ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5239

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

ELI PUBLISHING, L.C., *et al.*,
Intervenors-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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GLOSSARY

Complainants	Campaign Legal Center and Democracy 21
Corporate LLCs	Limited liability companies taxed as corporations
CREW	Citizens for Responsibility & Ethics in Washington
FEC or Commission	Federal Election Commission
FECA or Act	Federal Election Campaign Act
J.A.	Joint Appendix
MUR	Matter Under Review
OGC	FEC Office of the General Counsel

INTRODUCTION

Appellants Campaign Legal Center and Democracy 21 (collectively, "Complainants") challenge the Federal Election Commission's ("FEC" or "Commission") dismissal of their administrative complaints alleging that various individuals and entities violated the Federal Election Campaign Act's ("FECA" or "Act") prohibition against contributions made in the name of another and reporting and registration requirements. Certain contributions to independent-expenditure-only political committees (also known as "super PACs") by closely held corporations and limited liability companies taxed as corporations ("corporate LLCs") purportedly were attributable to the corporate entities' owner/member as their "true source," and these entities thus had acted as "straw donors."

Addressing what they concluded was an issue of first impression, a group of three Commissioners, who voted not to pursue an investigation and ended up controlling the outcome, explained that they had done so as "an exercise of the Commission's prosecutorial discretion." (J.A.149.) These Commissioners agreed with their colleagues that closely held corporations and corporate LLCs may be "straw donors" in violation of FECA's prohibition against making contributions in the name of another, but concluded that this interpretation of FECA should be applied only prospectively. All the Commissioners thus agreed that, when an individual is the "true source" of a contribution from such a corporate entity,

FECA requires disclosure of the identity of the individual, rather than the corporate entity, as the contributor. When determining the "true source" in similar future matters, the controlling Commissioners explained that, for their part, they would inquire into the purpose of the contribution.

Concerned that the respondents did not have sufficient notice to justify retroactive application of a newly announced interpretation, and sensitive to the First Amendment rights at stake, however, the controlling group concluded that it would be unfair to proceed against the respondents. Observing that the question presented by the administrative complaints arose in an area where the law had recently underwent a sea change due to *Citizens United v. FEC*, 558 U.S. 310 (2010), and in light of potentially confusing Commission precedent and regulations, the controlling Commissioners instead "used the present matters to announce a governing interpretation to put the public on notice of the conduct that constitutes a violation of the Act, while dismissing" the matters before them. (J.A.173.)

The district court determined that it possessed jurisdiction to review several of the administrative matters and granted judgment for the Commission, finding that the controlling Commissioners' decision to exercise their prosecutorial discretion "was rational[] and indeed an able attempt to balance the competing values that lie at the heart of campaign finance law," and that Complainants'

challenge to their announced purpose-based approach for future matters was "not even close to being ripe." (J.A.40-45, 424, 426.) Thereafter, in a separate case similarly involving controlling FEC Commissioners exercising their prosecutorial discretion, this Court held that such dismissals are "not subject to judicial review." *CREW v. FEC*, 892 F.3d 434, 441 (D.C. Cir. 2018) ("*Commission on Hope*"), *pet. for reh'g en banc denied*, 923 F.3d 1141 (D.C. Cir. 2019).

Because Complainants are injured by the lack of information they seek in only a generalized way of seeking to have the law enforced, and not in any concrete and particularized way, they lack standing to pursue this appeal. And because the FEC's "unreviewable prosecutorial discretion" was the basis for the dismissal here, this Court should affirm the district court's judgment. *Id.* at 438. In any event, as the district court found, the decision was reasonable and thus not contrary to law. Moreover, Complainants' challenge to a new standard that may (or may not) be applied in future cases is not ripe and that standard is nonetheless rational.

STATUTES AND REGULATIONS

52 U.S.C. § 30101(8)(A)(i): "When used in this Act: . . . (8)(A) The term 'contribution' includes—(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any

election for Federal office . . . ."

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Administrative Enforcement Process

1. The Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA. Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has "exclusive jurisdiction" to initiate civil enforcement actions for violations of FECA. *Id.* §§ 30106(b)(1), 30109(a)(6).

2. FECA's Enforcement and Judicial-Review Provisions

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. *Id.* § 30109(a)(1). After considering these allegations and any response, the FEC determines whether there is "reason to believe" that the respondent violated FECA. *Id.* § 30109(a)(2). If the Commission so finds, then the Commission conducts "an investigation of such alleged violation" to determine whether there is "probable cause to believe" that a FECA

violation has occurred. *Id.* § 30109(a)(2), (4). If probable cause is found, the Commission is required to attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, FECA provides that the agency "may" institute a *de novo* civil enforcement action. *Id.* § 30109(a)(6)(A). At each stage, the affirmative vote of at least four Commissioners is required for the agency to proceed. *Id.* § 30109(a)(2), (a)(4)(A)(i), (a)(6)(A).

If the Commission dismisses the complaint, FECA provides a cause of action for "aggrieved" administrative complainants to seek judicial review. *Id.* § 30109(a)(8)(A); *Commission on Hope*, 892 F.3d at 438. In instances where a dismissal results from a split vote, the "Commissioners who voted to dismiss" "constitute a controlling group," since "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) (discussing *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133-35 (D.C. Cir. 1987) ("*DCCC*")).

If a court finds a reviewable dismissal decision to be "contrary to law," the court can "direct the Commission to conform" with its ruling "within 30 days." 52 U.S.C. § 30109(a)(8)(C). If, and only if, the Commission fails to conform, the complainant may bring "a civil action to remedy the violation involved in the

original [administrative] complaint." *Id.*

B. FECA's Straw Donor Prohibition and Political Committee Requirements

FECA provides: "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." *Id.* § 30122. It thus prohibits the "true source" of a contribution from concealing its identity by making the contribution through a pass through, or what is commonly known as a "straw donor" — *i.e.*, a concealed intermediary or conduit. *United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010). A "contribution," in turn, is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i).

FECA also imposes distinct disclosure requirements on organizations qualifying as "political committees." *Id.* §§ 30103, 30104(a)-(b). An organization is a "political committee" only if (a) the group crosses the $1,000 threshold of contributions or expenditures, and (b) has as its "major purpose" the nomination or election of federal candidates. *Id.* §§ 30101(4)(A), 30101(8)(A)(i), (9)(A)(i); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

II. FACTUAL BACKGROUND

A. Administrative Participants and Proceedings

Campaign Legal Center is a nonpartisan, nonprofit organization whose mission includes the "proper implementation and enforcement" of "campaign finance reform" and "educating the public regarding the persons and entities funding political communications." (J.A.12; *Campaign Legal Ctr. v. FEC*, No. 16-cv-752 (D.D.C.), Dkt. 18-1 ¶¶ 4, 9 (Aug. 2, 2016).) Democracy 21 is similarly a nonpartisan, nonprofit organization whose work includes "efforts to help ensure that campaign finance laws are properly enforced and implemented" and publication of a "Political Money Report." (*Id.* at Dkt. 18-2 ¶¶ 2-3.)

Three of Complainants' administrative matters are on appeal. *See infra* pp. 15-16.

1. F8 and Eli Publishing

Eli Publishing, L.C. is a limited liability company founded in 1997 by Steven Lund "for the purpose of publishing a range of specialty books." (J.A.150 (internal quotation marks omitted).) Although it had only published one book, publicly available information indicated it was a going concern. (J.A.110, 150.)

F8 LLC was formed in 2008 with a self-described "commercial" purpose. (J.A.150.) F8 listed two managers who were reportedly connected to Lund by family and/or business relationships. (J.A.110-11, 150 n.19.)

A registered super PAC, Restore Our Future, Inc., disclosed that it received two $1 million contributions in March 2011 from F8 and Eli Publishing, respectively. (J.A.85, 150 & n.20.) A television news show later stated that neither company appeared to do "substantial business" (J.A.85, 179); and that Lund had purportedly told the reporter that he was "not trying to hide the donation," and "made it through a corporation he created . . . years ago because donating through a corporation has accounting advantages" (J.A.112 (internal quotation marks and emphasis omitted)). He also purportedly said that "he made the contribution through Eli Publishing because he did not want to be real public about being a part of the campaign." (J.A.128 (internal quotation marks and emphasis omitted).)

Complainants filed two administrative complaints, alleging that F8 and Eli Publishing were straw donors and "the person(s) who created, operated and/or contributed to F8" and Lund, respectively, were the true sources of the contributions in violation of section 30122, and that the corporate entities violated FECA's political committee requirements. (J.A.84, 90, 184.)

The FEC's Office of the General Counsel ("OGC") recommended that the Commission find reason to believe that F8, Eli Publishing, Lund, and "Unknown Respondents" violated section 30122, and to take no action at that time regarding the political committee allegations. (J.A.122-23.)

