UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*,	
Plaintiffs,	Civ. No. 16-cv-752 (JDB)
v.	
FEDERAL ELECTION COMMISSION,	
Defendant,	
	SUMMARY JUDGMENT
F8, LLC, *et al.*,	MEMORANDUM
Intervenor-Defendants.	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Campaign Legal Center and Democracy 21 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. Plaintiffs' administrative complaints alleged that certain contributions to super PACs by closely-held corporations or corporate LLCs were actually attributable to other sources and that these entities thus had acted as "straw donors." In February 2016, the Commission voted on whether to find "reason to believe" that any of the respondents in plaintiffs' administrative complaints had violated FECA. The Commission did not approve pursuing any of the matters further, and so voted to close its files, thereby dismissing plaintiffs' administrative complaints.

The Commission's dismissal of plaintiffs' administrative complaints is not contrary to law. The decision of the three Commissioners who voted not to proceed in the matters in an exercise of prosecutorial discretion is fully explained in a statement of reasons grounded in the administrative record. Under the highly deferential standard that governs judicial review of FEC decisions to dismiss administrative complaints, the Commission's exercise of prosecutorial discretion need only be reasonable to be affirmed. The dismissal decision here readily satisfies this relaxed standard of review. Observing that the question presented by each of plaintiffs' complaints was unsettled, arising in an area where the law not only was unclear but also had recently underwent a sea change in light of *Citizens United v. FEC*, 558 U.S. 310 (2010), the three Commissioners found that respondents did not have adequate notice regarding the potential unlawfulness of their conduct. Discussing due process concerns and the need for sensitivity when regulating in the sphere of First Amendment rights, the Commissioners concluded that it would be unfair to pursue enforcement in these

circumstances. Instead, the Commissioners "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 these cases of first impression." (AR 98.)

Plaintiffs' claim that this action was contrary to law largely boils down to one untenable proposition. They argue that, because the record before the Commission could support a finding that administrative respondents made improper conduit contributions, the FEC was compelled to pursue the alleged violations in enforcement proceedings. But no principle of law requires a federal agency to pursue every enforcement matter. Simply because the Commission *could* pursue an enforcement matter does not mean that it *must*. To the contrary, an unbroken line of decisions from the Supreme Court, the D.C. Circuit, and other courts in this District makes plain that agencies like the FEC have the discretion to elect not to pursue enforcement of alleged statutory violations in particular cases. Indeed, the Supreme Court has observed that the FEC has discretion not to pursue an enforcement matter *even if the agency agrees* that the law may have been violated. *FEC v. Akins*, 524 U.S. 11, 24 (1998). Here, the Commissioners' exercise of that discretion should be sustained.

In addition, plaintiffs' challenge to the new standard announced in the Commissioners' statement of reasons also must fail. Because that standard was not applied in these administrative matters, or any others, plaintiffs' challenge is not ripe. Judicial review must be reserved for a concrete setting when one or more applications of the standard are under review. In any event, even if plaintiffs' disagreements with the Commissioners' new proposed standard arose in a ripe matter, the standard is not contrary to law or arbitrary or capricious. Consistent with other areas of FECA and Commission regulations that have been affirmed in court, their preferred standard incorporates a purpose requirement to distinguish between dissimilar circumstances and reasonably implements FECA in a First Amendment-sensitive manner.

Finally, plaintiffs' general concerns about the FEC's enforcement actions in other cases have no bearing on this matter. To the extent plaintiffs have timely asserted a statutory right of action to seek review of agency dismissals, it is limited to the particular administrative complaints that remain before the Court.

Because the Commission's actions were not contrary to law, the Court should grant summary judgment to the agency.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The FEC and FECA's 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 in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6). It is required under FECA to make decisions through majority votes and, for certain actions, including enforcement decisions, with the affirmative vote of at least four Commissioners. *Id.* § 30106(c).

2. FECA's Administrative 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); *see also* 11 C.F.R. § 111.4. After reviewing the complaint and any response filed by the respondent, the Commission considers whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2).

If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2).

If the Commission votes to proceed with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. *Id.* § 30109(a)(4)(A)(i). Like a reason-to-believe determination, a determination to find probable cause requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i). If the Commission so votes, it is statutorily required to attempt to remedy the violation informally and attempt to reach a conciliation agreement with the respondent. *Id.* The FEC's assent to a conciliation agreement requires an affirmative vote of at least four Commissioners. *Id.* If the Commission is unable to reach a conciliation agreement, FECA authorizes the agency to institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). The institution of a civil action under section 30109(a)(6)(A) requires an affirmative vote of at least four Commissioners. *Id.* § 30106(c).

If, at any point in the administrative process, the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason, FECA permits a complainant to file suit in the District Court for the District of Columbia to obtain judicial review to determine whether the decision was "contrary to law." *Id.* § 30109(a)(8)(A), (C). Reviewable dismissal decisions include instances in which "the Commission deadlocks 3-3 and so dismisses a complaint." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"); *see also Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*"). In such split-vote cases, "the three Commissioners who voted to dismiss must provide a statement of their reasons" in order "to make judicial review a meaningful exercise." *NRSC*, 966 F.2d at 1476. "Since those Commissioners constitute a controlling group for purposes of the

decision, their rationale necessarily states the agency's reasons for acting as it did." *Id.* Should a court find the Commission's dismissal to be unlawful, FECA permits the court to "direct the Commission to conform" with the court's ruling "within 30 days." 52 U.S.C. § 30109(a)(8)(C).

B. FECA's Prohibition Against Contributions Made in the Name of Another

FECA's prohibition against contributions made in the name of another person complements the Act's disclosure requirements, and in some circumstances its contribution limits and source restrictions. It does so by independently prohibiting the "true source" of a contribution from concealing his or her identity by making the contribution through a pass through, or what is commonly known as a "straw donor" — *i.e.*, an intermediary or conduit. FECA thus 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." *Id.* § 30122.

Commission regulations illustrate the types of activities and transactions that constitute making a contribution in the name of another. These include making a contribution, all or part of which was provided by "another person (the true contributor)" without disclosing the true contributor, or by making a contribution and attributing its source to "another person when in fact the contributor is the source." 11 C.F.R. § 110.4(b)(2)(i)-(ii).

C. Political Committee Registration and Reporting Requirements

FECA imposes several different kinds of disclosure obligations that apply depending upon the nature of the organization making the communications and the timing, form, and content of the communications. In addition to imposing certain event-driven disclosure requirements that apply whenever speakers' communications meet certain criteria, FECA provides that certain organizations, which qualify as "political committees," must, *inter alia*,

register with the Commission, appoint a treasurer, maintain names and addresses of contributors, and file periodic reports disclosing to the public most receipts of $200 or more. 52 U.S.C. §§ 30103, 30104(a)-(b).

