.F.R. § 110.6(a), (b)(1) (incorporated by reference in 11 C.F.R § 110.4(b)(2)(i)). Earmarking does not require the intermediary work at the total "direction or control" of the source or third party. 11 C.F.R. § 110.6(d)(2) (incorporated by reference in 11 C.F.R. § 110.4(b)(2)(i)).

Registration and Reporting Requirement for Political Committees

26. The FECA imposes certain reporting obligations on entities that spend significant funds to influence federal elections. Most relevant here, it requires political committees to file periodic reports with the FEC that, among other things, (1) identify all individuals who contribute an aggregate of more than $200, (2) identify all political committees that made a contribution to the political committee at issue, (3) detail a political committee's debts and obligations, and (4) list all of a political committee's expenditures. 52 U.S.C. § 30104(b)(2)–(8); 11 C.F.R. § 104.3.

27. The FECA defines the term "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a). Expenditures include "any … payment … , deposit, or gift of money or anything of value, made by any person for the

purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111. In addition, the Supreme Court in *Buckley v. Valeo* carved out from this definition organizations that, while meeting one of the statutory thresholds, are (1) not under the control of a candidate and (2) do not have a "major purpose" of "nominat[ing] or elect[ing] ... candidate[s]." 424 U.S. at 79. A group that "extensive[ly]" spends on elections has a major purpose to influence elections and cannot be excused from reporting. *FEC v. Mass. Right to Life, Inc.*, 479 U.S. 238, 262 (1986). Neither the courts nor the FEC has defined the threshold of spending that qualifies as "extensive," but a group devoting half of its yearly expenses to electioneering is sufficient.

28. As a result of the major purpose test's focus on a group's proportional spending, a group and its donors could attempt to evade disclosure while still ensuring most of their funds are spent to influence an election. A donor could, for example, pass funds through one entity which would devote slightly less than half of its spending to reportable electioneering. The group could then pass the remaining funds to a second ostensibly non-political entity, permitting the first to claim that it lacked the requisite major purpose because most of its activities consisted of the transfer. That second entity could then spend slightly less than half of its receipt on electioneering and pass the remainder to a third. Accordingly, just as one might structure a set of transactions to evade money laundering laws by breaking one large transaction into a series of smaller ones, one might attempt to evade the FECA's reporting rules by breaking one or more transactions into smaller ones passed through one or more intermediary entities.

29. Nonetheless, where an entity meets the test for political committee status, it must file a statement of organization within ten days after becoming a political committee within the meaning of 52 U.S.C. § 30101(4). 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1.

30. A political committee's duty to file reports is continuous until the political committee terminates its status with the FEC. *See* Statement of Reasons of Chairman Allen Dickerson at 1, MUR 7920 (Oklahomans for T.R.U.M.P.) (June 29, 2022), *available at* https://perma.cc/6Q2C-PDY8 ("[T]he law does not require a committee to register as [a political committee] in order to be one."). Each failure to file a required report on the date it is due is a continuation of the unlawful behavior or, in the alternative, a new violation. A political committee may only terminate its status and end its reporting obligation when it ceases making any expenditure or accepting any contributions to influence federal elections. 52 U.S.C. § 30103(d). Moreover, political committees are under a continuous duty to supplement or correct any missing or erroneous reports. *Filing Amendments*, FEC, https://perma.cc/A9SC-3D8Y (last visited Aug. 13, 2024) ("The committee must file an amended report if it: [d]iscovers that an earlier report contained erroneous information [or] [d]oes not obtain all the required information concerning a particular transaction"); *see also* FEC Advisory Opinion 1999-33 (MediaOne PAC), 2000 WL 124401, at *2 (Jan. 28, 2000) (political committee "must amend" prior erroneous reports that omitted contributor information).

Preliminary Adjudication of Private Complaints Through the FEC

31. The FECA affords a private cause of action to those injured by violations of the FECA. To protect respondents against frivolous suits, before pursuing their claims in court, the complainants must first present their allegations to the Commission for preliminary adjudication and administrative exhaustion. *See* 52 U.S.C. § 30109(a)(1); *see also Stockman v. FEC*, 138 F.3d 144, 153 (5th Cir. 1998) (dismissing action brought without first presenting claim to FEC and exhausting administrative procedures). The FEC then acts as "first arbiter" over the complainant's claims, *CREW v. FEC*, 923 F.3d 1141, 1149 (D.C. Cir. 2019) (Pillard, J., dissenting), able to adjudicate the complaint's merit subject to judicial review, *see generally* 52

U.S.C. § 30109. The Commission may further authorize the agency to take up the allegations itself, to the exclusion of the private complainant. *See* 52 U.S.C. § 30107(e). If at the termination of the agency's proceedings the FEC has not itself pursued the allegations or lawfully adjudicated the allegations as lacking merit, the FECA provides the private plaintiffs with the right to seek their own relief in federal court.