2. Specialty Investment Group and Kingston Pike

In September 2012, William Rose, Jr. formed Specialty Investment Group Inc. and its subsidiary, Kingston Pike Development LLC. (J.A.151.) Rose represented that he caused the two entities to be "'formed for the purpose of engaging in the real estate business,'" and that they had "'purchased, offered to purchase, and/or negotiated real estate investments valued at over $50 million.'" (J.A.151 & n.26 (quoting J.A.218).) The entities were administratively dissolved in August 2013. (J.A.253.)

A registered super PAC, FreedomWorks for America, disclosed that it received contributions from these entities, totaling $10,575,000 and $1,500,000, respectively, during October 2012. (J.A.219, 252, 255.)

Based on press reports, Complainants filed an administrative complaint alleging that Specialty Group and Kingston Pike were straw donors, and that "any person(s) who created, operated and made contributions" to these entities and/or Rose were the true source(s) of the contributions in violation of section 30122, and that the corporate entities violated FECA's political committee requirements. (J.A.194-95.)

After additional press, Complainants amended their complaint, stating that Richard Stephenson was the true source of the contributions; Rose and unnamed other individuals may have knowingly permitted the companies' names to be used

for these alleged straw donor contributions; and that FreedomWorks and Adam Brandon knowingly accepted these contributions in violation of section 30122. (J.A.206-12, 224-29.)

OGC recommended that the Commission find reason to believe that Stephenson, Rose, Specialty Group, Kingston Pike, FreedomWorks, and Brandon violated section 30122, and to take no action at that time with respect to the political committee allegations. (J.A.268.)

B. The Dismissals

In February 2016, the Commission, by a vote of 3-3, did not find reason to believe that the respondents violated section 30122. (J.A.138-39, 399-400.) Commissioners Petersen, Hunter, and Goodman voted against finding reason to believe, while Commissioners Walther, Ravel, and Weintraub voted for finding reason to believe. (*Id.*) The Commission then voted 6-0 to close its file, thereby dismissing the complaints. (*Id.*)

In a consolidated statement of reasons, Commissioners Petersen, Hunter, and Goodman explained their vote, which they later supplemented. (J.A.147-61, 173-76.) Commissioners Walther, Ravel, and Weintraub also issued a statement explaining their votes, which Commissioners Ravel and Weintraub later supplemented. (J.A.163-67, 169-71.)

Because Commissioners Petersen, Hunter, and Goodman voted against

finding reason to believe, they constitute the "controlling group." They determined that the matters were appropriately addressed under the straw-donor prohibition, not the political committee provisions. (J.A.152 n.36.) The controlling Commissioners explained that *Citizens United* and its progeny led to corporations being able to make unlimited contributions to a new type of entity, an independent-expenditure-only political action committee or "super PAC." (J.A.147-49 & n.1, 152-57.)

Until recently, they noted, "corporations could not make *any* contributions." J.A.153; *see also* 52 U.S.C. § 30118(a). Thus, while section 30122 referenced "person" and FECA generally defined the term to include corporations, in the pre-*Citizens United* era, "the Commission ha[d] never addressed the inverse of the conventional corporate straw-donor scheme" in which a closely held corporation or corporate LLC is alleged to be the straw donor. (J.A.153.)

The controlling Commissioners found that "Congress likely did not contemplate that corporations could violate the prohibition against giving in the name of another by acting as straw donors for contributions." (J.A.155.) Interpreting FECA in light of section 30122's language and purpose, they nevertheless concluded that closely held corporations and corporate LLCs could be unlawful straw donors. (J.A.154, 164.)

The controlling group, however, decided to exercise their prosecutorial

discretion due to a number of considerations. (J.A.148-49, 159 n.69, 160 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985), repeatedly).) *First*, they found that the agency had never before applied section 30122 when neither FECA's contribution limits nor its source prohibitions came into play. (J.A.148, 155.) Prior cases typically involved (a) an individual serving as a straw donor for a prohibited source, such as a corporation or federal contractor, or (b) an individual serving as a straw donor for another individual whose total contributions exceeded FECA's limits. (J.A.153, 155 & nn.42, 51.)

Second, "[e]ven more significant," the controlling Commissioners considered prior agency precedent where, even though a shareholder in a closely held corporation stated that he or she was the source of the funds at issue, the Commission nonetheless deemed the funds to be from the corporation. (J.A.155-56.) They discussed *FEC v. Kalogianis*, for example, a case where a campaign committee disclosed loans from closely held corporations owned by the candidate. No. 8:06-cv-68-T-23EAJ, 2007 WL 4247795, at *2 (M.D. Fla. Nov. 30, 2007). In response to the Commission's notification that corporate contributions were prohibited, the committee amended its disclosures to reflect that, although some of the funds for the loans may have technically come from the closely held corporations, the candidate was the source of the loans. *Id.* at *3. In agreement with the FEC, the court found that "'precedent preclude[d]'" the defendants'

argument that "'a contribution of corporate money by the sole shareholder of a corporation and a contribution by the shareholder of the shareholder's money warrant equivalent treatment because in each instance the contribution is necessarily the shareholder's money.'" (J.A.155-56 & n.54 (quoting *Kalogianis*, 2007 WL 4247795, at *4).)

Third, the controlling Commissioners observed that FEC regulations provide that a contribution from a corporate LLC is attributed to the corporate entity, not its owners. (J.A.157 (discussing 11 C.F.R. § 110.1(g)).) While contributions from certain types of LLCs are attributed to their owners, the Commission rejected a proposal attributing contributions from corporate LLCs to their owners. (*Id.*)

Fourth, after concluding that this was a case of first impression and that OGC's proposed standard had evolved over several matters, the controlling group reasoned that they needed "to set standards and draw lines distinguishing permissible versus proscribed conduct." (J.A.148, 152-54 & n.50.) They concluded that an inquiry into the purpose of a contribution was necessary. Given that such corporate entities ordinarily act only at the direction of their owner/member, they feared that otherwise any contribution by a closely held corporation or single-member corporate LLC could presumptively be deemed an unlawful conduit contribution. (J.A.152-54 & nn.46-48, 175.)

With the understanding that such corporate entities are entitled to make

unlimited contributions to super PACs as a matter of constitutional law, and so to "avoid[]constitutional doubt," the controlling Commissioners announced their view that, "when enforcing section 30122 in similar future matters, the proper focus will be on 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." (J.A.158-59.) In the absence of direct evidence of this purpose, they would consider evidence that a corporate entity is a straw donor, such as "evidence indicating 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." (J.A.158.) The controlling Commissioners thus "used the present matters to announce a governing interpretation to put the public on notice of the conduct that constitutes a violation of the Act." (J.A.173.)

At the same time, they concluded that it had been unclear whether and under what circumstances a contribution made by a closely held corporation or corporate LLC to a super PAC should be attributed to the entity's owner as the "true contributor" rather than the entity itself. (J.A.153-54, 157, 159.) Without "adequate notice of section 30122's application to closely held corporations and corporate LLCs or the proper standards for its application," the controlling group concluded that it would be "manifestly unfair" to pursue enforcement against

respondents. (J.A.154; *see also* J.A.158.)

Fifth, the controlling Commissioners considered that "'[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.'" (J.A.159-60 (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).) In cases that risk chilling First Amendment speech, such as the pending matters, they wrote that "[t]his concern is particularly acute" and worried that proceeding would "create due process concerns." (J.A.160 & n.72 (collecting cases).)

Sixth, the controlling group noted "the numerous legal and constitutional concerns" in the present matters, and that "the prudent and preferred course is to avoid such issues." (J.A.159 n.69.) Citing and quoting *Chaney* extensively, as well as citing several other cases recognizing prosecutorial discretion, they explained they had the discretion to dismiss this case and were exercising it. (J.A.159 n.69.)

The controlling group noted the option to find reason-to-believe while simultaneously dismissing the matters without imposing civil penalties, but found that the "Commission abandoned that procedure years ago." (J.A.174 & n.6.)

III. DISTRICT COURT PROCEEDINGS

Complainants filed suit challenging the dismissal of five administrative complaints as contrary to law. (J.A.9-30.) F8, Eli Publishing, and Lund

intervened. (J.A.4.) After dismissing two of the matters for lack of standing (J.A.31, 38-40), the district court granted judgment for the Commission as to the three remaining matters shortly before this Court issued *Commission on Hope* (J.A.428).

The court determined that the controlling group's reasoning, specifically, its "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," demonstrated a rational basis for exercising prosecutorial discretion, and thus concluded that the dismissals were not contrary to law. (J.A.417-18.) It found that "whether, and under what circumstances, a closely held corporation or corporate LLC may be considered a straw donor was an issue of first impression" (J.A.418); "[i]n the post-*Citizens United* context, the Commission's existing regulations and precedent were less than helpful" (*id.*); and "[i]n fact, even sophisticated lawyers were confused" (J.A.419). The court accordingly credited the controlling group's concerns about notice and due process, and agreed that such "concerns carry special weight" when constitutionally protected speech is at issue. (J.A.423.) Recognizing that the controlling group had weighed all of the various First Amendment interests involved, the court concluded that the group's decision was not only rational, but also "an able attempt to balance the competing values that lie at the heart of

campaign finance law." (J.A.424.)

