ORAL ARGUMENT NOT YET SCHEDULED

**No. 18-5239**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**CAMPAIGN LEGAL CENTER & DEMOCRACY 21**,
*Plaintiffs-Appellants*,

*v.*

**FEDERAL ELECTION COMMISSION**,
*Defendant-Appellee.*

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**F8, ELI PUBLISHING, AND STEVEN J. LUND**,
*Intervenors-Appellees*.

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On Appeal from the United States District Court
for the District of Columbia, No. 1:16-cv-00752-TNM
Before the Honorable Trevor McFadden

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# OPENING BRIEF OF PLAINTIFFS-APPELLANTS CAMPAIGN LEGAL CENTER AND DEMOCRACY 21

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), plaintiffs-appellants Campaign Legal Center ("CLC") and Democracy 21 hereby certify as follows:

**(a) Parties and *Amici*.** CLC and Democracy 21 are plaintiffs in the district court and appellants in this Court.

Pursuant to Circuit Rule 26.1, CLC certifies that it is a nonpartisan, nonprofit corporation that has no parent companies, does not issue stock, and in which no publicly held corporation has any form of ownership interest. CLC works to protect and strengthen the U.S. democratic process across all levels of government, including by supporting campaign finance reform through litigation, policy analysis, and public education.

Pursuant to Circuit Rule 26.1, Democracy 21 likewise certifies that it has no parent companies, does not issue stock, and no publicly owned company has any ownership interest in it. Democracy 21 is a nonprofit, nonpartisan organization dedicated to making democracy work for all Americans through support of campaign finance and other political reforms.

The Federal Election Commission ("FEC" or "Commission") is the defendant in the district court and appellee in this Court. F8 LLC, Eli Publishing L.C., and Steven J. Lund are intervenor-defendants in the district court and intervenor-appellees in this Court.

No *amici* appeared in the district court and no *amici* have yet appeared in this Court. Appellants understand that one or more parties may appear as an *amicus curiae* in this appeal.

**(b) Rulings Under Review.** Plaintiffs-appellants appeal the June 7, 2018 final order and judgment of the U.S. District Court for the District of Columbia (McFadden, J.), which denied plaintiffs' motion for summary judgment and granted the FEC's and intervenor-defendants' motions for summary judgment. The memorandum opinion is reported at *Campaign Legal Center v. FEC*, 312 F. Supp. 3d 153 (D.D.C. 2018).

**(c) Related Cases.** The ruling under review has not previously been before this Court or any other court. There are no related cases pending in this Court or any other court of which counsel are aware.

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## GLOSSARY OF ABBREVIATIONS

| | |
|---|---|
| **CLC** | Campaign Legal Center |
| **CREW** | Citizens for Responsibility & Ethics in Washington |
| **FEC** | Federal Election Commission |
| **FECA** | Federal Election Campaign Act |
| **LLC** | Limited Liability Company |
| **MUR** | Matter Under Review |
| **PAC** | Political Action Committee |
| **OGC** | FEC Office of General Counsel |

## INTRODUCTION

This case challenges the dismissals of three FEC complaints alleging schemes to conceal the true sources of millions of dollars in campaign contributions laundered through LLCs and other corporate entities, in violation of the Federal Election Campaign Act ("FECA")—specifically, FECA's "straw donor" prohibition, 52 U.S.C. § 30122, and its "political committee" disclosure provisions, 52 U.S.C. §§ 30102, 30103, and 30104. All three complaints, along with two others that are no longer at issue, were dismissed in 2016 after the Commission deadlocked, 3-3, in each matter.

The three "controlling Commissioners" who voted not to proceed found that there was no "reason to believe" the respondents violated FECA. They characterized their decision—and the Commission has defended it—as an exercise of prosecutorial discretion, and as such, completely beyond judicial review following *Citizens for Responsibility & Ethics in Washington v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CREW*"). But their votes against proceeding, by their own admission, were based solely on their conclusions of law, drawn from judicial precedent and "principles of due process, fair notice, and First Amendment clarity." JA 148. *CREW* does not shield their legal errors from judicial scrutiny. The dismissals were contrary to law, at odds with FECA's text and purpose, and unsustainable under any standard of reasoned decisionmaking.

## JURISDICTIONAL STATEMENT

This Court has jurisdiction over this timely appeal from a final judgment in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1291 and 52 U.S.C. § 30109(a)(9). The district court exercised jurisdiction of the case under 28 U.S.C. § 1331 and 52 U.S.C. § 30109(a)(8)(A). Appeal was timely taken on August 2, 2018, within sixty days of the district court's June 7, 2018 decision under review. Appellants Campaign Legal Center and Democracy 21 have informational standing as to the three administrative complaints that remain at issue, for the reasons stated by the district court (Bates, J.) in its March 29, 2017 memorandum opinion. *See Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 129 (D.D.C. 2017) (granting in part and denying in part FEC motion to dismiss); *see also* JA 32-45 (opinion); JA 31 (order).

## ISSUES PRESENTED

1. Whether the district court erred in ruling that it was not contrary to law for the controlling Commissioners to find no "reason to believe" a violation of FECA had occurred.

2. Whether the controlling Commissioners' purported exercise of prosecutorial discretion renders the dismissals unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985), and *CREW*, 892 F.3d 434 (D.C. Cir. 2018), even

though the dismissals in this case were premised on erroneous interpretations of statutory provisions, judicial precedent, and the Constitution.

3. Whether the district court erred in finding that the new "intent-based" interpretation of 52 U.S.C. § 30122 embedded in the controlling Commissioners' rationale for dismissal was unreviewable on ripeness grounds.

## STATUTES AND REGULATIONS

All applicable statutory provisions are reproduced in the Addendum to this brief.

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Framework

#### 1. FECA's Disclosure Provisions

A core purpose of federal campaign finance law is to serve the electorate's interest in knowing "where political campaign money comes from." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam). Toward that end, FECA contains numerous provisions designed to ensure accurate reporting from those who give and spend money to influence elections. One such provision is FECA's "straw donor" prohibition, which 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 person." 52 U.S.C. § 30122. "Person" is defined to

include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." *Id.* § 30101(11).

FECA also provides a comprehensive registration and reporting system for "political committees." *Id.* § 30101(4). The FEC employs a two-pronged test for determining political committee status under FECA, asking: (1) whether an entity or other group of persons has made more than $1,000 in "expenditures" or received more than $1,000 in "contributions" during a calendar year, *id.* § 30101(4)(A); and (2) whether the organization has as its "major purpose the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. Any entity that meets this test must file a "statement of organization," 52 U.S.C. § 30103, comply with organizational and recordkeeping requirements, *id.* § 30102, and file periodic reports disclosing its receipts and disbursements, *id.* § 30104.

### 2. The Commission's Administrative Complaint and Enforcement Process

Any person may file a complaint alleging a violation of FECA. *Id.* § 30109(a)(1). The Commission, after reviewing the complaint and any responses, then votes on whether there is "reason to believe" a violation has occurred, in which case it "shall" investigate. *Id.* § 30109(a)(2). FECA requires an affirmative vote of four Commissioners to undertake most agency actions, *id.* § 30106(c), including a reason-to-believe finding necessary to initiate an investigation, *id.* § 30109(a)(2), or a vote to dismiss on discretionary grounds, FEC, *Guidebook for Complainants and*

*Respondents on the FEC Enforcement Process* 12 (May 2012), https://transition.fec.gov/em/respondent_guide.pdf.

After the investigation, the Commission votes on whether there is "probable cause" to believe FECA was violated. 52 U.S.C. § 30109(a)(3). If it determines, by an affirmative vote of at least four Commissioners, that there is probable cause, it "shall" attempt to "correct or prevent such violation" by conciliating with the respondent. *Id.* § 30109(a)(4)(A), (a)(5). If the Commission is unable to correct the violation and enter a conciliation agreement, it "may," by the affirmative vote of at least four Commissioners, institute a civil action against the respondent in federal district court. *Id*. § 30109(a)(6)(A).

If, at any of these decisionmaking junctures, fewer than four Commissioners vote to proceed, the Commission may vote to dismiss the complaint and the "controlling group" of Commissioners who voted not to proceed must issue a "statement of reasons" that will serve as the basis for any subsequent judicial review. *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 & n.5 (D.C. Cir. 1987) ("*DCCC*").

FECA provides that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition" in district court seeking review of the Commission's action. 52 U.S.C. § 30109(a)(8)(A). If the court finds the dismissal "contrary to law," it may order the Commission to conform with

such declaration within 30 days, *id.* § 30109(a)(8)(C), failing which the complainant may bring a civil action directly against the respondent to remedy the violation. *Id.*

### B. Procedural Background

#### 1. Appellants' "Straw Donor" Complaints

In 2011, the media began reporting on a rash of donors who were trying to evade federal disclosure laws by using LLCs and similar corporate entities as conduits, or "straw donors," to obscure that they were the true contributors to certain political committees. Following *Citizens United v. FEC*, 558 U.S. 310 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), the FEC had authorized corporations to make both independent expenditures and unlimited contributions to "independent expenditure-only groups," or "super PACs," but FECA's existing disclosure requirements remained intact.