Under FECA, any "committee, club, association, or other group of persons" that receives more than $1,000 in "contributions" or makes more than $1,000 in "expenditures" in a calendar year is a "political committee." *Id.* § 30101(4)(A); 11 C.F.R. § 100.5(a). The Act defines "contribution" and "expenditure" to include any payment of money to or by any person "for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i). In *Buckley v. Valeo*, however, the Supreme Court held that FECA's political-committee provisions "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. 1, 79 (1976) (per curiam). *Buckley* thus established that an entity that is not controlled by a candidate must register as a political committee only if the group crosses the $1,000 threshold of contributions or expenditures and has as its "major purpose" the nomination or election of federal candidates.

II. FACTUAL BACKGROUND

A. Respondents and Administrative Proceedings

Plaintiffs seek judicial review of the Commission's dismissal of three administrative complaints they filed with the agency. Each are discussed below.[1]

1. F8 and Eli Publishing

Eli Publishing, L.C. ("Eli Publishing") is a limited liability company founded in 1997 by Steven Lund "for the purpose of publishing a range of specialty books." (AR 78 (internal quotation marks omitted).) Publicly available information indicated it was a going concern,

[1] Plaintiffs sought to challenge dismissals of two additional administrative complaints but lack standing to do so. (Mem. Op. at 7-9, 14 (Docket No. 23).)

with estimated sales of $72,000 and $70,000 in 2011 and 2012, respectively. (AR 34; AR 78.) Although it had only published one book as of June 2012, it stated at that time that it intended to publish additional books in the future. (AR 78.)

F8 LLC ("F8") was formed in 2008 with a self-described "commercial" purpose. (AR 78.) F8's two publicly listed managers, one of which was also the company's registered agent, were reportedly connected to Lund by family and/or business relationships. (AR 34-35; AR 78 n.19.) Both companies are publicly listed as having the same address. (AR 35.)

In 2011, Restore Our Future, Inc. ("ROF") was a registered independent-expenditure-only political committee (also known as a "super PAC"). (AR 2.) In its amended mid-year report that year, ROF disclosed that it received two $1 million contributions from F8 and Eli Publishing on March 31, 2011. (AR 78 & n.20.)

On August 11, 2011, plaintiffs filed two administrative complaints alleging that Eli Publishing and F8, respectively, were each used to make straw donor contributions of $1 million to ROF in violation of 52 U.S.C. § 30122. (AR 1; AR 201; *see also* AR 78.) The complaints were based upon an August 4, 2011 television news report stating that, while F8 and Eli Publishing had made separate $1 million donations to ROF, neither appeared to do "substantial business." (AR 2; AR 202.) The news footage indicated that neither F8 nor Eli Publishing operated out of their shared address. (AR 34-35.) Lund purportedly told the news 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.'" (AR 36 (emphasis omitted); *see also* AR 78.) Plaintiffs asserted that "the person(s) who created, operated and/or contributed to F8" and Lund, respectively, were the true sources of the contributions. (AR 1, 4; AR 201-02.) Plaintiffs also alleged that F8 and Eli Publishing were "political committees" that failed to register and file reports in violation of 52 U.S.C. §§ 30102, 30103, and 30104. (AR 2; AR 202.) Both complaints requested that

the FEC conduct an investigation into the alleged violations, impose appropriate sanctions for any violations found, and enjoin the respondents from any future violations. (AR 7; AR 207.)

ROF filed a response to both complaints on September 21, 2011. (AR 25-27.) F8 filed a response and Eli Publishing and Lund filed a joint response on October 6, 2011. (AR 28-30; AR 222-24.) The FEC's Office of General Counsel submitted to the Commission its First General Counsel's Report and Proposed Factual and Legal Analysis concerning plaintiffs' allegations on June 6, 2012. (AR 31-57.) This staff report 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 this time as to ROF or with respect to the allegations that F8 and Eli Publishing were political committees. (AR 46-47.)

2. Specialty Investment Group and Kingston Pike

In September 2012, William Rose, Jr. formed Specialty Investment Group Inc. ("Specialty Group") and its subsidiary, Kingston Pike Development LLC ("Kingston Pike"). (AR 79.) Rose was Specialty Group's chief executive officer, president, and chairman of the board, and Kingston Pike's sole manager. (*Id.* at n.25.) According to Rose and the companies, Specialty Group and Kingston Pike "'were formed for the purpose of engaging in the real estate business.'" (AR 79 (quoting AR 340).) They have further stated that Specialty Group has "'received private capital and made investments in properties and projects, many of which Mr. Rose has worked on for several years.'" (AR 79 (quoting AR 340).) Specialty Group and its subsidiaries, through their agent Rose, also claimed to have "'purchased, offered to purchase, and/or negotiated real estate investments valued at over $50 million'" between September 2012 and February 2013, and they provided a list detailing numerous real estate transactions. (AR 79 n.26 (quoting AR 341); AR 342.1-2.) Specialty Group and Kingston Pike were administratively dissolved in August 2013. (AR 389.)

In a press release, Rose described Specialty Group as "a private corporation which uses private capital for lawful business, social, and political purposes." (AR 462.) He stated that he felt "that the Democratic policies of big government, higher taxes and more government regulations will greatly . . . impact the success of Specialty Group in the future, if Mr. Obama is re-elected and his policies continue." (AR 459.)

Specialty Group and Kingston Pike made contributions to FreedomWorks for America ("FreedomWorks "), a super PAC registered with the FEC, totaling $10,575,000 and $1,500,000, respectively, between October 1, 2012 and November 1, 2012. (AR 341; AR 388; AR 391.)

On December 12, 2012, plaintiffs filed their administrative complaint regarding Specialty Group and Kingston Pike. Plaintiffs alleged that Rose and unnamed others made a series of straw donor contributions totaling approximately $12 million through Specialty Group and Kingston Pike to FreedomWorks in violation of 52 U.S.C. § 30122. (AR 301-02.) Plaintiffs further alleged that Specialty Group and Kingston Pike were "political committees" that failed to register and file reports in violation of 52 U.S.C. §§ 30102, 30103, and 30104. (AR 302.) Plaintiffs requested that the FEC conduct an investigation into the alleged violations, impose appropriate sanctions for any violations found, and enjoin the respondents from any future violations. (AR 309-10.)

Rose, Specialty Group, and Kingston denied that these were improper straw donations. (AR 341.) Rather, they asserted that Rose had directed the contributions from Specialty Group and Kingston Pike, and that these contributions were correctly disclosed by FreedomWorks as having come from those companies. (*Id.*)

According to a December 25, 2012 newspaper story, one of the members of FreedomWorks' board of directors, Richard Stephenson, pledged to donate $10-12 million during a FreedomWorks retreat in August 2012. (AR 326.) Adam Brandon, FreedomWorks'

executive vice president, purportedly met with Stephenson's family to arrange the donation, which the article asserts were the same donations ultimately made by Specialty Group and Kingston Pike. (AR 325-26.) On January 3, 2013, plaintiffs submitted a letter supplementing their complaint alleging that Stephenson was the actual "source" of the above contributions and attaching the December 25 newspaper article. (AR 322-28.) Plaintiffs' letter contended that 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 its executive vice president, Brandon, knowingly accepted these contributions in violation of section 30122. (AR 323.) On April 24, 2013, plaintiffs filed an amended complaint formally including these allegations. (AR 343-48.)