The court also rejected Complainants' challenge to the controlling group's announced purpose-based approach for future matters as "not even close to being ripe." (J.A.426.)

SUMMARY OF THE ARGUMENT

Complainants' appeal fails at the outset for two reasons. First, Complainants lack standing. They seek to invoke this Court's jurisdiction solely on the basis of informational standing. A long line of cases from the Supreme Court and this Court establish that, for a complainant to establish a concrete and particularized injury from the dismissal of an administrative complaint under FECA, 52 U.S.C. § 30109(a)(8)(A), the complainant must demonstrate both that they are legally entitled to disclosure of the withheld information and that this information would be useful to the complainant or the complainant's members when voting. Complainants, which are non-membership, nonpartisan nonprofit organizations that cannot vote have not, and cannot, establish that they have sustained such a concrete and particularized injury.

Second, even if appellants had standing, this Court's recent decision in *Commission on Hope* establishes that the controlling Commissioners' decision, based expressly and repeatedly on prosecutorial discretion, is not subject to judicial review. In trying to evade *Commission on Hope,* Complainants seek to cast this

case as something it is not, one based entirely on constructions of FECA. But as Complainants themselves argued below, "the Commission's decision did not turn on its interpretation of the Act's terms." (J.A.415.) Rather, the controlling group explained that, because "the question whether closely held corporations and corporate LLCs may be straw donors under section 30122 is one of first impression, and because past Commission decisions regarding funds deposited into corporate accounts may be confusing in light of recent legal developments, principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm." (J.A.148.) These abstract concerns about notice, due process, and clarity of administration are general agency considerations, not attempts at interpreting FECA to delineate its bounds.

Complainants' attempts to recast *Commission on Hope* as making reviewable any decision involving any legal interpretation, even about considerations expressly referenced in *Chaney* as being discretionary, should be rejected. The controlling Commissioners' approach, sensitive to the First Amendment area in which the FEC operates, should be sustained as an unreviewable exercise of prosecutorial discretion. *Cf. Buckley*, 424 U.S. at 40-43 (explaining that stricter standards of notice apply to regulation of speech).

Should this Court nonetheless reach the merits, the district court correctly

held that the controlling group's decision was reasonable. Complainants' challenge to that decision's announced standard for future matters, which was not applied here, is not ripe, and regardless is also reasonable.

Accordingly, the district court's decision should be affirmed.

ARGUMENT

I. COMPLAINANTS LACK STANDING

A. Standard of Review

This Court "has an independent obligation to assure that standing exists[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). 52 U.S.C. § 30109(a)(8)(A) "does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) ("*Common Cause I*"). To establish standing, appellants must demonstrate: (1) injury in fact, *i.e.*, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

B. Appellants Have Not Established Informational Standing

Appellants assert only an informational injury.[1] (D.C. Cir. R. 28(a)(7);

[1] Appellants have abandoned organizational standing, an alternative ground unaddressed below. *Am. Trucking Assocs. v. Fed. Motor Carrier Safety Admin.*,

Br. (Doc. 1797230) at 2.) To allege an injury that is concrete and particularized for informational standing under FECA, litigants must establish not only that they have failed to obtain information that must be publicly disclosed by statute, but also that "the disclosure they seek is related to their informed participation in the political process." *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013); *see also Common Cause I*, 108 F.3d at 418 (administrative complainant suing must show that the information it seeks "is *both* useful in voting *and* required by Congress to be disclosed" (emphasis added)).

Section 30122 does not itself require public reporting of any information. *CREW v. FEC*, 267 F. Supp. 3d 50, 54 (D.D.C. 2017) ("*Murray Energy*"). Though much of the potential information regarding the transactions at issue that could be required to be disclosed is already public, there is a possibility that, if Complainants' political committee allegations were investigated, it could turn out that additional persons had supplied funding and could be identified. (*See* J.A.40-41.) Even assuming that possibility is sufficiently actual rather than conjectural, however, information about which additional persons may have contributed to Eli Publishing, F8, Specialty Group, and Kingston Pike in 2011-12 would not further Complainants' participation in the political process because they do not vote or

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724 F.3d 243, 247 (D.C. Cir. 2013) (finding that public interest group petitioners had "abandoned any claim to associational standing"); J.A.42.

otherwise involve themselves in electoral efforts.

Nonprofits that cannot vote, have no members who vote, and cannot (Campaign Legal Center, a 501(c)(3)) or do not (Democracy 21, a 501(c)(4)) engage in partisan political activity do not suffer a particular injury. *See CREW v. FEC*, 475 F.3d 337, 339 (D.C. Cir. 2007) ("*Americans for Tax Reform*"). Complainants merely seek disclosure "to promote law enforcement," *i.e.* "to force the [Commission] to 'get the bad guys,'" an injury that is neither sufficiently concrete nor particularized to confer standing. *Nader*, 725 F.3d at 229-30. Lacking a role in voting and disclaiming any intent to be involved in electoral campaigns, there is "reason to doubt" Complainants' claim that the information sought would help them in any way related to voting. *See FEC v. Akins*, 524 U.S. 11, 20-25 (1998). This analysis derives from the concrete and particularized requirements of Article III injury-in-fact, not the separate "zone of interests" test, as the district court feared. (*Id.* at 20; J.A.43.)

There is an extensive line of lower court decisions implementing this Court's requirement for personal voting or political participation for plaintiffs to possess informational injury under FECA. *Alliance for Democracy v. FEC*, 335 F. Supp. 2d 39, 48 (D.D.C. 2004) (finding that value of mailing list would have no concrete effect on plaintiffs' voting); *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138 (D.D.C. 2005) (same); *Judicial Watch v. FEC*, 293 F. Supp. 2d 41, 46 (D.D.C.

2003) (same); *CREW v. FEC*, 401 F. Supp. 2d 115, 121 (D.D.C. 2005) (noting that information about the value of a list could not have been useful to the plaintiff in voting), *aff'd*, *Americans for Tax Reform*, 475 F.3d 337; *Murray Energy*, 267 F. Supp. 3d at 54-55 (holding that information sought would not be used to evaluate candidates or causes and that publicizing violations constituted an insufficient interest in seeing the law obeyed).

The district court here, in contrast, concluded that Circuit precedent interpreting other statutes indicated that plaintiffs need not demonstrate that the information they seek would be useful in voting. (J.A.44.) This Court already addressed the issue under FECA in *Nader*, 725 F.3d at 230, *Americans for Tax Reform*, 475 F.3d at 339-41, and *Common Cause I*, 108 F.3d at 418: The sought information must be useful in voting and related to the informed participation of the plaintiff in the political process.

Moreover, *Nader* postdates two of the three cases on which the district court relies and is reinforced in the third, later case. *See* J.A.44; *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (comparing *Nader* with cases involving plaintiffs who suffered concrete and particular injuries). And the plaintiffs in the two principal cases cited by the district court participated directly in the regimes covered by the mandated disclosures and suffered the harm Congress sought to avoid. *See Ethyl Corp. v. EPA*, 306 F.3d 1144, 1146 (D.C. Cir. 2002)

(manufacturer of fuel additives unable to improve products' emissions performance when new motor vehicle emissions tests not publicized); *Friends of Animals v. Jewell*, 824 F.3d 1033, 1037, 1041-42 (D.C. Cir. 2016) (membership group that exercised statutory right to participate in permit exception hearings for three endangered antelope species would be harmed if materials were no longer disclosed). In *American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, the third case cited, the reporting requirements were "secondary" in that case because the organization sued to enforce a separate provision that did not require disclosure even if plaintiffs prevailed. 659 F.3d 13, 24 (D.C. Cir. 2011).

Finally, appellants cannot rely upon a derivative harm based on their alleged inability to help others who *are* participants in the political process obtain information that those individuals may use in voting, as those individuals remain free to file their own administrative complaints. "[T]o withstand the rigors of Article III, an injury in fact must be suffered by the plaintiff or the plaintiff's members; one cannot piggyback on the injuries of wholly unaffiliated parties." *CREW*, 401 F. Supp. 2d at 121; *see also Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998).

Accordingly, the district court's judgment should be affirmed because appellants lack standing.

II. THE DISMISSAL BASED ON PROSECUTORIAL DISCRETION IS NOT JUDICIALLY REVIEWABLE

A. Standard of Review

This Court reviews district court orders granting summary judgment *de novo*, and may affirm on any ground. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005); *Jenkins v. Wash. Convention Ctr.*, 236 F.3d 6, 8 n.3 (D.C. Cir. 2001).