Appellants filed five administrative complaints between August 2011 and April 2015, JA 9-10, alleging that suspect contributions from LLCs to super PACs—ranging from $875,000 to over $12 million—violated section 30122 by concealing the identities of the true donors. The complaints were filed separately over a four-year period, but the Commission evaluated them jointly, JA 148-49, 169-70. On February 23, 2016, the three controlling Commissioners voted against a reason-to-believe finding in all five matters, issuing a single Statement of Reasons in April 2016 to explain their votes. Three of the five dismissals are at issue here: Matter

Under Review ("MUR") 6487 (F8 LLC), MUR 6488 (Eli Publishing), and MUR 6711 (Specialty Group).

The F8 and Eli Publishing complaints, filed in August 2011, alleged that two LLCs were used as illegal straw donors to conceal the true sources of two $1 million contributions to Restore Our Future, a super PAC supporting Mitt Romney's 2012 presidential run. According to media reports, the two entities shared an address in Provo, Utah but "[didn't] seem to do any substantial business." JA 179. Steven J. Lund, the registered agent of Eli Publishing, was reported as a possible source of the two $1 million contributions, JA 179-80, and he later admitted that he used the two LLCs to contribute to the super PAC because "he did not want '*to be real public* about being a part of the campaign.'" JA 112.

Appellants asked the FEC to find reason to believe a violation had occurred and to authorize an investigation into whether Eli Publishing, F8, Lund, and other respondents had violated 52 U.S.C. § 30122. Appellants also argued that there was reason to believe F8 and Eli Publishing had violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and file reports as political committees, since both organizations made contributions in excess of $1,000 and appeared to have campaign activity as their "major purpose" in the relevant time frame.

On June 6, 2012, the FEC's Office of General Counsel ("OGC") recommended the Commission find reason to believe that F8, Eli Publishing, and

Lund violated 52 U.S.C. § 30122, but take "no action at th[at] time," JA 122, with respect to the alleged violations of 52 U.S.C. §§ 30102, 30103, and 30104, "[b]ecause the resolution of this [political committee] allegation may depend on the disposition of the section [30122] allegation." JA 252, 336.

The third complaint—filed December 20, 2012, more than a year after the first two—alleged that Specialty Investment Group Inc. ("Specialty Group") and its subsidiary, Kingston Pike Development LLC ("Kingston"), were used as conduits to hide the true source of almost $12 million contributed to another super PAC, FreedomWorks for America ("FreedomWorks"). JA 193-204. Media reports noted that "Specialty Group filed its incorporation papers on Sept. 26, less than a week before it gave several contributions to [FreedomWorks] worth between $125,000 and $1.5 million apiece." JA 196.

Appellants alleged that Specialty Group, Kingston, and any other persons who made contributions in their names had violated 52 U.S.C. § 30122, and that Specialty Group and Kingston violated FECA by failing to register as political committees. Appellants amended their complaint in April 2013 to take into account news reports that FreedomWorks and its leadership may have facilitated the potential straw donor contributions, and accordingly, may have also violated section 30122. JA 225-27.

On June 6, 2014, OGC recommended the Commission find reason to believe that the undisclosed individuals who contributed over $12 million to FreedomWorks

in the names of Specialty Group and Kingston had violated section 30122. JA 268. It again recommended deferring action on the political committee allegations until the section 30122 allegations were resolved. JA 252, 267.

Appellants filed two other administrative complaints that are no longer at issue. Because the Commission disposed of all five complaints together, all of these matters "informed the Commission's decision," as the district court recognized, JA 410.

The first of these other complaints, MUR 6485 (W Spann LLC), involved an LLC that was created in March 2011, made a $1 million contribution in April 2011 to Restore Our Future, and then, three months later, dissolved. Only after this contribution attracted public attention and prompted the FEC complaint did Edward Conard, Romney's former business partner, acknowledge that he was the true source of the W Spann contribution, and had contributed through an LLC to conceal his involvement. JA 17-19. The W Spann contribution "set off a furor over secrecy in politics," prompting Romney to assure the public that there was "no controversy because [Conard] said, 'Hey, it's me, and I've given to Mitt many times before.'" Alexander Burns, *Romney: Pay no attention to the man behind W Spann LLC*, Politico (Aug. 8, 2011), http://www.politico.com/story/2011/08/romney-pay-no-attention-to-the-man-behind-w-spann-llc-060895.

The other complaint, filed in April 2015, MUR 6930 (Michel), alleged that there was reason to believe that Prakazrel "Pras" Michel violated section 30122 by routing $875,000 through SPM Holdings LLC to the super PAC Black Men Vote. JA 22-23. While the original theory was that Michel likely funded the contribution himself, this straw donor contribution was later revealed to be part of a much larger alleged conspiracy: Michel was recently indicted for laundering millions of dollars in illegal foreign contributions through Black Men Vote into President Obama's 2012 campaign.[1]

OGC recommended the Commission find reason to believe that Conard and W Spann violated section 30122, but find no reason to believe in the Michel matter. JA 152.

**2. The Controlling Commissioners' Statement of Reasons**

Although OGC recommended investigation in each of the three complaints at issue here, the Commission deadlocked in each, by a vote of 3-3, on whether there was reason to believe a FECA violation had occurred. Unable to proceed because of

[1] This revelation came courtesy of the "1MDB" global corruption probe involving Malaysia's sovereign investment fund. *See* Press Release, U.S. Dep't of Justice, Entertainer/Businessman and Malaysian Financier Indicted for Conspiring to Make and Conceal Foreign and Conduit Contributions During 2012 U.S. Presidential Election (May 10, 2019), https://www.justice.gov/opa/pr/entertainerbusinessman-and-malaysian-financier-indicted-conspiring-make-and-conceal-foreign.

the deadlocks, the Commission voted 6-0 to dismiss the complaints, JA 138-39, 399-400, as it customarily does in cases of deadlock.

The three controlling Commissioners issued a single Statement of Reasons setting forth their legal analysis of all five complaints. JA 147-61. The three "dissenting" Commissioners who voted to proceed also issued a Statement of Reasons addressing all five MURs, JA 163-67, prompting a supplemental statement by the controlling Commissioners in response. JA 173-76.

In explaining their decision, the controlling Commissioners relied upon their interpretations of FECA and prior Commission guidance, as well as their understanding of judicial precedent and "First Amendment clarity." JA 148. They acknowledged that "section 30122 applies to closely held corporations and corporate LLCs." JA 158. Nevertheless, invoking prosecutorial discretion, they voted against finding reason to believe, concluding that it would be "unfair" to apply the law to corporate respondents who, they believed, lacked sufficient notice that section 30122 applied to their activity. JA 154.

That "inadequate notice" theory rested on these Commissioners' interpretations of judicial precedent and constitutional rights, which they understood to require creating a new "intent-based standard" for section 30122 before it could be enforced against corporations. Their new standard was devised in opposition to the dissenting Commissioners' alternative "functional" standard, which the

controlling Commissioners decided would render "hollow" the corporate "speech rights recognized in *Citizens United*." JA 148.

The controlling group did not consider appellants' claim that respondent corporations, if not straw donors, would qualify as "political committees," and thus had violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and report as committees.

### 3. The District Court Proceedings

Appellants filed this action on April 22, 2016 in the U.S. District Court for the District of Columbia seeking review of all five dismissals under 52 U.S.C. § 30109(a)(8)(A).

The Commission moved to dismiss the complaint for want of standing. JA 32. On March 29, 2017, the district court denied the motion in part, finding that appellants had standing to challenge the dismissals of MURs 6487 (F8 LLC), 6488 (Eli Publishing), and 6711 (Specialty Investment). JA 31, 38-40, 45.

The parties filed cross-motions for summary judgment. On June 7, 2018, the district court granted summary judgment for the Commission, holding that the dismissals were (1) premised on prosecutorial discretion and thus subject only to review for "abuse of discretion," and (2) not an abuse of discretion because the controlling Commissioners had provided a rational basis for their decision. JA 417-18 (finding invocation of "intertwined concerns of fair notice and due process in a

post-*Citizens United* context, confusing Commission precedent, and the obligation to protect First Amendment speech" "supplied a rational basis" for dismissal).

## SUMMARY OF ARGUMENT

Appellants' administrative complaints asked the Commission to apply a clear statutory prohibition to clear violations by persons that the statute clearly covers. The controlling Commissioners did not dispute the applicability of section 30122, nor the sufficiency or gravity of the allegations in the complaints. Instead, they refused to proceed because they concluded that the respondents lacked adequate "notice" of a law that is unambiguous on its face—and on that basis, invoked their "prosecutorial discretion" not to investigate "some of the most crystal-clear violations this Commission had seen in recent memory." JA 169.

This was not the reasoned analysis the Commission was bound to provide, and the district court was wrong to find that it was not contrary to law.

Rather than defend the dismissals on the merits, however, the Commission has primarily focused on shielding them from any judicial review. In fact, since the *CREW* decision—which postdated the district court decision here—the Commission has treated the mere invocation of prosecutorial discretion as a bar to judicial review that is automatic, absolute, and unbounded.