32. Specifically, the process set out in the FECA provides that, once a complaint is filed, the FEC's OGC reviews that complaint and any responses it receives from the respondents and makes a recommendation to the Commission on whether the allegations raise a "reason to believe" a violation may have occurred. 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.7. A "reason to believe" exists where a complaint "credibly alleges" a violation of the FECA "may have occurred." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. 19729, 19730 (Mar. 20, 2024) (to be codified at 11 C.F.R. pt. 111).

33. The six-member Commission then considers the matter and the OGC's recommendation. If four commissioners find there is "reason to believe" a violation of the FECA may have occurred, the FEC "shall make an investigation of such alleged violation." 52 U.S.C. § 30109(a)(2). As a result of that investigation, the FEC may seek conciliation with the respondents or, failing that, pursue its own civil action in court. 52 U.S.C. § 30109(a)(4), (a)(6).

34. If, however, the Commission dismisses the matter, the complainant, as a "party aggrieved" by the dismissal, may seek judicial review in the United States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed "within 60 days after the date of the dismissal." 52 U.S.C. § 30109(a)(8)(B).

35. To permit judicial review, the administrative record must contain an explanation for the dismissal. Where the dismissal follows the recommendation of the FEC's OGC and the Commission does not otherwise adopt a justification, the OGC's analysis stands as the explanation for the dismissal. *See CREW v. FEC*, 971 F.3d 340, 346 (D.C. Cir. 2020). Where the Commission dismisses against the OGC's recommendation, the Commission must adopt its own analysis to enable judicial review. Where the dismissal is the result of the Commission's deadlock on the merits' thresholds for enforcement, the commissioners who deadlocked the Commission must draft and present to the Commission a justification for that dismissal "at the time when [the] deadlock vote results in … dismissal." *End Citizens United PAC v. FEC*, 69 F.4th 916, 920 (D.C. Cir. 2023) (first quoting *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988); and then citing *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987)).

36. If the district court reviewing the FEC's justification for dismissing the complaint determines that analysis rested on an "impermissible interpretation" of law or was otherwise "arbitrary or capricious, or an abuse of discretion," *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986), it may declare the FEC's actions "contrary to law" and order the FEC "to conform with such declaration within 30 days," 52 U.S.C. § 30109(a)(8)(C). If the FEC thereafter continues to prove itself incapable of pursuing a meritorious complaint, the complainant will then have established that it has exhausted administrative remedies and may then bring their own suit against the respondents "to remedy the violation involved in the original complaint." *Id.*

FACTUAL BACKGROUND

37. Plaintiffs filed an initial administrative complaint with the FEC on February 3, 2023, and amended it on November 14, 2023, alleging a scheme to launder approximately $5

million through various entities to influence the 2020 federal Senate elections in Georgia. Amended Complaint, MUR 8110 (Am. Coal. for Conservative Policies) (Nov. 14, 2023), *available at* https://www.fec.gov/files/legal/murs/8110/8110_31.pdf (attached as Ex. 1).

38. As alleged in the amended complaint, approximately $5 million was first transferred in 2020 to ACCP, an ostensible social welfare nonprofit, between March 23, 2020, and July 16, 2020, comprising the near entirety of funds ACCP received that year. In the days between July 14, 2020, and July 16, 2020, ACCP transferred $3.1 million of that initial $5 million to another ostensible social welfare nonprofit, PSAA, which was created only shortly before the transfer and within weeks of ACCP. The transfer from ACCP was PSAA's sole funding in 2020. That same year, ACCP transferred nearly all of the remaining funds, $1.8 million, to a third ostensible social welfare nonprofit, RightOn Issues.

39. Within days of receiving funds from ACCP, PSAA began to convert $1.475 million of those funds into contributions to a Super PAC, Georgia United Victory, which reported that the funds were intended to influence federal elections. The Super PAC then used those funds to pay for independent expenditures to oppose the candidacy of a U.S. Senate candidate.