B. Judicial Review Is Not Available Here

This Court recently held: "[F]ederal administrative agencies in general and the Federal Election Commission in particular have unreviewable prosecutorial discretion to determine whether to bring an enforcement action." *Commission on Hope*, 892 F.3d at 438 (citing *Chaney*, 470 U.S. at 831, and *Akins*, 524 U.S. at 25). That determination is dispositive here.

In *Commission on Hope*, as here, fewer than four Commissioners voted to pursue enforcement, and the Commission thus dismissed the underlying matters. 892 F.3d at 437; J.A.138-39, 399-400. The controlling group there "placed their judgment squarely on the ground of prosecutorial discretion." 892 F.3d at 439. Any fair reading of the decision here — which expressly and repeatedly invokes prosecutorial discretion — demonstrates that the basis of the decision was prosecutorial discretion. (J.A.148-49 ("[W]e concluded that [these matters] should be dismissed in an exercise of . . . prosecutorial discretion[.]"); J.A.159 n.69, 160.) The controlling Commissioners explained that their decision was predicated on a

discretionary judgment about the value and risks of proceeding, not a merits determination regarding whether the subject conduct was prohibited by FECA.

Complainants spend a significant portion of their brief arguing that *Commission on Hope* was incorrectly decided (*e.g.*, Br. at 18, 26-29, 34-37), and the amici the entirety of their brief so arguing (Doc. 1798277), but acknowledge that this panel cannot overrule precedent. (Br. at 26 (quoting *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).)

None of the authorities Complainants cite conflict with the Court's opinion, as those cases did not review a dismissal decision based on prosecutorial discretion. (Br. at 27-28 (citing *Akins*, 524 U.S. at 18 (considering whether complainant had standing to challenge a "no reason to believe" dismissal based entirely on an interpretation of FECA); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (reviewing a challenge to a Commission rule); *DCCC*, 831 F.2d at 1131).) In *DCCC*, for example, this Court considered an unexplained dismissal from a split vote, finding that the mere fact that such a vote occurred did not necessarily mean that the Commission intended to invoke its prosecutorial discretion. 831 F.2d at 1133-35. Although *DCCC* "presum[ed]" that a properly explained decision invoking prosecutorial discretion would be reviewable, it did not definitively conclude that was the case. *Id.*; *see also id.* at 1135 n.5 ("arguendo, assuming reviewability"). *DCCC* merely determined that Commission

dismissals are "reviewable" in the sense that they must be sufficiently explained so courts can discern the agency's path. *Id.* at 1134. *Commission on Hope* is consistent with that holding.

C. *Commission on Hope* Is Not Distinguishable

1. The Dismissal Was Based on Prosecutorial Discretion

As the district court correctly found, the entire basis of the controlling group's decision was prosecutorial discretion. (J.A.148-49, 159 n.69, 160, 416.) Repeatedly citing *Chaney*, the controlling Commissioners explained that their decision arose from their discretionary judgment weighing the clarity of the notice given and the fairness of proceeding in a First Amendment-sensitive area with a heightened requirement for advance clarity. (J.A.149 n.4, 159 n.69, 160 n. 74.) They also considered "the numerous legal and constitutional concerns" that this case presented and that their "preferred course" was to avoid "provok[ing] legal and constitutional controversies," and were cognizant of the public interest in disclosure. (J.A.148, 158, 159 n.70.)

Complainants nonetheless assert that the controlling Commissioners did not actually exercise prosecutorial discretion because they did not use certain words.[2]

[2] Complainants misrepresent the record when stating that the FEC has not argued that the decision "rest[ed] on any actual discretionary considerations." (*Compare* Br. at 23, *with, e.g.*, *Campaign Legal Ctr. v. FEC*, No. 16-cv-752 (D.D.C.), Dkt. 41 at 3-6 (Nov. 9, 2017).)

(*E.g.*, Br. at 14, 23-26.) When explaining why agency exercises of prosecutorial discretion are unreviewable, some of the reasons the Supreme Court cited were that "the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, [and] whether the particular enforcement action requested best fits the agency's overall policies." *Chaney*, 470 U.S. at 831. But neither *Chaney* nor *Commission on Hope* require the FEC to use any particular words to invoke prosecutorial discretion. To the contrary, *Chaney* stated: "We of course only list the above concerns to facilitate understanding of our conclusion that an agency's decision not to take enforcement action should be presumed immune from judicial review." *Id.* at 832; *see also id.* at 831-32 (holding that "[t]he agency is far better equipped than the courts to deal with the *many variables* involved in the proper ordering of its priorities" (emphasis added)).

Moreover, as the district court found, the controlling Commissioners did consider the *Chaney* factors, even if their statement did not recite all the precise buzzwords Complainants would demand. (J.A.416.) Complainants incorrectly assert that the controlling group "did not address the significance or severity of the alleged violations," or "consider the potential effects of letting the violations go unchecked." (Br. at 25.) The controlling group explained that, "[o]f the many issues resulting from [*Citizens United*]," determining how to apply FECA and

Commission regulations to the types of contributions here was "amongst the most difficult," and it thus "was necessary to examine a sufficient number of factual scenarios to ensure a sound application of the Act and to provide clear public guidance on the appropriate standard that we will apply in future matters." (J.A.147, 148; *see also* J.A.174.)

They found the nature of the alleged violations significant for several reasons, including that, unlike in pre-*Citizens United* matters, unlimited contributions from corporations to super PACs were constitutionally protected. (J.A.155, 158 n.68, 160.) Explaining the need "to set standards and draw lines between permissible versus proscribed conduct," and that "discussions within the Commission . . . indicated notice and comment rulemaking would not be constructive," the controlling Commissioners prioritized using these enforcement matters arising out of the first presidential cycle following *Citizens United* to provide notice to guide future conduct. (J.A.147 n.1, 148, 154-55 n.50, 173, 174.) They prioritized acting cautiously when regulating in this area of important fundamental rights, noting that enforcement could entail "numerous legal and constitutional concerns," and quoting *Chaney*'s admonition that agencies must assess "'not only whether a violation has occurred,'" but also "'whether the agency is likely to succeed if it acts.'" (J.A.148, 159 n.69, 160 & n.72 (quoting *Chaney*, 470 U.S. at 831).) The cited "legal and constitutional concerns" of due process,

notice, and lack of clarity in a First Amendment setting are relevant to likelihood of success because they can prevent a finding of a violation as *Fox*, 567 U.S. 239, on which they repeatedly relied, demonstrates. *Id.* at 256-58; J.A.148-49 n.3, 159-60 & nn.71-72.

Complainants note that the dismissals were not under the FEC's Enforcement Priority System (Br. at 25 n.2), but that system does not limit the Commission's dismissal authority. Regardless, the controlling group conducted a similar analysis, examining "the gravity of the alleged violation" (J.A.155, 158 n.68, 160), "the complexity of the legal issues raised" (J.A.155-60), and "recent trends in potential violations and other developments of the law" (*e.g.*, J.A.155).

While Complainants belabor the controlling group's purported failure to state that it considered the agency's limited resources when making its decision (*e.g.*, Br. at 14, 23, 25), they fail to explain why even unlimited resources would require Commissioners to pursue a case that they determined was otherwise unfair or unjust case in an area of protected fundamental rights.

Importantly, declining to pursue an enforcement action so as "[t]o ameliorate a harsh and unjust outcome" is itself an "exercise in administrative discretion." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (internal quotation marks omitted); J.A.148, 154, 158, 160. Of course, the fundamental fairness of pursuing charges is a proper, discretionary consideration for any official

charged with enforcing the law. As then-Attorney General, later Supreme Court Justice Robert Jackson said: "Your positions [as prosecutors] are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just." Robert H. Jackson, *The Federal Prosecutor* (Apr. 1, 1940).[3] And taking constitutional interests into account fulfills the FEC's "unique mandate" that comes with having the purpose of regulating "core constitutionally protected activity." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) ("*Van Hollen II*").

Pursuing an enforcement matter that three Commissioners believe to be unfair, as Complainants seek, would be contrary to how Congress designed the FEC to work. With the four-vote requirement, Congress was generally guarding *against* the risk of partisan or ill-considered use of enforcement powers. *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015); *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) (explaining that "unlike other agencies — where deadlocks are rather atypical — [the Commission] will regularly deadlock as part of its *modus operandi*"). Congress did not seek to have split votes routinely serve as springboards to the very limited private rights of action potentially available, as Complainants contend.

[3] Available at https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/.

(*Compare* Br. at 35-36, *with* 52 U.S.C. § 30109(a)(8)(A) (limiting private right to only when the Commission does not conform).)