But withholding review in this case would stretch *CREW* beyond its breaking point. The *CREW* majority specifically noted that it was *not* constraining judicial

review under 52 U.S.C. § 30109(a)(8) for FEC dismissals based on interpretations of law. And here, the controlling Commissioners' rationale rested entirely on a series of erroneous propositions of law, including their interpretations of judicial precedent and "due process, fair notice, and First Amendment clarity." JA 148. These are legal arguments well within the capacity of a court to judge.

*CREW* is also distinguishable on its facts. The dismissal there was based on concerns about scarce agency resources and the time already spent on a costly and increasingly futile investigation pursuing a defunct organization. No such discretionary considerations prompted the dismissals here.

Because *CREW* differs so significantly from this case, there is no need to explore all of its potential implications for judicial review of FEC non-enforcement decisions. But clearly, *CREW* cannot be read to preclude judicial review of the legal justifications underpinning the dismissal of a complaint following a deadlocked reason-to-believe vote simply because the controlling Commissioners invoke the words "prosecutorial discretion" or mention agency resources. To hold otherwise would contradict prior precedents of the Supreme Court and this Circuit.

Moreover, *CREW* has no relevance to determinations that were not even nominally justified on discretionary grounds, like the controlling Commissioners' cursory rejection of the allegations that FECA's political committee disclosure provisions were violated. And the announcement of a new "legal interpretation" of

section 30122 is indisputably not something "committed to the agency's unreviewable discretion," nor is it unripe for review, given that it was part and parcel of their rationale for dismissal.

On the merits, it is clear that the Commission's explanation for the dismissals does not meet even the bare test of credibility, much less the standards of reasoned decisionmaking required by *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

Resting their decision on a theory of inadequate notice required the controlling Commissioners to manufacture ambiguity in a legal and factual setting where none was present. No respondent claimed any confusion about the applicability of section 30122 to corporate straw donors. None contested the law's clarity. Even a perfunctory review of the record makes clear that the Commissioners' "unfair notice" rationale lacked any basis in the facts of these proceedings.

It is also impossible to sustain as a legal theory. The controlling Commissioners made much of *Citizens United* and *SpeechNow*, but the simple fact that corporations were newly able to make contributions does not mean that section 30122 did not clearly prohibit corporations from acting as straw donors. Likewise unavailing are the controlling Commissioners' citations to "confusing" FEC guidance on the attribution of corporate contributions, because none of the precedents concern section 30122 or address how to determine the true sources of contributions in potential straw donor situations. JA 148, 418.

For these reasons, this Court should reject the Commission's attempt to inoculate its interpretations of law from judicial review, reverse the judgment of the district court, and remand these proceedings with a direction to grant appellants' motion for summary judgment.

## STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005).

Under FECA, the Commission's decision to dismiss an administrative complaint will be set aside if it is "contrary to law," 52 U.S.C. § 30109(a)(8)(C), meaning the dismissal (1) rests on an impermissible interpretation of law, or (2) is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 156, 161. FEC dismissals are subject to judicial review under the contrary-to-law standard regardless of whether they spring from a majority vote or a deadlock. When the Commission fails to muster four votes to proceed in any enforcement matter, to enable and "make meaningful" the review that FECA provides, the Commissioners voting against proceeding must "issue a statement explaining their votes," *CREW*, 892 F.3d at 437-38, which the court treats as dispositive because "their rationale necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

The test for whether the FEC's dismissal of a complaint was arbitrary, capricious, or an abuse of discretion under *Orloski* is analytically similar to the "arbitrary [or] capricious" standard applied under the APA. *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 550-51 & n.6 (D.C. Cir. 1980). A court must set aside agency action "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Dismissals grounded on the Commission's interpretation of judicial precedent or constitutional issues, however, are reviewed *de novo*. *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009). That is especially so where, as here, the decision "is based on constitutional concerns, an area of presumed judicial, rather than administrative, competence." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

## ARGUMENT

### I. THE DISMISSALS ARE REVIEWABLE.

#### A. *CREW* Does Not Bar Review of Dismissals Premised on Legal Error.

There is a "'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted). That imperative applies with even more force in statutory settings, such as this one, where Congress has expressed its "clear intent" to make judicial review available. *CREW*, 923 F.3d 1141, 1142 (D.C. Cir. 2019) (Griffith, J., concurring in denial of rehr'g en banc).

Therefore, "[a]lthough *Heckler* does stand for the proposition that there is a presumption that agency decisions not to enforce are unreviewable," FECA "rebuts that presumption." *Lieu v. FEC*, 370 F. Supp. 3d 175, 183 (D.D.C. 2019) (finding *Heckler* "inapposite" in light of "FECA's express provision for the judicial review of FEC dismissal decisions") (citing *FEC v. Akins*, 524 U.S. 11, 26 (1998)). Applying *CREW* to foreclose review here would effectively render *any* Commission decision that refers to "prosecutorial discretion"—however insubstantial the reference—entirely unreviewable. The *CREW* majority did not purport to do that, and neither should this Court.

Importantly, it is not necessary to delineate the outer bounds of unreviewability under *CREW* in order to decide this case. Unlike the Commission

decision at issue in *CREW*, the dismissals here were not based on a "complicated balancing of factors which are appropriately within [the FEC's] expertise," *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014), but on conclusions of law falling squarely within *the Court's* expertise: interpreting statutes, judicial decisions, and constitutional rights.

**1. The dismissals in this case were based entirely on the Commission's erroneous interpretations of law.**

As *CREW* acknowledged, a decision to dismiss an administrative complaint based entirely on an interpretation of law remains subject to review. 892 F.3d at 441 n.11. And, of course, this Court is "not obliged to defer" *at all* to "an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle," *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. at 29—much less treat dismissals based on an agency's interpretation of judicial precedent as unreviewable.

The dismissals here rested entirely on a series of erroneous propositions of law. The controlling Commissioners did not dispute that the straw donor prohibition in section 30122 clearly covered the corporate respondents. Instead, they concluded that judicial decisions concerning unrelated FECA provisions—including *Citizens United*, 558 U.S. at 366 (invalidating a ban on corporate independent expenditures), and *SpeechNow*, 599 F.3d at 696 (allowing unlimited contributions to independent expenditure-only committees)—rendered section 30122 and existing regulatory

guidance "unclear" with respect to how contributions from LLCs should be attributed. They ultimately determined that even though section 30122, by its express terms, "applies to closely held corporations and corporate LLCs," JA 158, it would be "manifestly unfair"—and would raise "numerous legal and constitutional concerns"—to enforce the prohibition here. JA 154, 159.

In reaching this determination, the controlling Commissioners relied upon other faulty propositions of law, including:

- FECA had not been applied to corporate straw donors in the past, and the allegations here "differ[ed] substantially" from prior matters applying section 30122 to analogous recipient entities, such as political committees. JA 155.

- Congress had not "contemplate[d] that corporations could violate the prohibition against giving in the name of another," *id.*, despite having enacted a statutory prohibition that unambiguously and on its face applies to corporations.

- The Commission's default attribution rules—which, *by definition*, do not apply in straw donor situations, *see infra* Part II.B.3—made it unclear whether a contribution by a closely held corporation or LLC to a super PAC was attributable to the entity's owner or to the entity itself. JA 155-58.

- The First Amendment rights recognized in *Citizens United* would be rendered "hollow" without the addition of an "intent" standard to section 30122. JA 148.

In short, the dispositive statement in this case relied entirely on a legal analysis of statute and precedent. This is plain from the document's subheadings alone. *See* JA 149-52 ("Factual Background"), JA 152-60 ("*Legal Analysis*") (emphasis added), JA 160 ("Conclusion"). There was no discussion of any discretionary factors "peculiarly within the agency's expertise." *Heckler*, 470 U.S. at 831-32. Given the controlling Commissioners' exclusive focus on considerations of law, their mere invocation of the words "prosecutorial discretion" cannot insulate their conclusions from judicial review.

An agency's dismissal based on its erroneous interpretation of a statute, or the statute's substantive requirements, is reviewable. *See, e.g.*, *CREW*, 892 F.3d at 441 n.11; *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (holding agency's "Enforcement Policy Statement" was reviewable because its "interpretation has to do with the substantive requirements of the law"). And a dismissal based on an agency's belief that clear statutory language requires further "clarification" in light of judicial precedent is plainly reviewable. *See, e.g.*, *Akins*, 101 F.3d at 740 ("[S]ince it is not, and cannot be, contended that the statutory language itself is ambiguous, and the asserted 'ambiguity' only arises because of the Supreme Court's narrowing opinions, we must decide *de novo* the precise impact of those opinions.").

Even assuming *arguendo* that *Heckler* or *CREW* would foreclose review of FEC dismissals in some instances, neither bars review of a dismissal that some Commissioners erroneously believe to be compelled by the Constitution or judicial precedent. "An agency action, however permissible as an exercise of discretion, cannot be sustained where it is based not on the agency's own judgment but on an erroneous view of the law." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998).