40. PSAA took $1.5 million, most of the remaining funds it received from ACCP, and transferred them to the entity that also received funds from ACCP, RightOn Issues. By transferring slightly more funds to an ostensible social welfare nonprofit than it directly contributed to political committees, PSAA prevented its public reporting from immediately demonstrating that a majority of its activities consisted of contributions to political committees, which would have easily revealed its major purpose that qualified PSAA as a political committee.

41. RightOn Issues, however, itself spent heavily on electioneering in 2020. Specifically, RightOn Issues made three contributions totaling $1.32 million to Super PACs, including a $1 million contribution to the same Super PAC that already received $1.475 million from PSAA, Georgia United Victory. These contributions by RightOn Issues occurred over a 3-day period from September 21 to September 23, 2020, a period not long after PSAA made its last contribution to RightOn Issues on August 31, 2020, and totaled nearly the amount RightOn Issues received from PSAA. In addition to indirectly funding electioneering through the Super PACs, RightOn Issues also made significant direct expenditures to influence federal elections that year, together likely amounting to more than half of RightOn Issues 2020 spending. *See supra* ¶ 4 (visual chart laying out scheme). In total, RightOn Issues received $3.3 million from ACCP, both directly and indirectly through PSAA. Those funds made up a majority of RightOn Issue's receipts that year and nearly matched what RightOn Issues likely spent on electioneering in 2020.

42. The use of this layered scheme permitted the original $5 million in funds to eventually be deposited to three Super PACs (Georgia United Victory, Georgia Action Fund, and RightOn Time) and an ostensible social welfare nonprofit (RightOn Issues), each of which spent to influence the 2020 federal Senate elections in Georgia, all while keeping the true source of those funds secret. Had the unknown source or sources directly funded the Super PACs, their identity would have been disclosed. Had ACCP directly made the approximately $2.795 million in contributions to the three Super PACs, public reporting would have immediately revealed its major purpose and subjected it, and its funders, to disclosure. Had PSAA made the approximately $2.475 million in contributions to one Super PAC, public reporting would have immediately revealed its major purpose, which, in turn, would have revealed ACCP's major

purpose and subjected it, and its funders, to disclosure. By structuring the transaction and using RightOn Issues, an ostensible nonprofit that could have avoided—but ultimately failed to avoid—triggering its own political committee obligations, the funders could attempt to evade disclosure.

43. Based on these facts, Plaintiffs alleged alternative violations of the FECA: (1) that the original source or sources of the $5 million used one or more of the entities in an unlawful conduit contribution scheme while concealing their identities; (2) that ACCP used PSAA and RightOn Issues as conduits, rather than make contributions itself, to evade revealing its own qualification as a political committee obligated to report the source of its funds; (3) that PSAA used RightOn Issues as a conduit for a $1 million contribution to the same Super PAC that PSAA funded to evade revealing its own qualification as a political committee, which qualification would in turn serve to establish ACCP's qualification as a political committee obligating ACCP to reveal the sources of its funds; and (4) even if no transfer qualified as a conduit contribution, RightOn Issues's extensive spending to influence federal elections qualified it as a political committee, which in turn made ACCP's and PSAA's transfers to it into contributions that qualified PSAA and ACCP as political committees and obligated them to report the source of their funds.

44. The FEC's OGC reviewed the Plaintiffs' complaint and the responses it received and concluded that there was reason to believe a violation of the FECA may have occurred. In doing so, the OGC relied on case law and the Commission's majority opinions that recognized that while speculation is insufficient to satisfy the reason-to-believe threshold, the standard's evidentiary bar was nevertheless "low" and required only "credibl[e] alleg[ations]." *See* First General Counsel's Report at 19 & nn.80–82, MUR 8110 (Am. Coal. for Conservative Policies)

(May 3, 2024), *available at* https://www.fec.gov/files/legal/murs/8110/8110_56.pdf. Employing that appropriate standard and looking at analogous investigatory authorizations, the OGC found the allegations were easily sufficient and recommended the FEC take up the investigation of the conduit allegations while holding in abeyance an investigation into Plaintiffs' political committee claims. The OGC did so because it reasoned that the political committee allegations could fall away if the transfers were all conduit contributions because the funds would be attributed to the source rather than the intermediary entities. *See id.* at 37–38, 44–45 (reasoning a conduit contribution is not attributable to a conduit and thus not indicative of the conduit's "major purpose," but noting that "[i]f our proposed investigation reveals that either ACCP, PSAA, or RightOn Issues was the true source of the contributions at issue," the OGC would revise its recommendations). In other words, the OGC's recommendation to pause further proceedings on Plaintiffs' political committee allegations was contingent on the Commission approving an investigation into the Plaintiffs' conduit contributions.