Finally, the controlling group exercised its prosecutorial discretion by limiting its reasoning to matters involving conduct that arose before the instant statement provided notice to the public. (J.A.148, 154 n.50, 155, 158, 173.) Announcing a new legal principle prospectively only is a well-established practice. *See, e.g.*, *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932) (Cardozo, J.) (discussing court discretion to choose between "forward operation" and "relation backward"). The Commission has since continued to pursue disclosure and liability in similar matters. *E.g.*, *Doe v. FEC*, 920 F.3d 866, 868 (D.C. Cir. 2019); Matter Under Review ("MUR") 6920, https://www.fec.gov/files/legal/murs/6920/17044434756.pdf; MUR 7247, https://www.fec.gov/files/legal/murs/7247/17044430333.pdf; MURs 7005 & 7056, https://www.fec.gov/files/legal/murs/7005/17044424178.pdf. And the dismissal of some similar matters involving conduct prior to the decision here is consistent with the controlling Commissioners' rationale. (Br. at 44 n.7) By considering each case individually and pursuing similar straw donor claims where appropriate, the Commission operates as *Chaney* intended.

Even where, unlike here, an FEC decision is "of less than ideal clarity," *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990), "[i]t is enough that a

reviewing court can reasonably discern the agency's analytical path," *Van Hollen II*, 811 F.3d at 496-97. The controlling Commissioners' exercise of prosecutorial discretion can be readily discerned, so *Commission on Hope* applies.

2. The Reasons for Exercising Prosecutorial Discretion Are Not Reviewable

Complainants assert that they can nonetheless challenge the reasons underpinning the decision to exercise prosecutorial discretion. *Commission on Hope*, however, expressly considered and rejected this argument.

Since neither FECA nor the Administrative Procedure Act provide a meaningful standard to judge the Commission's exercise of prosecutorial discretion, a complaint dismissed on this basis cannot be "contrary to law" or "not in accordance with the law" because there simply is no "law to apply." *Commission on Hope*, 892 F.3d at 440, 446. Rather, "[i]n such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment *absolutely*." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Chaney*, 470 U.S. at 830) (emphasis added).

As this Court reasoned, "'if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Commission on Hope*, 892 F.3d at 441 (quoting *Chaney*, 470 U.S. at 830). Accordingly, regarding prosecutorial discretion, the complainant "is not entitled to have the court evaluate

for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id*.

As *Commission on Hope* demonstrates, this principle extends to legal determinations underpinning the controlling group's decision to exercise prosecutorial discretion. For example, one of the primary bases for the controlling Commissioners' decision to exercise prosecutorial discretion there was that certain violations were, or shortly would be, time barred. *CREW v. FEC*, 236 F. Supp. 3d 378, 389, 392 (D.D.C. 2017). Whether those violations would actually be time barred due to an exception to the statute of limitations, such as whether the statute of limitations bars equitable relief or is tolled for a purported ongoing FECA violation, presented legal questions that courts were capable of resolving. *See id.* at 392. Similarly, this Court could have resolved whether the political-committee issues raised, such as how to treat vendor commissions or other general payments to officers and directors when determining an organization's major purpose, were "novel legal issues." *Id.* at 393-94. Yet this Court held that such questions were not subject to judicial review for abuse of discretion or otherwise. *Commission on Hope*, 892 F.2d at 440-42.

Like appellants here, the dissent "read the Commissioners as having dismissed the case based on a legally erroneous view of the law." *Id.* at 444 (Pillard, J., dissenting). Specifically, Judge Pillard "believe[d] that it is evident

from the Controlling Commissioners' finding and reasoning that their dismissal of [this] case depended materially on an erroneous legal view of the organization's political-committee status," so she argued that judicial review was available. *Id.* at 443.

The *Commission on Hope* majority, however, found that "[t]he law of this circuit rejects the notion of carving reviewable legal rulings out from the middle of non-reviewable actions." *Id.* at 442. This Court thus concluded that, "even if some statutory interpretation could be teased out of the controlling Commissioners' statement of reasons," judicial review was still unavailable. *Id.* at 441-42.

3. The Dismissals Were Not Based Entirely on Interpretations of FECA

While *Commission on Hope* recognized that an FEC dismissal "based *entirely* on its interpretation of the statute" would be judicially reviewable,[4] *id.* at 441 n.11 (emphasis added), Complainants' attempt to cram the controlling Commissioners' rationale into this category fails.

Dismissals are generally explained as occurring either for: (1) a

[4] *Commission on Hope* noted that *Chaney* "left open the possibility that an agency nonenforcement decision may be reviewed if the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," 892 F.3d at 440 n.9 (internal quotation marks omitted), but Complainants have forfeited this argument on appeal, *Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015).

determination that there is no reason or no probable cause to believe that FECA was violated; or (2) even if FECA was potentially violated, as an exercise of prosecutorial discretion. *Id.* *Commission on Hope* recognized that the first category may be reviewed for whether the dismissal was "contrary to law." *Id.* (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981) (reviewing an FEC decision finding "no reason to believe")); *see also Hagelin v. FEC*, 411 F.3d 237, 240 (D.C. Cir. 2005) (same). This Court found that *Akins* illustrated this distinction. 892 F.3d at 438 n.6, 441 n.11. In *Akins*, the Commission found no probable cause to believe regarding the complainant's first claim for violation of political committee requirements, but exercised its prosecutorial discretion for the second claim for prohibited corporate contributions. *Id.* at 438 n.6 (citing *Akins*, 524 U.S. at 25; *Akins v. FEC*, 736 F. Supp. 2d 9, 13-15 (D.D.C. 2010)). This Court noted that the first claim — which was the only one considered by the Supreme Court — was agency action "based entirely on its interpretation of the statute" and thus judicially reviewable. *Id.* at 441 n.11.

Here, the dismissals were *not* based on a finding that there was "no reason to believe" that respondents violated FECA. (J.A.148-49, 159 n.70; Br. at 13.) To the contrary, the controlling Commissioners recognized that the respondents' "conduct could potentially violate section 30122." (J.A.157.) And they declined to determine — one way or the other — whether there was reason to believe

respondents violated the law. (J.A.417.) As the district court found, and Complainants admitted below, "the Commission's decision did not turn on its interpretation of the Act's terms." (J.A.415-16.)

Complainants misleadingly characterize certain of the controlling Commissioners' statements to argue otherwise. (Br. at 22-23.) For example, the controlling group noted that its prospective standard "was '*dictated* by the plain text of the Act, court decisions, forty years of Commission practice, and common sense,'" not the dismissal decision. (Br. at 23 (quoting J.A.174).) And the same is true for the other statement Complainants quote. (Br. at 22 (quoting J.A.158).) Further, the controlling Commissioners explained that they dismissed due to a lack of *any* clear prior standard for assessing respondents' liability — not their particular standard. (*Compare* Br. at 30, *with* J.A.154-57.)

While the dismissals were animated by the controlling group's concerns about "principles of due process, fair notice, and First Amendment clarity" (J.A.148; *see also* J.A.159-60), even under a conventional *Chevron* analysis, courts give deference to FEC decisions interpreting FECA in light of constitutional considerations and implementing judicial precedent. *E.g.*, *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) ("*Common Cause II*"). In *Van Hollen II*, for example, this Court applied *Chevron* deference to the FEC's new regulation which "implement[ed]" a recent Supreme Court case and where the Commission's

rationale took into consideration constitutional concerns. 811 F.3d at 491; *cf. AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003) ("[T]he Commission must attempt to avoid unnecessarily infringing on First Amendment interests . . . ."). Indeed, rather than undercutting deference, this Court held that the FEC was under a "mandate" to tailor the regulation to satisfy constitutional interests. *Van Hollen II*, 811 F.3d at 491. Because "every action the FEC takes implicates fundamental rights," and it, like other agencies, is frequently tasked with implementing court decisions, the FEC would regularly be denied deference under Complainants' view. *Id.* This is not the case. *E.g.*, *id.*; *Common Cause II*, 842 F.2d at 448.

More fundamentally, Complainants' argument misconceives the relative domains of expertise of the FEC and the courts. FECA does not compel the Commission to pursue all potentially meritorious allegations of campaign finance violations. *Akins*, 524 U.S. at 25; *Americans for Tax Reform*, 475 F.3d at 340. Accordingly, while courts may have expertise in determining whether the FEC may proceed with an enforcement claim, the FEC determines whether the agency *should* pursue a particular enforcement claim. That latter determination is in the heartland of the FEC's expertise and regulatory authority. *Chaney*, 470 U.S. at 831-32.

The controlling Commissioners' acknowledgment that respondents may have violated FECA and determination that prudential factors weighed in favor of

dismissing these matters were a classic application of prosecutorial discretion.

4. The Political Committee Claims Were Dismissed as a Matter of Prosecutorial Discretion

Similarly unpersuasive is Complainants' argument that the controlling Commissioners did not dismiss as a matter of prosecutorial discretion Complainants' political committee claim. (Br. at 29-30; *see also id.* at 52-54.) All of the Commissioners, as well as OGC, recognized that the allegations required the Commission to first address the straw donor claim before reaching Complainants' alternative political committee claim. (J.A.120-21, 152 n.36, 163-67, 252, 267.)