And here, the controlling Commissioners did not ultimately discuss their conclusions in discretionary terms, but rather as "compelled" by the Constitution and judicial precedent. *See* JA 155. According to their Statement of Reasons, they were following a constitutional "command": "the Commission's approach *may not* merely presume that contributions from closely held corporations or corporate LLCs are actually contributions in the name of another," because, "[a]s Commissioners," they were "*obligated* to 'safeguard the First Amendment when implementing' the Act." JA 158 (emphasis added) (citing *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016)). Even taken on its own terms, their "discretionary" decision to dismiss was bootstrapped from their own decision to formulate a new "legal interpretation" of section 30122, JA 159, and *that* decision was based on the misguided view that a new standard was legally and constitutionally required. *See, e.g.*, JA 158-59. On the

merits, they are wrong, *see infra* Part II.D, and this Court is empowered to correct their error.

Having claimed that the dismissal decision was "*dictated* by the plain text of the Act, court decisions, forty years of Commission practice, and common sense," JA 174 (emphasis added), the Commission cannot now insulate it from review by framing it as discretionary. "[A]n official cannot claim that the law ties her hands while at the same time denying the courts' power to unbind her." *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018), *cert. granted before judgment*, No. 18-588 (June 24, 2019).

**2. *CREW* is distinguishable on its facts.**

In stark contrast to the underlying dismissal in *CREW*, the controlling Commissioners' putative discretionary action here did not rest on any actual discretionary considerations. At no point in this litigation has the FEC attempted to argue otherwise.

In *CREW*, the rationale for dismissal was rooted in traditionally "prosecutorial" considerations about agency resources. The administrative respondent was a fly-by-night political association that had dissolved and vanished while CREW's complaint was pending. The controlling Commissioners explained their decision to end the agency's enforcement efforts almost exclusively based on concerns about scarce agency resources and the dim prospects for success. They

found, *inter alia*, that the "defunct" association "no longer existed," "had filed termination papers with the IRS in 2011," and "had no money . . . [or] counsel . . . [or] agents who could legally bind it." 892 F.3d at 438. They also cited concerns about timing, noting that any agency action against the association would "raise[] novel legal issues that the Commission had no briefing or time to decide." *CREW v. FEC*, 236 F. Supp. 3d 378, 389 (D.D.C. 2017), *aff'd*, 892 F.3d 434.

Moreover, the dismissal at issue in *CREW* came after the Commission had already voted unanimously to *authorize an investigation* at the reason-to-believe stage; OGC then spent significant time and effort to conduct that investigation, which "encountered procedural and evidentiary difficulties from the outset" that only multiplied over time, until it became clear "that CHGO had become a defunct organization without any money, officers, directors, or attorney representing it." *Id.* at 388. At that point, even OGC conceded that further enforcement efforts would be a "pyrrhic" exercise. *Id.* at 388-89.

In this case, by contrast, the rationale did not hinge on factors such as "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, [or], indeed, whether the agency has enough

resources to undertake the action at all." *CREW*, 892 F.3d at 439 n.7 (citing *Heckler*, 470 U.S. at 831-32).[2]

Nor did the controlling Commissioners here even mention the "discretionary" factors identified in *Heckler*. They did not claim to find the factual allegations in the complaints insufficient to support a reason-to-believe finding. They did not address the significance or severity of the alleged violations. They did not weigh how or whether enforcement would tax scarce agency resources. And they did not consider the potential effects of letting the violations go unchecked, either on the agency's own enforcement priorities or the purposes of FECA. In other words, they did not base their votes upon any conventional discretionary considerations.

While *the district court* recast their reasons into concerns about litigation risk, the Commissioners themselves never mentioned that concern. "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. Courts may not rely on a rationale unarticulated by the agency. Were it otherwise, especially given the contested constitutional space in which the

[2] Notably, the Commission has created internal policies to focus its enforcement efforts—including through an Enforcement Priority System that "us[es] formal, pre-determined scoring criteria to allocate agency resources" and evaluate whether incoming complaints rated "low priority" or de minimis should be dismissed, "consistent with the Commission's prosecutorial discretion." Dismissal Report, MUR 7254 (Trump for President, Inc.) (Nov. 15, 2017), https://eqs.fec.gov/eqsdocs MUR/18044436431.pdf. None of those criteria were cited here.

campaign finance laws operate, the Commission could invoke a post hoc "litigation risk" rationale in virtually any case and thereby erect an absolute bar to judicial review of its decisions.

### 3. *CREW* does not permit the Commission to block review of the legal bases for its dismissals by invoking "discretion."

*CREW* did not claim to erect a categorical bar to judicial review of FEC dismissal decisions, because doing so would have required reading Congress's express provision for judicial review out of FECA and departing from Supreme Court and Circuit precedent—which the panel was not empowered to do. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[T]his Court is bound to follow circuit precedent until it is overruled either by an *en banc* court or the Supreme Court.") (citation omitted).

To be sure, the *CREW* majority viewed aspects of FEC non-enforcement decisions as "control[led]" by *Heckler*, 892 F.3d at 439—although this view is in potential tension with the Supreme Court's decision in *Akins*. 524 U.S. at 26 (noting that although "agency enforcement decisions have traditionally been committed to agency discretion, . . . [w]e deal here with a statute [FECA] that explicitly indicates the contrary" (quoting *Heckler*, 470 U.S. at 832) (internal quotation marks omitted)). But this case does not require exploring the outer reaches of the holding in *CREW*, or whether it conflicts with existing precedents, because the rationale for the dismissals here, unlike in *CREW*, was entirely a matter of law.

However, if the district court's post hoc manufacture of "implicit" discretionary bases for the dismissals here is credited, or the controlling Commissioners' rationale is retroactively recast as a *mixed* decision of law and discretion, *CREW* may require further consideration. A reading of *CREW* that would preclude judicial review of a dismissal based predominantly on legal grounds because one or two discretionary factors are also mentioned, or even just inferred, would be unsustainable.

The presumption of unreviewability established in *Heckler* was premised on the fact that agency enforcement decisions have "traditionally" been committed to agency discretion. Here, however, the "statute . . . explicitly indicates the contrary." *Akins*, 524 U.S. at 26. *CREW* cannot mean that a non-majority bloc of Commissioners can dress their legal determinations in "discretionary" garb and thereby defeat the judicial review that FECA provides. There is no authority for negating judicial review in this manner where—as recognized repeatedly in the decisions of the Supreme Court and this Circuit—Congress expressly overrode any presumption of unreviewability. *Akins*, 524 U.S. at 26; *Akins*, 101 F.3d at 734 (noting that FECA "permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings"); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) ("[FECA] is unusual in that it permits a private party

to challenge the FEC's decision *not* to enforce."); *DCCC*, 831 F.2d at 1133-34 (finding 3-3 decision not to enforce based on "prosecutorial discretion" reviewable).

To be sure, an "otherwise unreviewable action" does not "become[] reviewable" simply because "the agency gives a 'reviewable' reason." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987). By the same token, an otherwise reviewable action does not become *un*reviewable simply because the agency tacks on an unreviewable reason. This is even more strongly the case here, where the controlling Commissioners did not actually raise any unreviewable reasons.

The Commission cannot shield its dismissals from review merely by labeling its reviewable reasons (its legal premises) in unreviewable terms ("prosecutorial discretion"). This would be impossible to reconcile with *Akins*. There, the Commission argued that the complainants lacked standing because their informational injury ultimately might not be redressed on remand. Even if the Supreme Court agreed that the dismissal was "contrary to law" and remanded the matter to the FEC, the FEC could still "reach the same result" for a different, discretionary reason, 524 U.S. at 25—and therefore, the theory went, there would still not be any FECA-required disclosure. But the Supreme Court rejected the argument, *id.*, and this Court deemed it "a breathtaking attack on the legitimacy of virtually all judicial review of agency action." *Akins*, 101 F.3d at 738.

Instead, as this Court noted and the Supreme Court confirmed, "it has *always* been an acceptable feature of judicial review of agency action that a petitioner's 'injury' is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning." *Id.* That the Commission, like other agencies, generally "enjoy[s] some measure of enforcement discretion," did not mean the Commission's erroneous *legal* determinations were unreviewable, because "that would virtually end judicial review of agency action." *Id.* The role of the courts is to "correct[] a legal error—if error is committed—in the agency decision," provided the error is "one upon which the agency decision rests." *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)). *CREW* did not claim to overrule this holding; nor could it have done so. *Sierra Club*, 648 F.3d at 854.

### B. The Commission Does Not Have Unreviewable Discretion to Dismiss Allegations without Explanation or Engage in De Facto Rulemaking.

#### 1. The Commission did not provide any rationale, discretionary or otherwise, for failing to address whether respondents should have registered and reported as political committees.

The controlling Commissioners claimed to exercise their prosecutorial discretion in dismissing the alleged violations of section 30122, but they made no such claim in dismissing appellants' allegations that the respondent corporations had violated 52 U.S.C. §§ 30102, 30103, and 30104 by not registering and filing reports as political committees. The Commissioners did not meaningfully address these

claims at all, in terms of discretion or otherwise, remarking only that they would "not discuss those allegations," JA 152, and would rest on OGC's recommendation. That silence makes their rationale inadequate on its face. *See infra* Part II.C.