45. Notwithstanding this recommendation, on June 25, 2024, the Commission divided three-to-three on the OGC's various recommendations. *See* Certification, MUR 8110 (Am. Coal. for Conservative Policies) (July 2, 2024), *available at* https://www.fec.gov/files/legal/murs/8110/8110_58.pdf. The Commission also divided three-to-three on a proposal to dismiss the complaint. *Id.* at 3. One week later, on July 3, 2024, the Commission voted unanimously to "[c]lose the file effective 30 days from the date of certification of this vote." Certification, MUR 8110 (Am. Coal. for Conservative Policies) (July 3, 2024), *available at* https://www.fec.gov/files/legal/murs/8110/8110_59.pdf.

46. About one month later, on July 29, 2024, the three commissioners who voted against the OGC's recommendation and judged the complaint to lack any merit, issued a

statement of reasons to explain the FEC's dismissal. The Controlling Statement accused the OGC of employing a "watered-down [reason-to-believe] standard" in its analysis, Controlling Statement 7, faulting the OGC for relying on case law interpreting that standard, *id.* at 2–3. Rather, the Controlling Statement imposed a higher standard based on a prior non-majority statement of commissioners that requires a complainant to disprove every potentially exonerating possibility in order to avoid what the Statement terms "RTB-of-the-gaps." *Id.* at 2 & n.9.

47. The Controlling Statement then examined one portion of the scheme—the transfers that passed through RightOn Issues—to conclude the allegations were insufficient because Plaintiffs did not allege the specific date on which the transfers were made. *Id.* at 6. According to the Controlling Statement, there was "no evidence in the complaint or publicly available government documents that tells us whether ACCP gave that money before or after RightOn Issues made its contributions to the three Super PACs" or that "PSAA gave $1,500,000 to RightOn Issues before RightOn Issues contributed to the Super PACs." *Id.* As the Controlling Statement recognized, the dates of those transactions are not subject to public reporting, and thus not available to Plaintiffs. The Controlling Statement omitted the fact that the respondents also did not supply this information, despite their ability to do so if it were exonerating. It also did not address the facts noted by the OGC that RightOn Issues was only founded on July 2, 2020—shortly before PSAA's political committee contributions—and made its contributions over a three-day period approximately two-and-a-half months later, only a few weeks after PSAA made its last contribution. It further ignores the fact that RightOn Issues's contributions occurred in mid-September and its tax year ran until December 31, meaning that it must have received funds from ACCP and PSAA within, at most, little more than three months of its contributions.

48. Although not a model of clarity, the Controlling Statement's weighting of this timing appears to rely, at least in part, on the its erroneous presumption that a conduit transfer must follow an immediate sequential process: that it exists only where "A gives a contribution to B with the intention that B immediately transfer those funds to C, but C, whether unknowingly or corruptly, reports the donation as coming from B, rather than A." Controlling Statement 4 n.20. Insofar as the Controlling Statement interprets the ban on conduit contributions to require "immedia[cy]," *id.*, or that the conduit receive funds prior to its own transfer, the Controlling Statement relies on an erroneous interpretation of law. *See O'Donnell*, 608 F.3d at 549 (conduit contributions include reimbursements). Further, insofar as the Controlling Statement requires a complainant to allege not only a conduit transfer, but to allege "evidence of control" of the source over the conduit, Controlling Statement 5; *see also id*. at 7 (arguing RightOn Issues could not be a conduit because it was an "independent entity" not controlled by source)—for which its sole authority is another non-majority statement of commissioners—it relies on an impermissible interpretation of law. *See, e.g.*, *United States v. Whittemore*, 776 F.3d 1074, 1079 (9th Cir. 2015) (source's "unconditional gift" made with "suggestion" to contribute was sufficient to support conduit charge).

49. Beyond this legal error, what is clear is that the Controlling Statement treated this singular possibility—that facts might exist that could tend to weigh against finding a particular transfer was a conduit—as sufficient reason not only to reject an investigation into that particular transaction but also to reject an investigation into any of the other transactions. The Controlling Statement, for example, never discusses the approximately $1.475 million PSAA provided to Georgia United Victory split between two transfers. Those transactions possess all of the attributes the Controlling Statement claimed were deficient for the transfers to RightOn Issues.