FreedomWorks filed responses to the original complaint and supplemental complaint on February 14 and June 12, 2013, respectively. (AR 337-38; AR 370-75.) Specialty Group, Kingston Pike, and Rose filed a joint response on February 25, 2013. (AR 339-42.) Stephenson filed a response on June 14, 2013. (AR 376-78.) Brandon filed a response on June 27, 2013. (AR 379-84.)

The FEC's Office of General Counsel submitted to the Commission its First General Counsel's Report and Proposed Factual and Legal Analysis concerning plaintiffs' allegations on June 17, 2014. (AR 385-527.) The report 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 this time with respect to the allegations that the Specialty Group and Kingston Pike were political committees. (AR 404.)

B. The FEC's Dismissals of Plaintiffs' Administrative Complaints

On February 23, 2016, the Commission, by a vote of 3-3, did not find reason to believe that the respondents in each of the three matters above violated section 30122. (AR 67-68; AR 543-44.) Commissioners Petersen, Hunter, and Goodman voted against finding

reason to believe, while Commissioners Walther, Ravel, and Weintraub voted for finding reason to believe and to authorize investigations. (*Id.*) The Commission then voted 6-0 to close the files in the matters. (*Id.*)

On April 1, 2016, Commissioners Petersen, Hunter, and Goodman issued a statement of reasons explaining their vote against finding reason to believe, which they later supplemented on April 18, 2016. (AR 75-89; AR 98-101.) Commissioners Walther, Ravel, and Weintraub also issued a statement on April 1, 2016 explaining their votes to proceed with investigations, which Commissioners Ravel and Weintraub later supplemented on April 13, 2016. (AR 90-94; AR 95-97.) Because Commissioners Petersen, Hunter, and Goodman were the Commissioners voting against making reason-to-believe findings, their "rationale[s] necessarily state[] the agency's reasons for acting as it did" and they accordingly constitute the "controlling group" of Commissioners in these matters. *NRSC*, 966 F.2d at 1476.

The controlling Commissioners determined that the pending matters were appropriately addressed under the straw donor prohibition, not under the regulations concerning political committee registration and reporting. (AR 80 n.36.) The controlling Commissioners framed their analysis of plaintiffs' administrative complaints around *Citizens United* and its progeny, explaining the effect of those decisions on the agency's historical treatment of corporate contributions and FECA's straw donor prohibition in section 30122. (AR 75-77; AR 81-85.) As these Commissioners explained, *Citizens United* led to corporations being able to make unlimited contributions to a new type of entity, called an independent-expenditure-only political action committee or "super PAC." (AR 75 & n.1.)

In section 30122, FECA provides that "'[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a

contribution.'" (AR 81 (quoting 52 U.S.C. § 30122).)[2] Until recently, however, the controlling Commissioners explained, "corporations could not make *any* contributions" for the purpose of influencing federal elections. AR 81; *see also* 52 U.S.C. § 30118(a) (making it "unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any election" for federal office). Thus, while FECA generally defines "person" to include corporations (AR 81 (citing 52 U.S.C. § 30101(11)), in the pre-*Citizens United* era "the Commission ha[d] never addressed the inverse of the conventional corporate straw-donor scheme" in which a corporation or corporate LLC is alleged to be a straw donor under section 30122. (AR 81.)

The controlling Commissioners explained that because corporations could not make any contributions under FECA at the time the prohibition against conduit contributions was enacted, they 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." (AR 83.) Interpreting FECA in light of section 30122's language and purpose, the controlling Commissioners concluded — and the Commissioners who voted to find reason to believe in these matters agreed — that closely-held and corporate LLCs could be straw donors under section 30122. (AR 82; AR 91.)

After concluding that the question presented by plaintiffs' administrative complaints was an issue of first impression, as well as taking into account several other considerations discussed below, the controlling Commissioners decided to exercise their prosecutorial discretion and voted against finding reason-to-believe that section 30122 was violated in the pending matters. (AR 76-77.) *First*, the Commissioners found that the agency had never before applied section 30122 to a situation where neither FECA's contribution limits nor its

[2] A "contribution" 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).

source prohibition came into play. (AR 76; AR 83.) Prior cases before the Commission typically either 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. (AR 81 & n.42; AR 83 & n.51.) By contrast, the issue presented in the pending matters, as plaintiffs alleged them, presented neither prohibited sources nor excess contributions because corporations currently may make unlimited contributions to super PACs. Accordingly, the controlling Commissioners found that the pending matters "differ[ed] substantially" from prior matters and, consequently, warranted fresh consideration. (AR 83.)

Second, the controlling Commissioners considered prior precedent in other contexts where, even though a shareholder in a closely-held corporation stated that it was the source of the funds at issue, the Commission nonetheless deemed the funds to be from the corporation. (AR 83-84.) The Commissioners discussed *FEC v. Kalogianis*, for example, a case in which a candidate's campaign committee disclosed several loans from two 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); AR 83-84. In response to the Commission's notification that corporate contributions were prohibited, the campaign 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. *Kalogianis*, 2007 WL 4247795, at *3. The FEC did not accept this rationale and filed suit. *Id.* The court agreed with the FEC, finding 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.'" (AR 83-84 & n.54 (quoting *Kalogianis*, 2007 WL 4247795, at *4).)

Third, the controlling Commissioners observed that Commission regulations provide that contributions from corporate LLCs are attributed to the corporate entity, not its owners. (AR 85 (discussing 11 C.F.R. § 110.1(g)).) While contributions from certain types of LLCs are attributed to its owners, the Commission rejected a proposal attributing contributions from corporate LLCs to its owners. (*Id.*) In light of such historical treatment, the controlling Commissioners found that "it would be reasonable for Respondents to conclude that contributions made by their closely held corporations and corporate LLCs were lawful and not contributions in the name of another." (AR 85.)