**2. The new "legal standard" announced by the controlling Commissioners is ripe for review.**

In dismissing the straw donor allegations, the controlling Commissioners announced a "new" "governing interpretation" of section 30122, under which they would find the statute was violated only if presented with "direct evidence" that funds were "intentionally funneled" through a closely held corporation or LLC for the purpose of evading FECA's reporting requirements. JA 158.

The Commission has not even tried to characterize this new "intent" standard as a matter committed to the agency's unfettered discretion. And for good reason. Such a standard is the paradigmatic "interpretation of FECA" that the *CREW* majority confirmed "is not committed to the agency's unreviewable discretion." 892 F.3d at 441 n.11. Instead, the Commission has resisted any review of this new "legal interpretation" as premature. JA 159. The district court agreed, JA 425-27, but this was error. The Commission's "ripeness" arguments are unavailing because the new legal standard was part and parcel of the controlling group's rationale for dismissal, and is reviewable as such.

The controlling Commissioners declared that in "similar future matters," they would examine "whether funds were intentionally funneled through a closely held

corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements," and that corporate contributions "shall be presumed lawful unless specific evidence demonstrates otherwise." JA 158. Then, referring back to this new "intent" standard, these Commissioners declared that enforcing section 30122 as written—or as the dissenting Commissioners interpreted it—would create constitutional notice concerns and chill First Amendment activity. Based on their concerns about the constitutionality of applying section 30122 without their narrowing gloss on it, the Commissioners voted against OGC's recommendation to find reason to believe. Their "intent" standard was essential to their no-vote, so it is necessarily ripe for review.

Whether the newly announced legal standard is a permissible interpretation of FECA is also a purely legal question. The purpose of the ripeness doctrine is to prevent courts from engaging in the "premature adjudication" of "abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Here, the "intent" standard devised by the controlling Commissioners is a "purely legal" interpretation of FECA and thus "presumptively suitable to judicial review." *Shays v. FEC*, 414 F.3d 76, 95 (D.C. Cir. 2005) (citation omitted). Moreover, because the standard was devised in response to five successive complaints over multiple election cycles, the factual setting is particularly well-developed for the Court's review. Indeed, the fact that the standard emerged in an adjudication indicates that

the "facts upon which its resolution may depend are . . . . 'fully crystallized.'" *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996).

The hardship that appellants will suffer if review is withheld is also sufficient to "outweigh any institutional interests in the deferral of review." *Payne Enterprises v. United States*, 837 F.2d 486, 493 (D.C. Cir. 1988) (citation omitted). The district court was incorrect to accept the Commission's argument that the "only hardship that the [appellants] face is the speculative possibility that the Commission will apply this standard in a future case to their detriment." JA 427. The controlling Commissioners dismissed all five complaints *precisely because* they concluded that section 30122 "must be modified" to incorporate their standard, JA 175, thus giving rise to this lawsuit. As a result, appellants—and the public—have been denied the disclosure to which they are entitled under FECA with respect to five different straw donor schemes. JA 40-44. This is sufficient hardship to merit review of both the dismissals and the newly created legal standard that gave rise to them.

Withholding review of the controlling group's intent standard would also clear an easy path for partisan blocs of Commissioners to bypass notice-and-comment rulemaking procedures and instead announce their preferred legal interpretations in an enforcement setting. *See OSG Bulk Ships, Inc. v. United States*,

132 F.3d 808, 812 (D.C. Cir. 1998); *Edison Elec*, 996 F.2d at 333.[3] Here, the controlling Commissioners acknowledged that they "proceeded to announce [their] view of the proper standard" in the context of these MURs only after concluding that "notice and comment rulemaking would not be constructive." JA 155. If this Court were to decline to review the crux of their reasoning—their new "intent" standard—it would effectively allow a non-majority of Commissioners to engage in de facto rulemaking without judicial oversight.

The controlling Commissioners "delay[ed] the consideration of these matters repeatedly over the course of almost four years," JA 169, justified the delay by kicking up a cloud of legal uncertainty unmoored from the statute or the facts, and on that basis decided that the straw donor provision "must be modified," JA 175, before it could be fairly applied. They cannot now block judicial review by attempting to decouple the "discretionary" dismissal decisions from the standard that served as the express justification for them.

[3] Citing a lone enforcement case involving corporate straw donors (*see* FEC Mot. for Summ. Aff. 17 n.2) also does not suffice to defeat concerns about agency abdication. Notably, that case involved conduct that *predated* the "governing norm" (JA 148) announced here, potentially raising separate questions about consistent treatment. *See* Pls.'-Appellants' Opp'n to Summ. Aff. 22 (noting prevalence of FEC dismissals citing "prosecutorial discretion" following the district court decision in *CREW*).

### C. Considerations Unique to FECA's Statutory Scheme Strongly Favor Review.

When legal determinations underlie an FEC decision to dismiss, this Court has always exercised its responsibility to review whether those determinations are "contrary to law." Preserving that judicial role is even more important when Commission enforcement decisions lack majority support. Dismissals invoking "prosecutorial discretion" that garner four or more votes may not be as difficult to square with "[t]he purposes underlying FECA," because "the fourth vote—necessarily from a Commissioner who crossed party lines—makes us less worried about partisan gamesmanship." *CREW*, 923 F.3d at 1142 (Griffith, J., concurring in denial of rehr'g en banc). But when a dismissal invoking "prosecutorial discretion" fails to attract four votes, a presumption of unreviewability runs distinctly against the statutory scheme.

The deadlock dismissals here fall squarely in the latter camp. When three Commissioners refuse to apply an unambiguous statutory prohibition to conduct that it indisputably covers, rest their refusal on views about the law that are contrary to FECA, and then seek to immunize their action from review by invoking the "magic words" of "prosecutorial discretion," the need for FECA's judicial check is at its apex.

In addition, the dispositive vote in each matter here was on a question of law—whether there was "reason to believe" the administrative respondents had violated

FECA. Although the controlling Commissioners tried to characterize their action as discretionary, their explanation rests entirely on flawed legal determinations. *See supra* Part I.A.1. If the Commission had really wanted to avoid making any legal findings, it could have done so—by directly voting to dismiss for discretionary reasons. It did not do so here, even though the Commission can and sometimes *does* dispose of enforcement actions specifically on the basis of *Heckler*.[4] A direct vote to dismiss on grounds of prosecutorial discretion might warrant different consideration. But that did not happen here.

In any case, Congress did not intend to endow a non-majority bloc of Commissioners with unreviewable enforcement discretion. FECA requires that "[a]ll 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." 52 U.S.C. § 30106(c). "To ignore this requirement would be to undermine the carefully balanced bipartisan structure which Congress has erected." *Common Cause*, 842 F.2d at 449 n.32.

And insofar as Congress wished to offset the effects of partisan parity on the FEC, it was for the purpose of *promoting* compliance with FECA, not impeding it.

[4] *See, e.g.*, Certification, MUR 7114 (Casperson for Congress) (June 26, 2018), https://www.fec.gov/files/legal/murs/7114/17044430961.pdf (dismissing by a vote of 5-0 under *Heckler*); *see also supra* note 2 and accompanying text.

Congress created several mechanisms for private involvement to ensure that partisan deadlock did not render the FEC toothless or FECA unenforceable. *See, e.g.*, 52 U.S.C. § 30109(a)(1) (permitting filing of complaints); *id.* § 30109(a)(8)(A) (permitting judicial review of dismissals); *id.* § 30109(a)(8)(C) (permitting complainant to bring civil action against violator if the FEC fails to conform to a judicial decision in an (a)(8)(A) suit).

These "unusual" features of FECA further distance it from the realm of *Heckler*. *Chamber of Commerce*, 69 F.3d at 603. So, too, does this Court's longstanding requirement in cases of deadlock that the naysayers provide their reasons "to allow meaningful judicial review of the Commission's decision not to proceed." *Common Cause*, 842 F.2d at 449. The reflexive resistance to judicial review the Commission has advocated in cases following *CREW*—including in this appeal—is a significant departure from this precedent, and indeed, antithetical to the very notion of judicial review under FECA. This cannot be the proper reading of *CREW*.

If *CREW* is understood to mean that blocs of fewer than four Commissioners can invoke "prosecutorial discretion" to foreclose review of the legal bases for dismissals, that "certainly seems contrary to Congress's intent." *CREW*, 923 F.3d at 1142 (Griffith, J., concurring in denial of rehr'g en banc). And it would also be contrary to Congress's intent if this Court were to block judicial review of dismissals

premised on three Commissioners' perceived need to "clarify" a clear FECA provision with a legal interpretation that narrows the statute's application. This would go far beyond giving a non-majority of Commissioners veto power over Commission enforcement decisions: it would endow them with absolute authority to control the Act's interpretation, all without judicial review.

## II. THE DISMISSALS WERE CONTRARY TO LAW.

### A. The District Court Incorrectly Deemed the Dismissals a Legitimate Exercise of the Commission's Discretion Not to Enforce.

Appellants presented the Commission with facts alleging serious potential violations of two key disclosure provisions in FECA: the straw donor prohibition at 52 U.S.C. § 30122 and the political committee disclosure requirements at 52 U.S.C. §§ 30102, 30103, and 30104. The controlling Commissioners declined to initiate an investigation of any of these allegations—describing this as "an exercise of the Commission's prosecutorial discretion"—although their justifications were entirely rooted in legal analysis. JA 149; *see supra* Part I.A.1.