To any extent that the controlling group's handling of the political committee allegations requires further explanation, they accepted OGC's recommendation, so it provides the agency's rationale. J.A.152 n.36; *Common Cause II*, 842 F.2d at 440-48. As OGC explained, "an entity can be a conduit or a political committee, but not both." (J.A.120.) Because a contribution is attributed to its "true source" and not the straw donor, a straw donor that has made no other contributions cannot constitute a political committee. (J.A.120-21.)

Indeed, it appears Complainants recognize that resolving their political committee claim would necessarily require first resolving their straw donor claim. By arguing that, "*if* respondent corporations were *not* conduits, *then* they may indeed have qualified as political committees," Complainants acknowledge that the Commission would have to first resolve whether the respondent corporations were

(or were not) mere conduits, *i.e.*, straw donors. (Br. at 54 (first and third emphases added).) Since the controlling Commissioners chose not to resolve the antecedent question for non-merits, discretionary reasons, Complainants' political committee claims were effectively also dismissed as a matter of prosecutorial discretion. (*See* J.A.152 n.36, 160.)

Accordingly, *Commission on Hope* applies and bars judicial review.

III. IN THE ALTERNATIVE, THE DISMISSAL WAS NOT CONTRARY TO LAW

A. Standard of Review

Dismissal of an administrative complaint cannot be disturbed unless it was "contrary to law," 52 U.S.C. § 30109(a)(8)(C), *i.e.*, based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

This standard simply requires that the Commission's decision was "sufficiently reasonable to be accepted." *Democratic Senatorial Campaign Comm.*, 454 U.S. at 37, 39. The decision need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.* Instead, the contrary-to-law standard is "extremely deferential" to the agency's decision and "requires

affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167.

B. The Dismissal Was Not Contrary to Law

In exercising prosecutorial discretion, the controlling Commissioners considered and weighed many different factors, *supra* pp. 10-15. No single factor was dispositive; rather, their decision was borne of them finding layers of potential uncertainty in an area of the law with a premium on certainty. (J.A.148.) Complainants' challenge to some of those factors does not demonstrate that, on the whole, the controlling Commissioners unreasonably exercised their prosecutorial discretion. As the district court held, the controlling Commissioners acted reasonably when taking due process and other constitutional and legal concerns into account. (J.A.424-25.)

1. There Was a Rational Basis for Finding that Respondents May Not Have Had Adequate Notice

Complainants' position turns upon a single, reductive proposition: Because section 30122 prohibits any "person" from making a straw donor contribution, and section 30101(11) defines "person" to include corporations, the straw-donor provision so clearly applied here that it was impermissible for the controlling Commissioners to elect not to prosecute respondents. This proposition of course ignores the previous prohibition on any corporate contributions.

Contrary to Complainants' representation, the controlling Commissioners did not find that the straw-donor provision is "clear and unambiguous." (Br. at

39.) Their finding that the language and purpose of FECA's straw-donor provision should make it applicable to closely held corporations and LLCs contributions to super PACs post-*Citizens United* does not make the concession Complainants suggest. (J.A.154, 164) The controlling group's conclusion was reasonable.

a. Citizens United *Warrants a Fresh Look*

The D.C. Circuit recently rejected an argument strikingly similar to Complainants' here. *Ctr. for Indiv. Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) ("*Van Hollen I*"). An FEC regulation required every "person" who funds "electioneering communications" to disclose "all contributors," and banned one class of "persons," corporations, from funding electioneering communications. 52 U.S.C. §§ 30104(f), 30118. In *FEC v. Wisconsin Right to Life, Inc.*, the Court struck down the financing prohibition. 551 U.S. 449, 465 (2007). The FEC thus was "left to decide how [the statute's] disclosure requirements should apply to a class of speakers Congress never expected would have anything to disclose." *Van Hollen II*, 811 F.3d at 490-91. The FEC construed the disclosure provision to apply to corporations differently than other "persons," and enacted a regulation requiring corporations to disclose contributions under a different standard. *Van Hollen I*, 694 F.3d at 111. This Court held that Congress did not have "an intention on the precise question at issue" because "it is doubtful that, in enacting [the statute], Congress even anticipated the circumstances that the FEC faced when it

promulgated [the regulation]." *Id.* (internal quotation marks omitted). In other words, this Court held that the same statutory definition of "person" to include corporations that Complainants rely on here was not dispositive with respect to how newly permitted corporate conduct would fit within the existing regulatory regime. *Id.* at 112; *see also Van Hollen II*, 811 F.3d at 491-92.

The same analysis applies here. It is reasonable to conclude that, regardless of the general statutory definition of "person," Congress may not have "an intention on the precise question at issue" because it is doubtful that, when enacting the straw donor provision, Congress anticipated corporations lawfully making contributions. *Van Hollen I*, 694 F.3d at 111; J.A.155, 418.

The unconstitutional vagueness cases Complainants cite do not demonstrate otherwise. (Br. at 39-40.) Those cases considered whether section 30122 encompassed straw donor violations *at all* and were distinguished by the controlling group as involving intermediaries who were individuals. *United States v. O'Donnell*, 608 F.3d 546, 548-49 (9th Cir. 2010); *United States v. Danielczyk*, 788 F. Supp. 2d 472, 478-79 (E.D. Va. 2011), *rev'd on other grounds*, 683 F.3d 611 (4th Cir. 2012); J.A.153 & nn.42, 43.

The controlling Commissioners also did not dispute the importance of disclosure requirements or the value of information required to be disclosed. (Br. at 40-42.) But the importance of the government's disclosure interest is not the

only interest to consider when determining to prosecute in a matter believed to be of first impression. *Cf. Buckley*, 424 U.S. at 40-43 (explaining that stricter standards of notice apply to regulation of speech). The FEC is not required to pursue every matter potentially vindicating a disclosure interest; the agency's prosecutorial discretion would be a nullity if that were the case.

b. Soft Money "Contributions" Are Irrelevant

Complainants' contention that corporations made contributions before *Citizens United* is incorrect. (Br. at 42 n.6.) As *McConnell v. FEC* explained, "soft money," which corporations could donate "to political parties for activities intended to influence state or location elections," does *not* include "hard money," *i.e.*, "'contributions,'" which are "'made by any person for the purpose of influencing any election for Federal office.'" 540 U.S. 93, 122 (2003), *overruled in part by Citizens United*, 558 U.S. 310 (quoting 52 U.S.C. § 30101(8)(A)(i)). Section 30122 is thus more clearly applicable to corporate contributions to federal super PACs after *Citizens United*. Indeed, one court held during the soft money era that section 30122 "applies only to hard money contributions." *United States v. Trie*, 23 F. Supp. 2d 55, 59 (D.D.C. 1998).

2. Even if Section 30122 Was Clear in the Abstract, It Was Rational to Find that It May Have Been Unclear as Applied

a. It Was Rational to Distinguish Corporate LLCs and Closely Held Corporations

The controlling Commissioners did not, as Complainants contend, find that due process would be violated any time FECA is applied to a new class of persons. (Br. at 44.) Rather, as the district court summarized, "the Commission's point was not that prior regulations and precedent *established* the point in favor of the alleged violators, but that they might have reasonably been confused." (J.A.421.)

In MUR 4313, for example, an individual wanted to buy television political advertisements. (J.A.156.) Rather than pay directly, he established a closely held corporation using solely his own personal funds. (MUR 4313 at 20, 32-34, https://www.fec.gov/files/legal/murs/4313/0000018F.pdf.) The individual had been advised that this "alter ego" arrangement was advantageous because the corporate form would offer "limited liability from suit by vendors and others." (*Id.* at 20.) The Commission held: "It has been the policy of the Commission that once a decision is made and carried out to conduct business using the corporate form, any funds taken from the corporation's accounts are to be deemed corporate in nature, whether or not they originated as, or could be converted into, the personal funds of a shareholder." (*Id.* at 34.)

This treatment in matters presenting analogous factual scenarios supports the

controlling group's view that respondents may previously have concluded that they were appropriately attributing the contributions at issue to the corporate respondents. (J.A.157.)

Further, FEC regulations distinguish entities based on corporate status. Even prior to *Citizens United*, regulations permitted partnerships and non-corporate LLCs to make contributions, which were attributed to both the partnership or non-corporate LLC and its individual partners/owners. 11 C.F.R. § 110.1(e), (g); J.A.157 & n.64. But the Commission rejected a similar proposal for corporate LLCs. (J.A.157 & n.63.) Instead, regulations require corporate LLCs, including single-member corporate LLCs, to be treated as corporations. 11 C.F.R. § 110.1(g)(3).