For these reasons, the controlling Commissioners 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 constituted an improper straw donor contribution under section 30122 that instead should be attributed to the entity's owner as the "true contributor" rather than the entity itself. (AR 82; AR 85; AR 87.) Given this understanding that previous matters or Commission regulations had not offered clear guidance, the controlling Commissioners found that Respondents did not have adequate notice regarding the application of section 30122 to closely-held corporations and corporate LLCs. (AR 82; AR 85; AR 87.) Because "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," they concluded that the pending matters "should be dismissed in an exercise of the Commission's prosecutorial discretion." (AR 76-77; *see also* AR 87-88.)[3]

[3] Although two of the Commissioners who had voted to find reason to believe had discussed the possibility of finding reason-to-believe as to the respondents while simultaneously dismissing the matters without imposing civil penalties, the controlling Commissioners explained their understanding that the "Commission abandoned that procedure years ago," citing an FEC policy statement that explained the agency's preference for dismissal or dismissal with admonishment in lieu of finding "'reason to believe, but take no further action'" in order to avoid confusion about the meaning of the reason to believe

Rather than imposing a new standard as part of a finding that the respondents had violated FECA, 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," thereby providing guidance for future conduct. (AR 98.) The Commissioners reasoned 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." (AR 87-88 (quoting *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).) In cases implicating First Amendment rights, such as the pending matters, they wrote that "[t]his concern is particularly acute." (AR 88 & n.72 (collecting cases)).

The Commissioners considered specific recommendations from the Office of General Counsel about several matters in the course of determining what they viewed to be the proper standard. (AR 81-82.) They concluded that an inquiry into the purpose of a contribution was necessary; without that inquiry, they feared that any contribution by a closely-held corporation or single-member corporate LLC would be presumptively an unlawful conduit contribution. (AR 81-82 & n.46; AR 100.) Because such corporate entities necessarily only act at the direction of their owner/member, the Commissioners reasoned that any contribution by the entity would thus be made at the individual's behest. (AR 81-82 & n.46; AR 100.) With the understanding that closely-held corporations and corporate LLCs are entitled to make 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." (AR 86-87.)

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finding. (AR 99 & n.6 (citing *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545 (Mar. 16, 2007)).)

In the absence of direct evidence of this purpose, these Commissioners 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." (AR 86.)

ARGUMENT

The Commission's dismissal of plaintiffs' administrative complaints should be sustained. The dismissal was based on a reasonable exercise of the agency's broad prosecutorial discretion, which readily survives the applicable highly deferential standard of review. As explained in their thorough analysis, the controlling Commissioners evaluated pursuing enforcement action in a new circumstance resulting from recent changes to federal campaign finance law. Their decision to exercise prosecutorial discretion in light of concerns of notice, fairness, due process, as well as the sensitivity the agency has been instructed to use when regulating in the First Amendment arena, is not contrary to law. In addition, the prospective standard the controlling Commissioners announced that they would be using in future cases is not ripe for review. Even if it were properly before the Court at this time, it is neither contrary to law nor arbitrary or capricious. Finally, plaintiffs here challenge the agency's dismissal of three of plaintiffs' administrative complaints, and their broad-brush complaints about the agency's enforcement decisions on other matters are irrelevant. The agency's dismissals of plaintiffs' administrative complaints should be affirmed.

I. THE COMMISSION'S DISMISSAL OF PLAINTIFFS' ADMINISTRATIVE COMPLAINTS IS NOT CONTRARY TO LAW

In reviewing the challenged dismissal decisions under section 30109(a)(8), the Court is bound by controlling decisions of the Supreme Court and D.C. Circuit requiring that the Commission's dismissal decisions be accorded full deference, irrespective of the Commission's divided votes on the matters. Plaintiffs' attempts to reduce their heavy burden

by urging a lesser degree of deference lack support and must be rejected. Applying the proper standard of review, the controlling Commissioners' dismissal decisions were both adequately explained and rational. They were not contrary to law.

A. Standard of Review

1. Section 30109(a)(8)'s Contrary to Law Standard of Review Is "Limited" and "Extremely Deferential"

In section 30109(a)(8), Congress mandated that the judicial task in cases like this is to determine whether the Commission's dismissals of plaintiffs' administrative complaints are "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Well-settled decisions construing section 30109(a)(8) make clear that such review is "limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). As plaintiffs acknowledge (Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. at 19 (Docket No. 30) ("Pls.' Mem.")), the FEC's dismissal of an administrative complaint cannot be disturbed unless it was 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).[4]

The contrary-to-law standard simply requires that the Commission's decision be "sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (internal quotation marks omitted). But the Commission's 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 proceedings." *Id.* As the Supreme

[4] Plaintiffs also purport to rely on the Administrative Procedure Act ("APA") as an independent source of jurisdiction (Pls.' Mem. at 18), but 52 U.S.C. § 30109(a)(8) provides the exclusive mechanism for judicial review of any FEC dismissal of an administrative complaint. *E.g.*, *Citizens for Responsibility & Ethics in Wash. v. FEC*, No. CV 16-259 (BAH), --- F. Supp. 2d ---, 2017 WL 1080920, at *10 (D.D.C. Mar. 22, 2017) (holding that section 30109(a)(8) serves as an adequate form of review of the Commission's dismissal decisions and thus precludes review of such decisions under the APA).

Court explained decades ago, "the Commission is precisely the type of agency to which deference should presumptively be afforded." *Id.* at 37. This is due to the FEC's "'primary and substantial responsibility for administering and enforcing [FECA],'" its authority to "'formulate general policy with respect to the administration of [the] Act,'" its "'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred," and its nonpartisan nature resulting from the fact that "no more than three of its six voting members may be of the same political party." *Id.* "For these reasons" and others, the Court said, Congress "wisely provided" that the "dismissal of a[n administrative] complaint should be reversed only if 'contrary to law.'" *Id.* Accordingly, that standard is "extremely deferential" to the agency's decision and "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167 (internal quotation marks omitted); *see also Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (holding that the contrary-to-law standard is "[h]ighly deferential" to the Commission's decision (internal quotation marks omitted)).

The case for deference to the agency's dismissal decision is even more appropriate where, as here, the agency's decision not to proceed with an enforcement case is an exercise of its prosecutorial discretion. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."). As courts in this District have recognized, "[t]he prosecutorial discretion afforded to the FEC is considerable." *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014) (internal quotation marks omitted); *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, No. 15-2038 (RC), --- F. Supp. 3d ---, 2017 WL 706155, at *8 (D.D.C. Feb. 22, 2017) ("*CREW I*") ("In deciding whether to initiate or proceed with charges of alleged FECA violations, the Court gives broad prosecutorial discretion to the FEC."); *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) ("[T]he prosecutorial discretion given to the Commission is entitled to great deference . . ., provided it supplies reasonable grounds.").

Such deference is due to the FEC's prosecutorial discretion because the "agency is in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). As the D.C. Circuit has instructed, such "budget flexibility as Congress has allowed the agency is not for [the courts] to hijack." *Id.* Courts in this Circuit have repeatedly applied these principles in affirming Commission decisions not to enforce FECA. *See Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) ("[T]he Court believes that the FEC is in a better position to evaluate its own resources and the probability of investigatory difficulties than is [the plaintiff]."), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013); *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) ("[I]t is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources."); *cf. FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986) (noting that it "is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted"). Indeed, the Commission retains prosecutorial discretion to dismiss an administrative complaint even if the complaint identifies a violation because the "FEC is not required to pursue every potential violation of FECA." *La Botz*, 61 F. Supp. 3d at 35; *cf. Blancett v. U.S. Bureau of Land Mgmt.*, No. 04-2152 (JDB), 2006 WL 696050, at *6-11 (D.D.C. Mar. 20, 2006) (rejecting argument that agency was legally required to pursue enforcement action under the APA and reiterating Supreme Court's acknowledgement "that law enforcement officers may choose not to pursue each and every violation of the law because of competing considerations").