The district court was wrong to accept this characterization of the decision, and wrong to apply rational basis review as a result. The court acknowledged, as appellants had argued below, that the controlling group did not "explicitly rely" upon grounds typically regarded as committed to agency discretion, such as "'agency resource[]' constraints or likelihood of success [in litigation]." JA 416. But the court nonetheless assumed that the controlling Commissioners, in citing factors such as

"fair notice and due process," had "*implicitly* raised questions about the likelihood of success in a legal challenge." JA 416-17 (emphasis added).

In fact, and as the district court essentially acknowledged elsewhere in its opinion, *see* JA 422-25, the controlling Commissioners' "fair notice" rationale was founded on constitutional concerns and interpretations of case law. Their conclusions are thus owed no deference, and this Court should review *de novo* whether they reflect an impermissible interpretation of law, or were "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161.

Furthermore, under any standard, the Commission must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted). Here, however, the controlling Commissioners relied on conclusory citations and inapposite case law to arrive at a "fair notice" rationale contradicted by the facts before them. That explanation falls far short of supplying a "reasoned basis" for the dismissals here. *Id.*

### B. The Decision to Dismiss the Straw Donor Claims Was Arbitrary and Capricious, and Contrary to Law.

#### 1. The dismissals were based on a rationale that is contrary to the plain language and purpose of the statute.

The language of section 30122 is unambiguous: "[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." In turn, FECA defines "person" as "an individual, partnership, committee, association, *corporation*, labor organization, or any other organization or group of persons." 52 U.S.C. § 30101(11) (emphasis added).

The controlling Commissioners acknowledged that the straw donor prohibition specifically covers "partnerships, *corporations*, and other organizations," JA 153 (emphasis added), and that "closely held corporations and corporate LLCs may be considered straw donors in violation of section 30122." JA 154. They did not assert that the statute itself is ambiguous in any way, nor did the district court suggest that it was. *See, e.g.*, JA 417.

The dismissals were thus based on a legally unsustainable proposition: that a clear and unambiguous law failed to provide the regulated community with sufficient notice as a matter of due process. But any "regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards" applicable to violations of section 30122, because those standards are evident on the face of the statute. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). Indeed, courts have already specifically considered and rejected various claims that section 30122 is unconstitutionally vague. *See, e.g.*, *United States v. Danielczyk*, 788 F. Supp. 2d 472, 485 (E.D. Va. 2011) (noting that section 30122 "defines the offense unambiguously and in plain terms, such that ordinary people can understand what is prohibited conduct"), *rev'd on other grounds*, 683 F.3d 611 (4th Cir. 2012);

*cf. United States v. O'Donnell*, 608 F.3d 546, 555 (9th Cir. 2010) (rejecting criminal defendant's notice-based rule of lenity argument because "the statutory language, structure and purpose [of § 30122] do not leave the provision's meaning 'genuinely in doubt'" (citation omitted)).

Applying section 30122 to corporate straw donors is not only mandated by the statute's text, but is also necessary to achieve Congress's goal of securing disclosure of the true sources of money flowing into federal elections. Disclosure "'[e]nsure[s] that the voters are fully informed' about the person or group who is speaking" and "able to evaluate the arguments to which they are being subjected." *Citizens United*, 558 U.S. at 368 (citations omitted).

Disclosure laws like section 30122 also work in tandem with FECA's prohibition on contributions from foreign nationals, 52 U.S.C. § 30121, because they help to expose foreign efforts to influence U.S. elections. The Commission has recognized this interplay in past enforcement cases.[5] Indeed, one of the five LLC straw donor complaints considered by the Commission below—though not one of the three that remains at issue, *see supra* at 10 (discussing MUR 6930)—highlighted contributions that were part of a much broader straw donor scheme to launder money from foreign nationals though U.S. corporations and PACs. The straw donor

[5] *See, e.g.*, MUR 4884 (Future Tech, Inc.); MUR 4398 (Thomas Kramer); MUR 3460 (Sports Shinko).

prohibition is thus a key part of FECA's disclosure regime: it "ensure[s] that foreign nationals or foreign governments do not seek to influence United States' elections." *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 191 & n.11 (D.D.C. 2016) (three-judge court).

The FEC has long recognized that disclosure is a central and distinct purpose of the straw donor prohibition. *See, e.g.*, FEC Advisory Op. 1986-41, at 2 (Dec. 5, 1986) (noting that section 30122 "serves to [e]nsure disclosure of the source of contributions to Federal candidates and political committees as well as compliance with the Act's limitations and prohibitions"). The courts have agreed. *O'Donnell*, 608 F.3d at 553 ("[T]he congressional purpose behind [§ 30122]—to ensure the complete and accurate disclosure of the contributors who finance federal elections—is plain.").

The evident purposes of section 30122 are impossible to reconcile with the controlling group's view that dismissal was required because congressional intent with respect to the scope of section 30122 was "unclear." JA 155 (arguing that Congress "did not contemplate that corporations could violate the prohibition against giving in the name of another by acting as straw donors for contributions"). Congress's intent to cover corporations is evident on the law's face. And Congress's focus on disclosure is buttressed by the legislative history of section 30122—which was initially enacted before FECA's contribution limits were in place, because

"Congress believed that full disclosure would make contribution limits unnecessary." *O'Donnell*, 608 F.3d at 553.

The controlling Commissioners did not even try to engage with this history before declaring congressional intent unclear. Nor did they undertake any analysis of how their decision would bear on the disclosure purposes of section 30122. Their refusal to enforce the straw donor prohibition was contrary to both the clear language and undisputed purposes of the statute.

**2. Respondents did not lack adequate notice simply because corporate contributions were a matter of "first impression."**

The controlling Commissioners' notice argument was largely premised on the contention that the administrative complaints presented an "issue of first impression" in light of the *Citizens United* and *SpeechNow* rulings and the "new" corporate contributions these rulings authorized. But even accepting their claim that corporate contributions in federal elections were novel,[6] this does not mean applying section 30122 to corporate straw donors raised any novel *legal* issues, or differed meaningfully from longstanding application of the statute to other entities and organizations that make contributions.

[6] As the district court acknowledged, corporations had donated millions of dollars to political parties until the Bipartisan Campaign Reform Act of 2002 prohibited these "soft money" contributions. JA 420; *see also McConnell v. FEC*, 540 U.S. 93, 124-25 (2003) (noting that largest corporate donors "often made substantial contributions to both parties").

And importantly, these supposed notice concerns were rooted in legal, not prudential, considerations: the controlling Commissioners cited no facts unique to the respondents or their knowledge of FECA. Instead, the "notice" rationale was built on a variety of generic legal and constitutional considerations, including "due process in a post-*Citizens United* context," "confusing Commission precedent," and "the obligation to protect First Amendment speech." JA 417-18.

As a legal and constitutional theory, it was without merit.

First, the controlling Commissioners observed that the FEC had never addressed "whether . . . a closely held corporation or corporate LLC may be considered a straw donor under section 30122," JA 153, but they did not explain why this was enough to deprive respondents of notice that the statute potentially applied to their activity: section 30122 unambiguously covers corporate straw donors, and its clarity is not in dispute. *See supra* Part II.B.1. Moreover, *Citizens United* did not address section 30122, which, by its terms, applied to corporations both before and after the decision. In other words, the corporate respondents had the same "notice" that FECA's straw donor prohibition applies to corporations after *Citizens United* as they did before.

Indeed, they had exactly the same notice as all other "persons" subject to section 30122—whether an "individual, partnership, committee, association, corporation, labor organization, or any other organization." 52 U.S.C. § 30101(11).

The controlling Commissioners' reasoning, taken to its logical conclusion, would mean that enforcement violates due process whenever a statute is for the first time applied to any class of "person" it covers, or whenever anything about the legal landscape changes. The Constitution does not require the Commission to give every regulated class one bite of the apple before it will enforce the law.[7]

The controlling Commissioners also claimed the administrative complaints were novel because the alleged straw donors were corporate entities, whereas the FEC had previously "considered alleged violations of section 30122 almost exclusively in contexts where individuals were the purported straw donors." JA 155. In fact, the FEC *has* scrutinized non-individual straw donors—specifically, political action committees ("PACs")—yet the controlling Commissioners neither acknowledged nor distinguished these cases. For example, the FEC found reason to believe that two individuals violated section 30122 by making disguised

[7] Regardless, that dispensation could only reasonably apply to the *first* LLC straw donor violations—not those that came years later. Following the five dismissals here, the FEC deadlocked on and dismissed at least *another five* corporate/LLC straw donor complaints filed in subsequent election cycles, because the controlling Commissioners believed the regulated community *still* lacked notice that "closely held corporations and corporate LLCs could violate section 30122." Statement of Reasons of Comm'rs Hunter & Petersen 10, MURs 6968 (Tread Standard LLC), 6995 (Right to Rise), 7014/7017/7019/7090 (DE First Holdings *et al.*) (July 2, 2018), https://www.fec.gov/files/legal/murs/7017/7017_2.pdf.

contributions that were "funneled through" various PACs to a candidate.[8] Given these precedents, regulated parties could not have reasonably believed that the FEC would regard non-individual entities as categorically incapable of being straw donors.