For example, it is known "ACCP gave that money [to PSAA] before … [PSAA] made its contributions to the [one] Super PAC[]," *cf.* Controlling Statement 6; in fact, ACCP gave the money no more than three days before PSAA began making contributions, facts which the Commission has previously found sufficient to warrant an investigation. *See, e.g.*, Factual and Legal Analysis at 11, MUR 7464 (Indep. and Freedom Network) (June 10, 2021), *available at* https://www.fec.gov/files/legal/murs/7464/7464_19.pdf ("temporal proximity" between receipt and distribution of two days supported reason to believe); *see also* First General Counsel's Report 21 & n.90. Further, PSAA received no other "unrelated contributions from third parties," and approximately 98% of ACCP's contributions were from a single source. *Cf.* Controlling Statement 6. In addition, the entities shared a treasurer, were created shortly before these transfers, and terminated shortly after. *Cf. id.* at 6-7 (focusing on RightOn Issues's supposed "independent entity" status); *see also* First General Counsel's Report 20–21 & nn.89, 91.

50. The Controlling Statement ignores these compelling facts that support the conclusion that ACCP's transfers through PSAA were conduits, and consequently ignores the inference that other transfers by the same entities at the same time were likely also unlawful conduits. That inference is more than reason to believe when viewed in concert with other evidence ignored by the Controlling Statement that indicated the transfers were conduits, such as temporal proximity of the transfers (at most slightly more than three months), the shared purpose to which the funds were put, the near parity between receipts and expenses, and the structuring of the transaction to evade public reporting that would reveal their major purpose. *See, e.g.*, First General Counsel's Report 22–35; Ex. 1 (Plaintiffs' Amended Complaint) ¶¶ 89–97, 104–05, 109–111, 136.

51. Finally, the Controlling Statement was also silent on Plaintiffs' remaining allegations over the entities' political committee status. By rejecting the OGC's suggested investigation into the conduit contributions, the Controlling Statement removed the only basis for holding in abeyance the investigation into the political committee claims. If, as the Controlling Statement concluded, these transfers were not in fact conduit contributions, then the transfers would be attributable to the conduit entities and qualify them as political committees. Yet the Controlling Statement neither mentions these allegations nor addresses why the entities did not qualify as political committees based on their uncontested activities.

PLAINTIFFS' FIRST CLAIM FOR RELIEF

The FEC's Untimely Explanation Renders the Dismissal of Plaintiffs' Complaint Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

52. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

53. This action is timely as it was filed within sixty days of the FEC's dismissal of MUR 8110. 52 U.S.C. § 30109(a)(8)(B).

54. The FEC's dismissal of CREW's complaint was arbitrary, capricious, an abuse of discretion, and contrary to law in violation of 52 U.S.C. § 30109(a)(8)(C).

55. The FEC dismissed Plaintiffs' complaint on July 3, 2024, when the Commission unanimously voted to close the file on the action. That vote constituted final agency action on Plaintiffs' complaint as there was no opportunity for the agency to reconsider the matter or revise its decision to close the file after the vote, and it is that vote that terminated the possibility of administrative relief and gave rise to the Plaintiffs' right to seek judicial review. Accordingly, the explanation for the act of dismissal must be "before the agency at the time the decision was made." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (quoting *Env't Def.*

Fund, Inc. v. Costle, 657 F.2d 275, 284 (D.C. Cir. 1981)). This is particularly important for the FEC where a non-majority subset of commissioners will often be charged, as they were here, with explaining the actions of the majority of Commissioners. Accordingly, the majority must have before them the non-majority's explanation for the impending dismissal so that the majority has an "opportunity for self-correction" to ensure the explanation accurately reflects the basis for the vote to close. *End Citizens United PAC v. FEC*, 69 F.4th at 920 (quoting *Common Cause*, 842 F.2d at 449).