2. The Controlling Commissioners' Rationale for Exercising Prosecutorial Discretion Does Not Change the Deference Accorded Their Dismissal Decisions

That the controlling Commissioners' rationale for exercising prosecutorial discretion here touched upon constitutional concerns does not affect the deference courts afford to FEC

dismissal decisions, as plaintiffs suggest. (*See* Pls.' Mem. at 21-24; *see also id.* at 25 (suggesting that the Court "conduct a *de novo* review of the relevant law and judicial precedents").) An agency's assessment of the likelihood of success in a matter will often involve analyzing legal doctrine outside of the organic statue it is tasked with enforcing, but that does not stop courts from deferring to this analysis so long as it is reasonable. *See CREW I*, 2017 WL 706155, at *10 (evaluating statute of limitations arguments); *Akins*, 736 F. Supp. 2d at 16 (explaining that "[t]he Commission reasoned that any further investigation would be frustrated" in part "by . . . the expiration of the applicable statute of limitations"). The Commission was not engaging in some pure legal construction of another statute, the Constitution, or a specific judicial opinion, and the decision instead warrants deference because the agency is in the best position to evaluate the alleged facts, its own resources and priorities, and the likelihood that it will prevail should it attempt enforcement. *See, e.g.*, *Heckler*, 470 U.S. at 831-32 ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."); *CREW I*, 2017 WL 706155, at *8; *La Botz*, 61 F. Supp. 3d at 33-34; *Nader*, 823 F. Supp. 2d at 65.

Plaintiffs' extended argument (Pls.' Mem. at 21-24) that the FEC should not receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), therefore, is largely beside the point.[5] To the extent that plaintiffs take issue with the controlling Commissioners' interpretation of section 30122 (*e.g.*, Pls.' Mem. at 37-39), they are also incorrect. When the FEC interprets a provision of FECA in the context of a section 30109(a)(8) dismissal, the D.C. Circuit has held that courts must accord *Chevron* deference to that decision. *E.g.*, *In re Sealed Case*, 223 F.3d 775, 779-81 (D.C. Cir. 2000);

[5] The familiar two-step *Chevron* framework requires the Court to first to determine "whether Congress has directly spoken to the precise question at issue" and, if not, to defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43.

FEC v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 185 (D.C. Cir. 2001); *Orloski*, 795 F.2d at 161-62; *NRSC*, 966 F.2d at 1476 ("[I]f the meaning of the statute is not clear, a reviewing court should accord deference to the Commission's rationale."); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 86 (D.D.C. 2016) ("*CREW II*") ("Usually, when a court's review turns on an interpretation of FECA's terms, the 'contrary to law' standard involves a straightforward application of the familiar two-step framework outlined in [*Chevron*]."). This same standard applies "to all FEC decisions, whether they be unanimous or determined by tie vote." *CREW II*, 209 F. Supp. 3d at 85; *see also id.* at 85 n.5 (rejecting argument advanced there and here (*see* Pls.' Mem. at 23-24) that *United States v. Mead Corp.*, 533 U.S. 218 (2001), alters this standard of review); *Sealed Case*, 223 F.3d at 779-81.[6]

The propriety of *Chevron* deference is rooted in Congress's design of the agency to take action with care and without the appearance of partisan politics. The Commission can "initiate investigations, . . . and take other steps of comparable importance only upon the affirmative vote of four . . . members. The four-vote requirement serves to assure that enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment." H.R. Rep. No. 94-917, at 3 (1976). The Court of Appeals has repeatedly emphasized this important element of the FEC's decision-making. *E.g.*, *Pub. Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) ("The [FEC's] voting and membership requirements mean that, unlike other agencies — where deadlocks are rather atypical — FEC will regularly deadlock as part of its *modus*

[6] Plaintiffs also rely on the D.C. Circuit's opinion in *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127 (D.C. Cir. 2014), to no avail. (*See* Pls.' Mem. at 24). *Fogo De Chao* rejected deference to an agency's decision that was "the product of *informal* adjudication within the [agency], rather than a *formal* adjudication or notice-and-comment rulemaking." 769 F.3d at 1136 (emphasis added). The dismissals at issue here are relatively formal adjudications that are accorded deference under *Sealed Case*. 223 F.3d at 780.

operandi."); *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (quoting legislative history).

Moreover, as the D.C. Circuit observed in *Van Hollen v. FEC*, "[t]he FEC is [u]nique among federal administrative agencies, having as its sole purpose the regulation of core constitutionally protected activity — the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." 811 F.3d 486, 499 (D.C. Cir. 2016) (second alteration in original; internal quotation marks omitted). There, the Court applied *Chevron* deference in evaluating an FEC regulation implementing *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). *Van Hollen*, 811 F.3d at 496.[7] Here, the portions of the controlling statement analyzing FECA in light of changes following Supreme Court's decision in *Citizens United* similarly attempted to effectuate the FEC's "unique prerogative to safeguard the First Amendment." 811 F.3d at 501.[8]

B. The Controlling Commissioners' Dismissal of Plaintiffs' Administrative Complaints Was Not Contrary to Law

For the reasons set forth in their statements, see *supra* pp. 11-15, the controlling Commissioners reasonably exercised their prosecutorial discretion when determining not to pursue an enforcement action against respondents. Presented with a statutory interpretation issue of first impression in an area where the law was unclear, the controlling Commissioners

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[7] *See also CREW II*, 209 F. Supp. 3d at 87 (distinguishing agency interpretations of court opinions from agency decisions about how court cases should be implemented, which are "the types of judgments that Congress committed to the sound discretion of the agency").

[8] Plaintiffs also attempt to reduce their heavy burden by arguing that the reason-to-believe standard is a "low threshold." (Pls.' Mem. at 7.) The argument is misplaced. The statement of policy on which plaintiffs rely merely recites in generic terms that the Commission generally will find reason to believe "in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation, *and* where the seriousness of the alleged violation warrants either further investigation or immediate conciliation." *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. at 12,545-46 (emphasis added). The regulation thus recognizes that the FEC has the discretion to pursue charges, which is precisely what the Commission did here.

determined that the pending matters were not appropriate vehicles for enforcement action. Their determination reflected a careful and thorough review of the records before the Commission, as well as a thoughtful and detailed analysis of the history and development of an evolving area of law, and is accorded broad deference. The agency's dismissals of those matters therefore should be affirmed.