The controlling Commissioners—and the district court—attempted to distinguish corporations from PACs on the ground that "political committees could make contributions before *Citizens United*." JA 420. This observation is true, but irrelevant: it does not explain why applying section 30122 to corporations is any more "confusing" than applying it to PACs. Considerations concerning the independence of the entity from its funder, *see* JA 155-57, the intent of the original donors, *see* JA 158-59, and the potential "chill" to the entity's speech, *see* JA 158, would arise as to either type of organization.

The district court, finding no actual explanation of this purported "legal confusion" in the Statement of Reasons itself, hypothesized that a potential complication in applying section 30122 to LLCs might be that "these small corporations blur the lines between the individual and the corporation, and

[8] *See* Factual and Legal Analysis 10, MUR 4634 (Sam Brownback) (June 8, 1998), https://www.fec.gov/files/legal/murs/4634/28044194356.pdf; *see also* Factual and Legal Analysis 7-8, MUR 5968 (John Shadegg's Friends) (Nov. 10, 2008), https://www.fec.gov/files/legal/murs/5968/28044221606.pdf (proceeding from the premise that a contribution knowingly funneled to a candidate through a PAC would violate section 30122).

thus . . . between a 'true' donor and 'straw' donor." JA 421. But this is equally the case with other politically active groups, which often have only a handful of donors or have donors active in their operations.[9] In short, the controlling Commissioners and the district court concluded that PACs and corporations are different, but failed to explain why any of these differences matter.

Finally, the controlling Commissioners treated this as a case of first impression because, in the past, "nearly every alleged straw-donor scheme addressed by the Commission involved excessive and/or prohibited contributions." JA 155. Again, they did not explain why the distinction is pertinent. To be sure, one objective of section 30122 is to prevent circumvention of the contribution limits and source restrictions. But it is undisputed here that a central and independent goal of the straw donor prohibition is to ensure disclosure of the true sources of campaign money. *See, e.g.*, *O'Donnell*, 608 F.3d at 553; *see also supra* Part II.B.1. A reasonable person could not read FECA to permit straw donor schemes where the true sources of a contribution were misreported but the contribution itself was within the applicable contribution limits.

[9] *See, e.g.*, First General Counsel's Report 4, MUR 6002 (Freedom's Watch) (Mar. 12, 2010) (noting group's "'roughly $30 million' in spending came almost entirely from casino mogul Sheldon Adelson"), https://www.fec.gov/files/legal/murs/6002/10044272054.pdf.

### 3. Respondents could not have been "misled" by Commission precedents addressing funds deposited in corporate accounts because none of these authorities concerned section 30122.

The controlling Commissioners attempted to bolster their theory of inadequate notice by claiming that although section 30122 may be clear, the FEC's own administrative guidance on the attribution of corporate contributions may have "[m]isled" respondents as to the application of the straw donor provisions to corporations. JA 155. The district court similarly presumed that respondents may "have reasonably been confused." JA 421. But although the administrative guidance cited in the statement is copious, it is all off point. The FEC cannot maintain that respondents were confused by guidance that had no application to their case.

The controlling Commissioners observed that historically, the FEC had found that contributions disbursed from corporate accounts violate FECA's ban on corporate contributions, 52 U.S.C. § 30118, irrespective of whether the corporation was controlled by a single shareholder or otherwise closely held. JA 155-57. They also pointed to an FEC rule providing that LLCs are treated as individuals, partnerships, or corporations for purposes of FECA's contribution limits and source restrictions depending on the federal tax treatment they elect. 11 C.F.R. § 110.1(g). Relying on these authorities, the controlling Commissioners posited that the "historical treatment of contributions made from funds deposited into a corporate

account as corporate contributions" might have led the respondents to believe their conduct would not violate section 30122. JA 157.

Their conclusion is unsustainable. None of the cited guidance addresses section 30122; it simply establishes the default rules for attributing corporate contributions to their original source in the absence of any evidence of fraud or straw donor activity, generally for the purpose of applying FECA's corporate contribution ban, 52 U.S.C. § 30118. But as default rules, these authorities cannot speak to situations involving deceptive conduct.

The Commission's OGC articulated at length the distinction between the default attribution rules and section 30122 in its analysis of the complaints here. It noted that respondents in the F8/Eli Publishing MURs, for instance, defended their actions by arguing that the contribution from Eli Publishing to Restore Our Future was drawn from Eli's "corporate funds, a lawful transaction on its face." JA 114-15. But as OGC pointed out, whether Eli's corporate contribution to a super PAC was permitted by section 30118 was not the correct inquiry in a straw donor case:

> [Respondents'] assertion simply elides the critical factual question—who was the true source of the contribution. And to the extent it is meant to imply that simply because the contribution came from an Eli Publishing account, it is "a lawful transaction," the contention fails as a matter of law. . . . Every contribution made "in the name of another" appears "on its face" to have been made from that source.

JA 115. As OGC recognized, asking whether funds drawn from a corporate account are "corporate" or lawful under section 30118 "simply begs the question." *Id.* The

FEC's default rules concerning how funds are generally attributed to corporate entities have no bearing on its inquiry under section 30122 as to whether the corporation is *in fact* the true donor, or just a conduit used to conceal the true donor.

Furthermore, the presumption that the immediate contributor is the true source of the donated amount is not unique to corporations. FECA and Commission regulations establish default rules for the attribution of contributions for all organizations active in federal elections. *See*, *e.g.*, 11 C.F.R. § 110.1(e) (providing that contribution from a partnership will be attributed to each partner in an amount directly proportional to their share of partnership profits); 52 U.S.C. § 30116(a)(2), (a)(8) (providing that contributions from political committees are attributed to the committee and not to its donors unless a donor has earmarked funds for a specific recipient). None of these default rules suggest that these entities are not on "notice" that their contributions can be investigated as potential straw donor transactions if evidence suggests the entity is not the true source of the funds.

The entire point of section 30122 is to proscribe fraudulent conduct where there is evidence that applying the default rule would not result in the disclosure of the true donor. This was exactly the conclusion the Commission came to in earlier enforcement actions where it found violations of section 30122 when individuals "funneled" contributions through PACs to a candidate. *See supra* Part II.B.2. The fact that a PAC contribution is typically attributed to the PAC as an entity, and not

to its underlying donors, was not deemed so confusing in those cases as to preclude applying section 30122 to the PAC.

As OGC explained, "[e]very contribution made 'in the name of another' appears 'on its face' to have been made from that source." JA 115; *see also* JA 263. The existence of default rules—and their assumption that the immediate donor is the true source of the funds—has never been treated as a source of "confusion" and then used to excuse other entities from being held accountable as straw donors. To find otherwise would render section 30122 a nullity.

**4. The proposition that respondents lacked notice was not credible.**

This Court should not accept an administrative decision "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citation omitted). Here, all record evidence contradicts the conclusion that the corporate respondents lacked "notice" of the potential application of section 30122 to their activity.

None of the respondents raised issues of notice in their responses to the admininistrative complaints. *See* JA 103-05, 190-92, 214-15, 217-20, 231-36, 238-40, 242-47. None professed any confusion about the applicability of section 30122 in even the most general terms. This record—or lack thereof—makes clear that the notice theory was an invention of the controlling Commissioners, who made no

attempt to consider whether these respondents were actually aware of the law's requirements. Nor did any respondents specifically refute any of the factual allegations leveled against them; they focused almost exclusively on attacking the facial sufficiency of the complaints. *See, e.g.*, JA 103, 190 (F8/Eli Publishing) (claiming "allegations in the complaint [were] insufficient" and plaintiffs' reliance on news reports inappropriate); JA 231 (FreedomWorks) (same).

The notice theory is belied by the facts in another important respect: the chronology of events. The straw donor contribution identified in the earliest administrative complaint (W Spann) was widely reported in national media outlets at the time, and drew enough attention to trigger comment from the candidate who would become the 2012 Republican Presidential nominee. *See supra* at 9 (discussing Romney's response). The Specialty Group respondents hatched their straw donor scheme more than a year later. And although the F8/Eli Publishing respondents made their contribution at the same time as W Spann, Lund and any other donors associated with the effort had years to come forward to correct the reporting at issue. It strains credulity that the respondents here—million-dollar donors who were sophisticated enough to create corporate entities to conceal their campaign activity—were unaware of these events, or confused about the law's requirements.

More importantly, several respondents conceded their intent to evade FECA's disclosure requirements. Lund admitted that he made the contribution through his

LLCs because "he did not want 'to be real public about being a part of the campaign.'" JA 117. Conard—respondent in the W Spann matter—was even more explicit, conceding that "he set up the business entity for the sole purpose of conveying his funds to [Restore Our Future] without disclosing his identity." First General Counsel's Report 9, MUR 6485 (W Spann) (Aug. 28, 2012), https://www.fec.gov/files/legal/murs/6485/16044390492.pdf.