Given section 110.1(g)'s command that even contributions from a single-member corporate LLC should be attributed to the entity, not the member, the controlling Commissioners concluded it was less likely — particularly in light of all the other factors the Commission discussed — that respondents were on notice that section 30122 nonetheless required the contribution to be attributed to the member as its "true source." (*See* J.A.158.)

Complainants seek to write off this distinction as a mere "default" rule of attribution (Br. at 48), but the FEC has *refused* to attribute a contribution or expenditure from a closely held corporation to that corporation's individual owner

despite the owner's attempts to argue that he was the true source of the donation. (J.A.155-56 (collecting examples).) Thus, the controlling Commissioners concluded that respondents could have reasonably believed that these attribution regulations were not the "default" rules, but rather just "the rules."

Finally, the political committee matters Complainants rely upon are inapt. (Br. at 45 n.8; J.A.421.) Not only do those matters involve potential excessive contributions, but also political committees can be formed for the purpose of making contributions. *See* 52 U.S.C. § 30116(a)(1)-(2). So of course Congress would have contemplated section 30122 reaching political committees as straw donors. Indeed, FECA and FEC regulations already provide specific guidance on appropriate attribution in certain cases like those Complainants cite, where an individual makes a contribution to a political committee that is earmarked or otherwise directed to a candidate through an intermediary or conduit. 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6; *see also* 11 C.F.R. § 110.1(h).

In contrast, the controlling Commissioners reasonably found that application of the straw donor prohibition here post-*Citizens United* to be novel. A corporate contribution or expenditure was not just "typically" attributed to the corporation under Commission authorities, but rather it was attributed to the corporation *even when* an individual was its true source. Regulated entities may reasonably have relied on rules of corporate attribution even if they arose in a slightly different

context. *See, e.g.*, *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 629 (D.C. Cir. 2000).

Commission precedent and regulations thus provided the controlling Commissioners with a rational basis for distinguishing the longstanding applicability of section 30122 to contributions by individuals and political committees from the provision's potential applicability to contributions by the corporate respondents after *Citizens United*. (J.A.155, 421.)

b. The Controlling Group's Notice Concerns Were Grounded in the Record

Complainants argue that the controlling group's rationale was not grounded in the administrative record. (Br. at 50.) They are mistaken. As the district court observed, "[i]n fact, even sophisticated lawyers were confused." (J.A.419.)

As Complainants recognize (Br. at 9), when considering the instant matters, the controlling Commissioners simultaneously considered two other matters, including MUR 6485. An individual had hired a national law firm to advise him about "whether he could 'create an entity for the sole purpose of making a [contribution] . . . [which] would not require full public disclosure of his name in connection with the contribution.'" (J.A.149 & n.8 (quoting MUR 6485 at 3, https://www.fec.gov/files/legal/murs/6485/17044423850.pdf ("Resp.")).) "For several weeks, Ropes [& Gray LLP] conducted legal research concerning the Federal Election Campaign Act, this Commission's regulations and advisory

opinions, and secondary sources, to determine whether current campaign finance laws would require disclosure of [Edward] Conard's identity if he formed and funded a new entity for the purpose of making a [contribution]." (Resp. at 3; *see also id.* at Exh. B ("Decl.") ¶ 6.) Although it did not find the law "entirely clear," Ropes & Gray advised Conard that he could lawfully make a contribution through a corporate LLC without disclosing his identity based on its understanding of 11 C.F.R. § 110.1(g). (Resp. at 1-2; Decl. ¶¶ 8, 10.)

Any dispute about the quality of this advice aside, it belies Complainants' claim that the controlling Commissioners' notice concerns "lack[] any foundation in the facts of this case." (*Compare* Br. at 52, *with* Br. at 9; J.A.410 n.2 (holding that "the facts underlying all five complaints informed the Commission's decision").)

Further, as discussed *infra* Section III.B.2.c, OGC's proposed standard for whether section 30122 was violated changed as a result of different matters. (J.A.153-54.) "[T]hat these attorneys [also] found the law difficult to apply supports the conclusion that the public lacked notice." (J.A.420.)

The above evidence is pertinent even though it does not involve the subjective understanding of the respondents still at issue. *Gates & Fox Co. v. Occupational Safety & Health Review Commission* held that inadequate regulatory language and the absence of an authoritative interpretation are relevant even where

there was informal, actual notice. 790 F.2d 154, 156-57 (D.C. Cir. 1986).

c. The Dispute Regarding the Appropriate Standard Underscores the Lack of Pre-Existing Clarity

Closely held corporations and single-member corporate LLCs are also unique because such corporate entities typically act only at the direction of their owner/member. (J.A.154 & n.46, 163 n.2, 166.) As the district court noted, "[b]y their nature, these small corporations blur the lines between the individual and corporation, and thus blur the line between a 'true' donor and a 'straw' donor." (J.A.421 n.6.) All of the Commissioners and OGC thus recognized that there must be a standard guiding when a contribution should be properly attributed to the corporate entity or its owner/member. (J.A.154, 158, 166 & n.15.) The dispute over that standard supports the controlling group's finding that there was not adequate notice. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995) ("[I]t is unlikely that regulations provide adequate notice when different divisions of the enforcing agency disagree about their meaning.").

OGC proposed one standard, but revised it in light of subsequent matters. (J.A.153-54.) Initially, OGC focused on who exercised "direction and control" over the funds. (J.A.154.) It later clarified that "direction and control" alone was not dispositive, and liability required also establishing "whether a source transmitted property to another with the purpose that it be used to make or reimburse a contribution" by "looking to the structure of the transaction itself and

the arrangement between the parties." (J.A.154 (quoting MUR 6930 at 10, https://www.fec.gov/files/legal/murs/6930/16044386985.pdf; MUR 6485 at 21 (Supp.), https://www.fec.gov/files/legal/murs/6485/16044390492.pdf.)

The controlling group stated that, in the future, its "focus will be on 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." (J.A.158.) Although phrased differently, this proposed standard includes many of the same considerations as the final approach OGC took in another of the consolidated matters not at issue here. (MUR 6930 at 8-10, https://www.fec.gov/files/legal/murs/6930/16044386985.pdf (considering, *inter alia*, the purpose(s) of the corporate entity and whether the individual sought to circumvent disclosure requirements by contributing through that entity).)

The other group of Commissioners stated that "direction and control over the funds is a critical consideration," "as well as whether or not the source transmitted the money with the purpose that it be used to make or reimburse a contribution." (J.A.166 n.15.) While two of those three Commissioners criticized the controlling group's standard as improperly "plac[ing] the focus on the contributor's intent to violate the Act" (J.A.170), the controlling group responded that their respective purpose-driven standards may not be as different as those Commissioners believed.

(J.A.174.)

The evolution of OGC's standard, as well as the Commissioners' internal disagreement as to the correct standard, further supports the controlling group's finding that respondents did not have adequate notice. *Fox*, 567 U.S. at 253 (holding that fair notice is lacking "[when] it is unclear as to what fact must be proved"); *Gen. Elec.*, 53 F.3d at 1332.

d. The Dismissal of the Political Committee Claims Was Not Contrary to Law

Complainants' argument that the Court should find the dismissals contrary to law because the controlling Commissioners did not resolve their political committee claim (Br. at 52-54) should be rejected for the reasons discussed above in Section II.C.4. In addition, the OGC explanation on which the controlling group relied found, in light of FEC precedent and the slim evidence regarding the major-purpose prong of the inquiry, that there was no basis "to conclude at this point that F8 or Eli Publishing is a political committee" and recommended not acting on those allegations. (J.A.109, 119-21.) OGC also identified an aspect of the political committee analysis that was not established with respect to Specialty Group and Kingston Pike, finding that the record did not make clear whether these entities even passed the statutory threshold for political committee status by "in fact accept[ing] or mak[ing] more than $1,000 in contributions." (J.A.267)

As OGC further explained, "an entity can be a conduit or a political

committee, but not both." (J.A.120.) Thus, "[b]ecause OGC did not recommend that we find reason to believe with respect to [the political committee] allegations, and *because we conclude the applicable statutory provisions addressing these circumstances is section 30122*, we do not discuss those allegations here." (J.A.152 n.36 (emphasis added).) The record lacked a basis to find reason to believe that the corporate respondents were political committees and further addressing the question was unnecessary given the conclusion that the relevant analysis was under section 30122.

e. The Controlling Commissioners Reasonably Determined It Would Be Unfair to Prosecute the Respondents

After concluding that the issue was one of first impression and that the governing law lacked clarity, the controlling Commissioners reasonably determined that "principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm" and dismissed Complainants' administrative complaints. (J.A.148.)

Complainants acknowledge that due process requires that regulated parties have prior notice about what is required of them. (Br. at 39.) They nevertheless argue that the respondents had "sufficient notice as a matter of due process" because section 30122 was "clear and unambiguous." (*Id.*) But this merely re-asserts their argument that respondents had adequate notice, and should be rejected

for the same reasons. *Supra* Section III.B.