1. The Well-Recognized Interest in Disclosure Does Not Impact *Whether* FECA Requires Particular Information To Be Disclosed

Plaintiffs do not contest the FEC's right to dismiss enforcement matters on the basis of prosecutorial discretion. (Pls.' Mem. at 20 ("To be sure, the FEC is entitled to exercise its enforcement discretion by dismissing matters that, in its considered judgment, do not justify the use of agency resources relative to the magnitude of the violation at issue.").) Instead, plaintiffs urge the Court to disregard binding precedent deferring to an agency's prosecutorial discretion in favor of a results-oriented analysis that plaintiffs believe would vindicate the government's interest in disclosure. (*Id.* at 26-28.)

But the importance of the government's disclosure interest is not the only interest for the Commissioners to consider here. The importance of disclosure requirements or the value of information required to be disclosed under FECA is undisputed. Rather, the novel question before the Commission was *whether* and under what circumstances FECA required disclosure of the owner/member of a closely-held corporation or corporate LLC as the source of a contribution coming from the corporate entity. That the FEC's Commissioners and plaintiffs agree that section 30122 may apply to such arrangements in certain circumstances does not mean that the controlling Commissioners acted improperly by exercising prosecutorial discretion in declining to vote to proceed with the enforcement actions plaintiffs requested. If the FEC were required to pursue every enforcement matter that could vindicate a disclosure interest, the agency's prosecutorial discretion would be a nullity.

2. The Controlling Commissioners Had a Rational Basis for Determining That Respondents May Not Have Had Adequate Notice Regarding Section 30122's Application to Closely-Held Corporations and Corporate LLCs

In determining whether respondents were sufficiently on notice that their actions were in violation of section 30122, the controlling Commissioners considered and weighed several different factors, *supra* pp. 11-15. First, the controlling Commissioners found — and plaintiffs do not dispute — that the Commission had never before considered whether a closely-held corporation or corporate LLC could be deemed a straw donor under section 30122. Second, until recently in *Citizens United*, a closely-held corporation or corporate LLC could not have been a conduit donor, straw or otherwise, because it was separately prohibited from making *any* contributions. Third, prior cases involving conduit contributions involved excessive and/or prohibited contributions, which were not at issue here. Fourth, the Commission has refused to attribute funds from closely-held corporations to their owners in a number of different contexts. And fifth, Commission rules provide that contributions from corporate LLCs are not attributed to its members.

Plaintiffs attempt to respond to the Commissioners' rationale by raising concerns regarding each of these factors. (Pls.' Mem. at 25-43.) Taking all of the various considerations together, however, even accepting some of the caveats and cautions urged by plaintiffs, the controlling Commissioners rationally concluded that respondents may not have had adequate notice that a closely-held corporation or corporate LLC could be deemed a straw donor.[9]

Plaintiffs seek to downplay the significance of *Citizens United*'s impact on the straw donor prohibition, arguing that the statutory language was clear and there is "no reason to

[9] Plaintiffs' delay argument (Pls.' Mem. at 39-40) is misconceived. The controlling Commissioners considered whether respondents had adequate notice *at the time they undertook the allegedly unlawful actions at issue*.

assume that Congress 'did not contemplate that corporations could violate the [straw donor] prohibition . . . by acting as straw donors for contributions.'" (Pls.' Mem. at 29, 30 (quoting AR 83).) But the controlling Commissioners' assessment that it was likely that Congress did not engage in such contemplation is supported by Congress's decision to prohibit corporations from making campaign contributions since the Tillman Act in 1907. 59 Cong. Ch. 420, 34 Stat. 864 (1907). At the time the straw donor prohibition was last amended, in 2002, the restrictions on corporate contributions had been in place for nearly 100 years. The controlling Commissioners thus certainly had a rational basis to find that Congress did not anticipate and intend the straw donor prohibition to encompass situations where a corporate entity was the purported straw donor.

Plaintiffs' contention that "it is not even true that corporations had never made contributions under FECA before *Citizens United*" (Pls.' Mem. at 30) is also incorrect. In support, plaintiffs point to the discussion in *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310, of "the 'soft money' era prior to BCRA's enactment" (Pls. Mem. at 30), during which corporations could donate money "to political parties for activities intended to influence state or location elections." *McConnell*, 540 U.S. at 122. That very same discussion, however, explains that "soft money" does *not* include "'contributions'" under FECA, which are defined as "to include only the gift or advance of anything of value 'made by any person for the purpose of influencing any election for *Federal* office.'" *McConnell*, 540 U.S. at 122 (quoting 52 U.S.C. § 30101(8)(A)). The contributions at issue here were made to groups undisputedly involved in express federal candidate advocacy, not issue-focused communications or advocacy arguably attributable in part to state and local elections. Section 30122, involving "contribution[s]" as defined in 52 U.S.C. § 30101(8), is thus far more clearly applicable to corporate contributions to federal

super PACs after *Citizens United* than to corporate donations of soft money to political parties for nonfederal activity prior to the BCRA.

Nor do the controlling Commissioners suggest, as plaintiffs assert, that "Congress would have wished to exempt corporations from the prohibition on straw donors." (Pls.' Mem. at 31.) To the contrary, examining the language and purpose of the straw donor statute, the controlling Commissioners concluded that closely-held corporations and corporate LLCs were *not* exempt from the prohibition on straw donors. (AR 82.) As discussed above, the controlling Commissioners merely found that Congress's intent was simply unclear because Congress was not faced with a situation in which closely-held corporations and corporate LLCs were making federally-regulated contributions when it enacted the straw donor prohibition.

Next, plaintiffs assert that the "fiction at the heart" of the controlling Commissioners' rationale is that "respondents, surveying the legal landscape after *Citizens United* and [*SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc)], could have reasonably concluded 'that contributions made by their closely held corporations and corporate LLCs were lawful.'" (Pls.' Mem. at 32 (quoting AR 85).) In making this argument the centerpiece of their case, however, plaintiffs appear to have overlooked that this is precisely what happened in another matter.

In Matter Under Review ("MUR") 6485 (W Spann LLC), Edward Conard hired Ropes & Gray LLP ("Ropes"), a nationally recognized 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.'" (AR 77 & n.8 (quoting Response from Edward Conard and W Spann LLC at 3, MUR 6485, http://eqs.fec.gov/eqsdocsMUR/16044390479.pdf ("Conard Resp.")).) According to his response to the Commission, supported by a sworn declaration of one of his

lawyers, "[f]or several weeks, Ropes 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 Mr. Conard's identity if he formed and funded a new entity for the purpose of making a [contribution]." (Conard Resp. at 3; *see also* Decl. of Kimberly E. Cohen, Esq. ("Cohen Decl.") ¶ 6 (attached as Exhibit B to Conard Resp.).) Although it did not find the law "'entirely clear,'" Ropes advised Conard that he could lawfully make a contribution through a corporate LLC without disclosing his identity. (Conard Resp. at 1-2; Cohen Decl. ¶¶ 8, 10.) This advice was based upon Ropes's "understanding that the FEC's regulations governing limited liability companies do not require attribution of a contribution the LLC's member or members if the LLC made the election to be treated as a corporation for federal tax purposes." (Cohen Decl. ¶ 10; *see also* First General Counsel's Report at 4-5, MUR 6485 (W Spann LLC), http://eqs.fec.gov/eqsdocsMUR/16044390492.pdf (paraphrasing same).)