The "fair notice" rationale thus lacks any foundation in the facts of this case and does not meet even the most deferential standard of reasoned decisionmaking.

### C. The Failure to Address Whether the Political Committee Requirements Applied to Respondents Was a Fatal Defect.

The complaints also alleged that there was reason to believe the corporate respondents had satisfied the two-pronged test for "political committee" status under FECA, because they (1) had a "major purpose" of influencing the "nomination or election of a candidate," *Buckley*, 424 U.S. at 79, and (2) had received "contributions" or made "expenditures" of $1,000 or more, 52 U.S.C. § 30101(4)(A). JA 87-90, 181-84, 199-202. Indeed, in the case of F8 and Specialty Group, both entities appeared to have campaign activity as their *sole* purpose in the relevant period. JA 110, 118, 257-58.

The controlling Commissioners ignored this distinct allegation. They did not suggest that the federal political committee registration and reporting requirements were ambiguous. Nor did they dispute that a corporate entity could qualify as a

"political committee"; indeed, the Commission has found in the past that certain corporations were required to register as political committees. *See, e.g.*, *FEC v. Malenick*, 310 F. Supp. 2d 230, 237 (D.D.C. 2004) (finding that Triad Management Services, Inc. illegally failed to register as a political committee). And they did not claim that a determination that a corporation was a "political committee" would in any way be a matter of "first impression" for which respondents lacked "notice."

In fact, they made no real attempt whatsoever to analyze whether respondents violated the political committee disclosure requirements. This omission makes their Statement of Reasons inadequate on its face. *State Farm*, 463 U.S. at 43 ("In reviewing [the agency] explanation, we must 'consider whether the decision . . . . entirely failed to consider an important aspect of the problem." (citations omitted)).

The district court glossed over this glaring defect, suggesting only that the Commissioners "viewed this case as a straw donor case, not a political committee case." JA 425. But to state the obvious, the FEC cannot simply dismiss a legal claim in a complaint because it prefers not to "view" the claim: the Commission still must articulate a reasonable basis for dismissing it. This it failed to do.

In the district court, the FEC attempted to justify this omission by claiming that the controlling group relied upon OGC's recommendation to "take no action *at [that] time*" on the political committee allegations. JA 122, 268 (emphasis added).

But OGC's recommendation was not that the Commission should analyze *only* the section 30122 claims, just that it should analyze these claims *first*.

The reason OGC recommended deferring action on the political committee allegation was "because the resolution of this allegation may depend on the disposition of the section [30122] allegation." JA 252. "[A]n entity can be a conduit or a political committee, but not both," OGC theorized. JA 120. If a section 30122 conduit violation were found, under OGC's theory, it would serve no purpose to analyze whether the political committee requirements were also violated: if respondent corporations are mere conduits, then the illegal conduit activity would not make them into political committees.

But OGC never suggested that the reverse was true: if respondent corporations were *not* conduits, then they may indeed have qualified as political committees. Because the controlling Commissioners declined to find any violations of section 30122, they should have considered whether the political committee allegations merited investigation. Their statement addressed only half of the potential FECA violations alleged in each complaint, so by any measure, it was fatally incomplete.

### D. The Controlling Commissioners' "Intent" Standard Is Arbitrary, Capricious, and Contrary to Law.

Although the controlling Commissioners declined to investigate the straw donor violations before them, they announced what they described as a prospective standard for assessing such violations in the future: they would find reason to believe

if "direct evidence" showed that funds were "intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements." JA 158. Other relevant evidence would include that "the corporate entity did not have income from assets, investment earnings, business revenues, or bona fide capital investments, or was created and operated for the *sole* purpose of making political contributions." *Id.* (emphasis added).

The "intent" standard, which was integral to the controlling Commissioners' decision, is contrary to law. As the FEC acknowledged below, the text of section 30122 contains no scienter requirement. And FECA already sets forth an alternative set of penalties for violations of section 30122 that *do* meet a "knowing and willful" standard—one that includes higher civil fines and possible referral to the Attorney General for criminal prosecution. 52 U.S.C § 30109(a)(5)(B)-(C), (d)(1)(D). These provisions—and the stepped-up penalties they prescribe—would make no sense if scienter was a requisite element for *all* violations of section 30122, including the civil violations at issue here.

The new standard also fails to capture the full range of straw donor activity proscribed by FECA. Its intent prong requires evidence that "funds used to make a contribution were *intentionally* funneled through a closely held corporation or corporate LLC *for the purpose of making a contribution that evades the Act's*

*reporting requirements*." JA 158 (emphasis added). This scienter requirement provides an easy escape hatch for donors to claim that they contributed through an LLC for *any* reason other than avoiding disclosure. And the requirement that "political contributions" be a corporation's "*sole* purpose" before a violation would be found allows corporate straw donors with any non-campaign activity, however artificial or minimal, to escape application of section 30122. JA 158. This standard contravenes the plain text of the statute.

The controlling Commissioners attempted to justify the need for their narrowing standard on the ground that the dissenting Commissioners' alternative approach would infringe upon First Amendment activities. The dissenters declared that there would be reason to believe section 30122 was violated where there is evidence that (1) "an individual is the source of the funds" and (2) an LLC "conveys the funds at the direction of" that individual. JA 166. The controlling Commissioners asserted that their colleagues' standard would have "presumed" that all corporate contributors are straw donors, rendering "hollow" the "speech rights recognized in *Citizens United*," JA 148, but did not provide even a scintilla of evidence to substantiate this fear.

The district court tried to augment this constitutional avoidance rationale by noting that "vagueness and notice concerns carry special weight" in the First Amendment context. JA 423. True enough. But the Commission has never claimed

that the statute is unconstitutionally "vague," nor has any court concluded as much. The district court also quoted *Van Hollen*, 811 F.3d at 501, for the proposition that it was appropriate for the FEC to consider First Amendment issues in "balanc[ing] the competing values that lie at the heart of campaign finance law." JA 424. But *Van Hollen* reviewed, under *Chevron* Step Two, an FEC regulation interpreting an *ambiguous* FECA provision, 811 F.3d at 488-89, not the dismissal of an administrative complaint alleging clear violations of a clear FECA provision. If FECA is ambiguous, the Commission may well pick an interpretation "which avoids legal and constitutional doubt." JA 159. But where FECA is *clear*, the Commission cannot sidestep its statutory mandate by manufacturing confusion or falling back on generalized concerns about First Amendment "chill."

## CONCLUSION

This Court should reverse the district court's ruling that the dismissals were not contrary to law, and remand with a direction to reverse its grant of the Commission's motion for summary judgment and grant appellants' motion for summary judgment.

Respectfully submitted,

*/s/ Megan P. McAllen*

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## CERTIFICATE OF COMPLIANCE

This response complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,831 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared using Microsoft Office Word 2016 in Times New Roman 14-point font.

*/s/ Megan P. McAllen*
Megan P. McAllen

## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I electronically filed this Brief and Joint Appendix with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

I further certify that I caused the required copies of the Brief of Appellants and Joint Appendix to be filed with the Clerk of the Court.

*/s/ Megan P. McAllen*
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# ADDENDUM

# ADDENDUM – TABLE OF CONTENTS

## Federal Statutes

# TITLE 52. VOTING AND ELECTIONS
## Chapter 301—Federal Election Campaigns
## Subchapter 1—Disclosure of Federal Campaign Funds

### § 30101. Definitions

When used in this Act:

* * *

**(4)** The term "political committee" means—

(A) 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;

* * *

**(11)** The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

* * *

### § 30109. Enforcement

**(a)** *Administrative and judicial practice and procedure*

**(1)** Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other

action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

**(2)** If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

**(3)** The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

**(4)** (A) (i) Except as provided in clauses (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to

correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

(C) (i) Notwithstanding subparagraph (A), in the case of a violation of a qualified disclosure requirement, the Commission may—

(I) find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II) based on such finding, require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure requirement, under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(iv) In this subparagraph, the term "qualified disclosure requirement" means any requirement of—

(I) subsections (a), (c), (e), (f), (g), or (i) of section 30104 of this title; or

(II) section 30105 of this title.

(v) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000, and that end on or before December 31, 2023.

**(5)** (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

**(6)** (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an

order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

**(7)** In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

**(8)** (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

**(9)** Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

**(10)** Repealed. Pub.L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357

**(11)** If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

**(12)** (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

**(b)** *Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports*
Before taking any action under subsection (a) against any person who has failed to file a report required under section 30104(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 30104(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 30111(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

**(c)** *Reports by Attorney General of apparent violations*
Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60

days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

**(d)** *Penalties; defenses; mitigation of offenses*

**(1)** (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating $25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

(B) In the case of a knowing and willful violation of section 30118(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 30118(b)(3) of this title may incorporate a violation of section 30119(b), 30122, or 30123 of this title.

(C) In the case of a knowing and willful violation of section 30124 of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(D) Any person who knowingly and willfully commits a violation of section 30122 of this title involving an amount aggregating more than $10,000 during a calendar year shall be—

(i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

(I) $50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

**(2)** In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission

under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

**(3)** In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

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**§ 30122. Contributions in Name of Another Prohibited**

No 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 person.