56. Nevertheless, as indicated by the public record, and as will likely be established by the certified record once produced, the vote to close occurred without any in-record justification or explanation. Rather, the only explanation for the dismissal was drafted nearly one month after that vote to close, which renders it a "post hoc rationalization" incapable of justifying the dismissal. *End Citizens United PAC*, 69 F.4th at 921–22; *see also* Sidney Shapiro and Kimberly Wehle, *The FEC's Reluctance to Abide by Overton Park*, YALE J. ON REG.: NOTICE & COMMENT (Aug. 21, 2024), https://www.yalejreg.com/nc/the-fecs-reluctance-to-abide-by-overton-park-by-sidney-shapiro-kimberly-wehle/ (stating Commission's practice of creating post-hoc explanations "falls so far short of basic administrative law principle and directly applicable Supreme Court precedent").

57. As the Controlling Statement is not cognizable on review, the dismissal occurred without any cognizable justification. Because the dismissal occurred when it was not "reasonably explained," it is arbitrary and capricious. *Ohio v. Env't Prot. Agency*, 144 S. Ct. 2040, 2053 (2024); *accord Tourus Recs., Inc. v. Drug Enf't Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001) ("[A]n agency's failure to [set forth its reasons for its decisions] constitutes arbitrary and

capricious agency action."). A dismissal that is arbitrary and capricious is "contrary to law." *Orloski*, 795 F.2d at 161.

PLAINTIFFS' SECOND CLAIM FOR RELIEF

The Commission's Reliance on an Impermissible Interpretation of the Reason-to-Believe Threshold Renders the Dismissal of Plaintiffs' Complaint Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

58. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

59. Putting aside its untimeliness, the Controlling Statement interpreted the FECA's reason-to-believe standard to impose a heightened evidentiary bar that conflicts with controlling precedent. *See* Controlling Statement 2 (asserting reason to believe imposed more than a "low evidentiary bar" and barred "RTB-of-the-gaps" requiring complainants to disprove all speculative potential defenses).

60. The Controlling Statement did so by rejecting relevant judicial precedent and relying instead on a prior non-majority statement of commissioners. It interpreted the standard to reject any complaint where evidence might exist that could weigh against the allegations in the complaint, even if it were not available to the complainant and not supplied by a respondent with access to it and the ability to furnish it.

61. The Controlling Statement's interpretation is inconsistent with controlling precedent, however, which recognizes a reason to believe is absent only when there is "no grounds for investigation." *Campaign Legal Ctr. v. FEC*, 106 F.4th 1175, 1194 (D.C. Cir. 2024); *see also Campaign Legal Ctr. v. FEC*, 646 F. Supp. 3d 57, 67 (D.D.C. 2022) (reason to believe is a "very low evidentiary bar"); *Common Cause Ga. v. FEC*, No. 22-cv-3067-DLF, 2023 WL 6388883, at *6 n.8 (D.D.C. Sept. 29, 2023) (viewing probable cause as "not a high bar" and "reason to believe" as "less than the standard for finding probable cause"); *see also* Statement of

Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 89 Fed. Reg. at 19730 (reason to believe satisfied by "credib[le] alleg[ations]").

62. Because the dismissal, as justified by the Controlling Statement, rests on an "impermissible interpretation of [law]," the dismissal was contrary to law. *Orloski*, 795 F.2d at 161.

<u>PLAINTIFFS' THIRD CLAIM FOR RELIEF</u>

The Commission's Reliance on an Impermissible Interpretation of the Bar on Conduit Contributions Renders the Dismissal of Plaintiffs' Complaint Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

63. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

64. The Controlling Statement also appears to have relied on an impermissible interpretation of the FECA's ban on conduit contributions, namely, one that requires the source's transfer to the conduit to predate the conduit's transfer to the recipient, requires the transfer to occur "immediately," and requires a source to control the conduit. *See* Controlling Statement 4 & n.20.

65. Binding precedent establishes, however, that a conduit transfer may involve a reimbursement, and although temporal proximity is indicative of a conduit, there is no requirement that the transfers occur immediately. *See, e.g., O'Donnell*, 608 F.3d at 549; Factual and Legal Analysis at 4-5, MURs 7005 & 7056 (Adam H. Victor, et al.) (Nov. 14, 2016), *available at* https://www.fec.gov/files/legal/murs/7005/17044424111.pdf (authorizing investigation of conduit contribution violation where there was two months between conduit transfers). The source, moreover, need not exercise control, but it is sufficient that it "earmark[] or otherwise direct[]" through "designation, instruction, or encumbrance." 11 C.F.R. § 110.6(a),

(b)(1) (incorporated by reference in 11 C.F.R § 110.4(b)(2)(i)); *see also Whittemore*, 776 F.3d at 1079. The Controlling Statement makes no effort to address or distinguish this authority.