The controlling Commissioners also relied on the heightened notice concerns when determining whether to pursue enforcement in a First Amendment context. J.A.148-49 & n.3, 159 & n.69, 160 & n.72, 423-24; *Fox*, 567 U.S. at 253-54 ("When speech is involved, rigorous adherence to [notice] requirements is necessary to ensure that ambiguity does not chill protected speech."). Complainants do not dispute this well-established law. (Br. at 39.) Instead, Complainants brush it aside because the controlling Commissioners never found the statute unconstitutionally vague. (Br. at 59-60.) But a law does not need to be found unconstitutionally vague before an official can consider the sufficiency of notice and potential unfairness.

Because the controlling Commissioners' decision to exercise prosecutorial discretion is adequately explained and reasonable, the Court should affirm the district court.

C. The Challenge to the Proposed Purpose-Based Approach Is Not Ripe and In Any Event Fails

3. It Is Not Ripe

As the district court held, Complainants' challenge to the controlling Commissioners' announced purpose-based standard that they intend to apply in future cases — but that they concededly did not apply here and which has not been formally adopted by the Commission — "is not even close to being ripe."

(J.A.426.)

Under the ripeness doctrine, "[c]ourts are obliged to . . . 'to protect the agencies from judicial interference until an administrative decision has been formalized *and* its effects felt in a concrete way by the challenging parties.'" *Util. Air Regulatory Grp. v. EPA*, 320 F.3d 272, 278 (D.C. Cir. 2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). When determining ripeness, courts consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).

Complainants attempt to elide the district court's holding — not by pointing to future harm that they might suffer if and when the announced standard is applied (as they did below) — but by arguing that they "have been denied the disclosure to which they are entitled under FECA" from respondents. (Br. at 32.)

Even assuming section 30122 contains a disclosure requirement, however, it was not the announced future standard itself that caused the purported harm because it was never applied. Further, the controlling Commissioners were concerned about the lack of notice of *any* previously announced clear standard, not their particular standard. (J.A.148, 153-55 & n.50, 175.) Regardless lack of notice, rather than the standard itself, was but one among many reasons that they exercised prosecutorial discretion. Thus, Complainants have not demonstrated that

they will suffer any legally cognizable harm from postponing review.

Additionally, Complainants' claim of harm ignores that section 30122, though it furthers informational interests as a general matter, does not itself require public reporting of any information. *See supra* pp. 6, 20. Complainants thus are not entitled to any disclosure on their principal claim which, if proven, forecloses their back-up claim for political committee disclosure. *Supra* pp. 38-39.

"[E]ven purely legal issues may be unfit for review," *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003), particularly under such circumstances, *Nat'l Park Hosp.*, 538 U.S. at 811-12 (finding challenge not ripe where the party "failed to demonstrate that deferring judicial review will result in real hardship"); *Chlorine Inst., Inc. v. Fed. R.R. Admin.*, 718 F.3d 922, 927 (D.C. Cir. 2013) (same). While Complainants state that declining review would result in "de facto rulemaking without judicial oversight" (Br. at 33), this is incorrect. *See Conference Grp. v. FCC*, 720 F.3d 957, 966 (D.C. Cir. 2013) ("The fact that an order rendered in an adjudication may affect agency policy and have general prospective application does not make it rulemaking subject to . . .notice and comment."). More importantly, if a majority or a controlling group found "no reason to believe" under the proposed standard in a future matter, the resultant dismissal decision would be reviewable. *Supra* Section II.C.3.

While true that this case mentions several fact patterns (Br. at 31), the

proposed standard was not *applied* to these facts, so it remains unclear if and how it will be applied and/or modified. *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation marks omitted)). For example, Complainants assert that "any non-campaign activity, however artificial or minimal" could avert application of section 30122" under the standard. (Br. at 56.) However, it is not readily apparent that the controlling group would draw that conclusion. (J.A.158; MUR 6930, https://www.fec.gov/files/legal/murs/6930/16044386985.pdf.) Complainants also assert that the standard "provides an easy escape hatch for donors to claim that they contributed through an LLC for *any* reason other than avoiding disclosure." (Br. at 56.) Future matters will permit the FEC to assess whether donors do, in fact, make such claims and to adjust the proposed standard, if necessary. In addition, Complainants assert that there is no distinction between the announced standard and a "knowing and willful" violation. Br. at 55; *see also* 52 U.S.C. § 30109(a)(5), (a)(6), (d)(1)(D). The controlling Commissioners, however, have not yet considered a "knowing and willful" section 30122 violation in a similar matter.

Complainants' assertions therefore demonstrate that "we have the classic institutional reason to postpone review: we need to wait for a rule to be applied [to

see what its effect will be." *Atl. States Legal Found.*, 325 F.3d at 285 (internal quotation marks omitted); J.A.426. Though the decision provides guidance on how two currently sitting Commissioners intend to approach future matters, judicial review should await actual, concrete application in future cases. *See Common Cause II*, 842 F.2d at 449 n.32 ("[A] statement of reasons [by declining-to-go-ahead Commissioners]" is not "binding legal precedent or authority for future cases."); J.A.426. Judicial intervention now denies the FEC "an opportunity to correct its own mistakes [(if any)] and to apply its expertise" to future facts. *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980); *see also Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 31 (D.C. Cir. 1984) ("Review of tentative agency positions on substantive questions severely compromises the interests that ripeness and finality notions protect."). Indeed, given multiple Commissioner vacancies, future applications are particularly uncertain.

Accordingly, "[i]n contrast to the [announced standard's] lack of legal or practical effect upon [Complainants], the effect of the judicial review sought by [Complainants] is likely to be interference with the proper functioning of the agency and a burden for the courts." *Standard Oil*, 449 U.S. at 242. And Complainants' challenge to the standard is not ripe.

4. The Proposed Standard Is Not Contrary to Law

If reviewable, the controlling Commissioners' purpose-based standard constitutes a permissible construction of section 30122 and passes *Chevron* review.

The statute is not clear as to what (if any) scienter is required to establish that someone has made a contribution in the name of another. The omission of an express intent requirement is not necessarily dispositive. *Compare* Br. at 55, *with Staples v. United States*, 511 U.S. 600, 605 (1994).

When originally enacted, section 30122 was enforced solely through criminal law — which presumptively contains a *mens rea* requirement. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §§ 310, 311, 86 Stat. 19 (1972); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

When civil enforcement was later added, the relevant language of the provision did not change. The legislative history does not indicate that Congress intended to have no purpose or scienter requirement for civil violations. Rather, Congress merely "distinguishe[d] between violations of the law as to which there is not a specific wrongful intent" and "violations as to which the Commission has clear and convincing proof that the acts were committed with a knowledge of all the relevant facts and a recognition that the action is prohibited by law." H.R. Rep. No. 94-917, at 4 (1976). In addition, the definition of "contribution" is purpose-based. 52 U.S.C. § 30101(8)(A)(i).

Here, the controlling Commissioners worried about dissuading constitutionally protected contributions by closely held corporations and corporate LLCs. (J.A.158.) Regardless of the lawfulness of the transaction, an owner/member will almost always exercise direction and control over their closely held corporation or corporate LLC to make a contribution because in many cases this is the only way these corporate entities can make contributions. (*Id.*) Thus, unless the standard requires more, they reasoned, these corporate entities could potentially be subject to a potential investigation every time they make a contribution. (*Id.*) The controlling Commissioners concluded that examining the purpose behind the transfers struck the appropriate balance between disclosure interests and First Amendment rights. (*Id.*) Interpreting section 30122 in a way that reduced impingements upon First Amendment rights was reasonable. *E.g.*, *Van Hollen II*, 811 F.3d at 501 ("By affixing a purpose requirement to [the Bipartisan Campaign Reform Act]'s disclosure provisions, the FEC exercised its unique prerogative to safeguard the First Amendment when implementing its congressional directives.").

Their purpose-based standard need only be rational to be upheld, *Orloski*, 795 F.2d at 167, and this is a rational approach for resolving a delicate line-drawing problem. Complainants attack the controlling Commissioners' approach on the ground that FECA already provides for "knowing and willful" violations.

(Br. at 55.) But a defendant must have an understanding that her actions are unlawful to commit a knowing and willful violation. *See, e.g.*, *FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985 (D.N.J. 1986). If the news reports and attorney statements were accurate, there were several individuals in the matters examined by the Commissioners who broadly speaking would appear to have intended to avoid FECA disclosures without understanding their course of action to have been unlawful. *See supra* pp. 8, 47-48. Such conduct in the record would meet the controlling group's standard without constituting a knowing and willful violation. Even if the proposed purpose-based standard is ripe, it is not contrary to law.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the district court's judgment be affirmed.

Respectfully submitted,

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/s/ *Haven G. Ward*
Haven G. Ward

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I hereby certify that on this 14th day of August, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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