Whatever plaintiffs make of the quality of this analysis and advice, it belies their claim that the controlling Commissioners' notice concerns were "fiction." (Pls.' Mem. at 32.) Rather, the Commissioners were aware of a factual scenario demonstrating uncertainty about the state of the law and the Commissioners considered that scenario in concluding that dismissal was justified at least in part due to such notice concerns.

Plaintiffs also contend incorrectly that, because the Commission has previously applied the straw donor prohibition to find political committees to be straw donors, the application of that prohibition to find closely-held corporations and corporate LLCs to be straw donors was not "novel." (Pls.' Mem. at 32-33.) But political committees have not only been legally permitted to make contributions for decades, but they can also be formed for that exact purpose. *See* 52 U.S.C. § 30116(a)(1)-(2) (limits on contributions by persons and

multicandidate political committees).[10] Accordingly, Congress would naturally have contemplated that political committees would fall within the scope of the straw donor prohibition. As discussed above, it was precisely because it was previously well-established that corporate entities could *not* make contributions, and Congress thus could not have contemplated the straw donor prohibition applying, that the controlling Commissioners found that application of the straw donor prohibition post-*Citizens United* to be novel.

As plaintiffs attempt to downplay the impact of *Citizens United* on the straw donor prohibition, they seek to minimize the significance of prior Commission precedent analyzing whether the owner or the corporate entity is the "source" of funds from a closely-held corporation under section 30118, dismissively stating that "[c]ontributions are *always* assumed to come from their immediate sources." (Pls.' Mem. at 34.) In those matters, however, the Commission considered arguably similar circumstances yet reached results seemingly inconsistent with the announced approach of determining that some contributions from closely-held corporations or corporate LLCs may have been made in the name of another.

As the controlling Commissioners explained, in MUR 4313 (Coalition for Good Government), for example, an individual wanted to run certain political advertisements on television. (AR 84.) Rather than pay for the advertisements directly, however, he established a closely-held corporation using solely his own personal funds for the purpose of making the

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[10] Further, the controlling Commissioners did not state that the Commission had *only* considered individuals as potential straw donors, merely that it "*almost* exclusively" considered such situations. (AR 83 (emphasis added).) Plaintiffs' identification of two matters (Pls.' Mem. at 33) in over 30 years of administrative enforcement history certainly does not demonstrate that the controlling group's analysis of prior matters was unreasonable. To the contrary, the controlling Commissioners found that, unlike the present matters as alleged by plaintiffs, "nearly every alleged straw-donor scheme [previously] addressed by the Commission involved *excessive and/or prohibited contributions*." (AR 83.) And both the matters plaintiffs' rely upon address excessive contributions. Rather than undercutting the controlling Commissioners' analysis, these matters thus fit comfortably within it.

advertisements. (First General Counsel's Report at 20, 32-34, MUR 4313 (Coalition for Good Government), http://eqs.fec.gov/eqsdocsMUR/0000018F.pdf.) The individual had been advised that it was advantageous to make the advertisements through a closely-held corporation because, while the corporation would serve effectively as his "alter ego in that [he] funded and controlled it," the corporate form would offer "limited liability from suit by vendors and others." (*Id.* at 20.) Upon review, the Commission concluded that the source of the advertisement funding was nonetheless the corporation, not the individual. (*Id.* at 34.) The Commission reasoned: "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.*) Thus, despite where and why the funds originated, the fact that the advertisements were ultimately paid for by the closely-held corporation was dispositive as to the source of the funds. (*Id.*) The controlling Commissioners found that examples such as this one supported the notion "that once funds are deposited in a corporate account, they become the corporation's funds and are no longer those of the corporation's owner." (AR 85.)

Certainly in the context of the straw donor prohibition's application to a contribution by a closely-held corporation, however, the controlling Commissioners have clarified that they intend to consider where and why the funds for the contribution originated going forward. (AR 86-87.) But the Commission's different treatment in other contexts presenting arguably similar factual scenarios supports the controlling Commissioners' view that respondents — without the benefit of the Commission's current guidance — could have relied upon such section 30118 precedents to reach a different conclusion. Moving ahead with an enforcement action in an identified area of legal uncertainty risks rejection in court. *See, e.g., Trinity Broad. of Fla., Inc. v. F.C.C.*, 211 F.3d 618, 628-32 (D.C. Cir. 2000)

(vacating agency's decision denying application to renew license because agency's interpretation of applicable regulation, though sufficiently reasonable to survive deferential review, had not been sufficiently noticed to the regulated party); *Gen. Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1328-34 (D.C. Cir. 1995) (similarly upholding agency's interpretation of regulations as permissible while vacating agency's finding of liability, concluding that "[w]here, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished").

Similarly, the controlling Commissioners did not suggest that respondents may have interpreted Commission regulations to mean that section 30122 did not prohibit corporate straw donors. (Pls.' Mem. at 36.) Rather, the Commissioners' point was that, given 11 C.F.R § 110.1(g)'s command that even contributions from a single-member corporate LLC should be attributed to the entity, not the member, 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* AR 86.)

3. The Controlling Commissioners Reasonably Determined It Would Be Unfair To Prosecute Respondents

Given that the issue was one of first impression and the lack of clarity in the governing law, 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 plaintiffs' administrative complaints. (AR 76.)

Plaintiffs acknowledge the "'due process concern[] . . . that regulated parties should know what is required of them so they may act accordingly' before being subjected to [an]

enforcement action." (Pls.' Mem. at 36-37 n.20 (quoting *Fox Television*, 567 U.S. at 253).) Plaintiffs nevertheless argue that, here, "[n]o due process concern was implicated because the regulated parties knew 'what [was] required of them.'" (*Id.* at 37 n.20 (quoting *Fox Television*, 567 U.S. at 253).) But this is merely a re-assertion of plaintiffs' argument that respondents had adequate notice that their conduct was potentially unlawful, and should be rejected for the same reasons discussed above. Because due process concerns are generally undisputed here, and because the controlling Commissioners' determination that respondents had insufficient notice is adequately explained and reasonable, the Court should sustain the controlling dismissal decision.