66. Because the dismissal, as justified by the Controlling Statement, rests on an "impermissible interpretation of [law]," the dismissal was contrary to law. *Orloski*, 795 F.2d at 161.

PLAINTIFFS' FOURTH CLAIM FOR RELIEF

The Commission's Analysis Ignored Important Evidence and Failed to Articulate a Satisfactory Explanation, Rendering the Dismissal of Plaintiffs' Complaint Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

67. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

68. Even under the correct legal standards, the Controlling Statement nevertheless failed to "offer[] 'a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made'" and ignored "an important aspect of the problem." *Ohio*, 144 S. Ct. at 2053 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

69. Specifically, the Controlling Statement "dismissed [Plaintiffs'] evidence wholesale," *Campaign Legal Ctr.*, 106 F.4th at 1193, largely because Plaintiffs could not allege the specific date or dates on which ACCP and PSAA transferred funds to RightOn Issues, notwithstanding their having no access to that information and the fact that the respondents, who had access, did not provide it to the Commission. The possible existence of potentially exculpatory facts not furnished by the respondents does not render a complaint without merit, however. It cannot justify the Commission's choice to terminate its own investigation that might reveal or disprove the existence of such facts, never mind justify the Commission's choice to prevent the Plaintiffs from pursuing their own civil suit that might reveal such facts. Nor, for that

matter, would RightOn Issues's status as an "independent entity" disprove its possible involvement in the scheme or give cause for the Commission to reject the evidence presented wholesale. *See* First General Counsel's Report 27–30 (discussing evidence of RightOn Issues's involvement). Accordingly, the Controlling Statement fails to offer a rational connection between the fact of their possible existence with the Commission's choice and renders the dismissal contrary to law. *Orloski*, 795 F.2d at 161.

70. The Controlling Statement further "ignore[s] … important aspect[s] of the problem." *Ohio*, 144 S. Ct. at 2053. The Controlling Statement focuses solely on the transfers from ACCP and PSAA to RightOn Issues and whether sufficient factual allegations supported a claim that those transfers constituted conduit contributions. The Controlling Statement ignores entirely, however, the transfers of approximately $1.475 million from the unknown source or sources through ACCP and PSAA to a federal Super PAC, which funds did not pass through RightOn Issues and which ACCP passed on to PSAA within a short period of receiving them and PSAA began to convert into federal Super PAC contributions within days. *See* First General Counsel's Report 22–27, 30–34.

71. Moreover, the Controlling Statement entirely ignores Plaintiffs' political committee allegations, which the OGC only recommended holding in abeyance pending the conduit investigation on the premise that their status as conduit contributions would preclude their use to qualify the intermediaries as political committees. By blocking an investigation into the conduit contributions, the commissioners removed the only justification in the record for delaying the investigation of the political committee claims. In the absence of any remaining basis to not pursue those claims, the Controlling Statement failed to "reasonably explain[]" their dismissal. *Ohio*, 144 S. Ct. at 2053 (quoting *Fed. Commc'ns Comm'n v. Prometheus Radio*

Project, 592 U.S. 414, 423 (2021)).

72. Because the Controlling Statement "ignor[ed] … important aspect[s]" of the claims before the Commission, *Ohio*, 144 S. Ct. at 2053, "dismissed … evidence wholesale," *Campaign Legal Ctr.*, 106 F.4th at 1193, and generally failed to offer a "satisfactory explanation," *Ohio*, 144 S. Ct. at 2053, the dismissal was arbitrary and capricious and therefore contrary to law, *Orloski*, 795 F.2d at 161.

REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that the FEC's dismissal of Plaintiffs' amended complaint in MUR 8110 was arbitrary, capricious, an abuse of discretion, and contrary to law;

2. Order the FEC to conform to such declaration within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C);

3. Award Plaintiffs their costs, expenses, and reasonable attorneys' fees in this action; and

4. Grant such other and further relief as the Court may deem proper and just.

Respectfully submitted,

/s/ Stuart McPhail
Stuart C. McPhail (D.C. Bar No. 1032529)
smcphail@citizensforethics.org
Kayvan Farchadi (D.C. Bar No. 1672753)
kfarchadi@citizensforethics.org
Citizens for Responsibility and Ethics
in Washington
1331 F Street, N.W., Suite 900
Washington, D.C. 20004
Phone: (202) 408-5565
Facsimile: (202) 588-5020