II. PLAINTIFFS' CHALLENGE TO THE CONTROLLING COMMISSIONERS' PURPOSE-BASED PROPOSED APPROACH IS NOT RIPE AND IN ANY EVENT FAILS

Plaintiffs also level a conclusory challenge to the controlling Commissioners' preferred purpose-based approach for applying the straw donor prohibition in future cases as arbitrary, capricious, and contrary to law. (Pls.' Mem. at 37.) But, as plaintiffs repeatedly emphasize, the controlling Commissioners "declined to apply that standard to the respondents" in this case. (*Id.* at 22; *see also id.* at 37, 38.) Any challenge to that standard thus is not ripe and should be rejected. In any event, the controlling Commissioners' approach is not contrary to law and passes *Chevron* review.

A. There Is No Ripe Dispute Regarding The Controlling Commissioners' Proposed Purpose-Based Approach

Plaintiffs admit that the controlling Commissioners did not apply their announced purpose-based approach to the allegations about the respondents in this case. Nor does it appear that it will be applied to plaintiffs in the immediate future and cause them harm. Plaintiffs' challenge to the controlling Commissioners' purpose-based approach should therefore be dismissed as unripe.

The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also 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." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). "The question is not whether judicial review will be available but rather whether judicial review is available *now*." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014). When determining whether an agency's action is ripe for review, 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).

Particularly because intent can be a heavily fact-intensive inquiry, the Commission and the Court would greatly benefit from analyzing the application of any purpose-based approach in a specific factual context. As plaintiffs recognize, the "parameters of the controlling group's standard have not been tested," and an announcement of a standard does not demonstrate how it would be applied in an individual case. (Pls.' Mem. at 38; *id.* (stating that "it is unclear whether [the controlling Commissioners'] standard would capture use of Eli Publishing as a straw donor").) Further, plaintiffs argue that the purpose requirement "*may be* 'virtually impossible to prove' because donors can simply 'claim[] publicly that they funneled contributions through a single member or closely held LLC for any reason other than evading disclosure." (*Id.* (quoting AR 96) (emphasis added).) Future matters will permit the FEC to assess whether donors do, in fact, make such claims and to determine exactly how difficult it is to satisfy a purpose requirement in the sharpened setting of application to concrete facts.

In contrast to the cost to the Court and the Commission of allowing review to proceed now, withholding review of the controlling Commissioners' purpose-based standard will not

impose any legally cognizable hardship on plaintiffs. Unlike cases where the Supreme Court has found a pre-enforcement challenge ripe, the proposed purpose-based standard does not "force [plaintiffs] to modify [their] behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (dismissing case as unripe where there is a lack of significant hardship to the plaintiff from postponement). Instead, "[t]he only conceivable hardship [plaintiffs] will endure as a result of postponement is the burden of participating in further administrative and judicial proceedings" — and that burden for an administrative complainant does "not constitute sufficient hardship for the purposes of ripeness." *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998); *see also AT&T Corp. v. F.C.C.*, 349 F.3d 692, 700 (D.C. Cir. 2003) ("If [t]he only hardship [a claimant] will endure as a result of delaying consideration of [the disputed] issue is the burden of having to [engage in] another suit, this will not suffice to overcome an agency's challenge to ripeness." (alterations in original; internal quotation marks omitted)).

Moreover, should plaintiffs instigate future proceedings raising this issue, the entire Commission will have the opportunity to consider the appropriate standard in the context of new facts. Though the controlling statement provides clear guidance on how three Commissioners intend to approach future matters, they may further develop the standard, and other Commissioners can continue to determine whether to agree to the proposed, and perhaps further developed, standard or continue to engage in a different analysis. *See Common Cause*, 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."). Judicial intervention now denies the FEC "an opportunity to correct its own mistakes [(if any)] and to apply its expertise" to adjust the standard as future facts and considerations warrant. *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.").

In sum, "[i]n contrast to the [announced standard's] lack of legal or practical effect upon [plaintiffs], the effect of the judicial review sought by [plaintiffs] 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. Plaintiffs challenge to that standard thus is not yet ripe and should be dismissed. *See Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 235-36 (D.C. Cir. 1988); *Cephalon, Inc. v. Sebelius*, 796 F. Supp. 2d 212, 216-21(D.D.C. 2011).

B. The Controlling Commissioners' Interpretation of Section 30122 Is Not Contrary to Law or Arbitrary or Capricious

To the extent that the controlling Commissioners' standard may be applied in future cases, their purpose-based standard constitutes a permissible construction of section 30122 and readily passes *Chevron* review. *See supra* pp. 20-21 & n.7 (explaining that declining-to-go-ahead FEC Commissioners receive *Chevron* deference when their reasons for voting not to find reason to believe rely upon their interpretation of FECA's provisions). Congress has not spoken to the precise issue of the level of intent required for a violation of the prohibition on making a contribution in the name of another. And the controlling Commissioners properly balanced the interest in disclosure with the potential First Amendment burden when deciding to incorporate a purpose-based requirement into section 30122.

The statute is not clear as to what (if any) scienter or purpose is required to establish that someone has made a contribution in the name of another. As the Supreme Court has repeatedly recognized in analogous determinations in criminal contexts, a statute's "silen[ce] concerning the *mens rea* for a violation" "does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element." *Staples v. United States*, 511 U.S. 600,

605 (1994). When section 30122 was originally enacted as part of the Federal Election Campaign Act of 1971, it was solely enforced through criminal law — which presumptively contains a *mens rea* requirement regardless of a criminal statute's silence on the matter. 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) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (holding that "mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced"); *FEC v. Weinsten*, 462 F. Supp. 243, 246, 249-50 (S.D.N.Y. 1978) (rejecting argument that section 30122 is unconstitutionally vague and assuming for purposes of dismissal motion that defendants in scheme to mask corporate contributions through use of employees and their spouses was done with "direct[ion]" and for the purpose of evading the "simple words" of FECA's prohibition on making a contribution in the name of another). And the relevant language of the statute has not changed since.

While later providing for both criminal and civil enforcement of the statute, Congress intended to increase the penalties where a more serious state of mind could be proven, but the legislative history does not indicate that Congress intended to have no purpose or scienter requirement for other 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; *see* 52 U.S.C. § 30109(a)(5), (a)(6), (d)(D) (providing criminal liability and higher civil fines for violations of section 30122 that are "knowing and willful").

While plaintiffs might prefer a different interpretation of section 30122, their failure to identify any law that is contrary to the controlling Commissioners' interpretation is largely dispositive. *DCCC*, 831 F.2d at 1135 n.5 (explaining that "[i]n the absence of prior Commission precedent . . . judicial deference to the agency's initial decision or indecision would be at its zenith"). Furthermore, the controlling Commissioners' purpose-based standard need only be rational to be upheld, a bar that is certainly met here. *Orloski*, 795 F.2d at 167. Indeed, even the Commissioners voting to find reason to believe noted that "whether or not the source transmitted the money *with the purpose* that it be used to make or reimburse a contribution" is a "critical consideration in determining the 'true source' of a contribution." (AR 93 n.15 (emphasis added).)

By way of illustration, the controlling Commissioners reasoned:

> [I]f Corporation A provides Individual B a $3,000 bonus for the purpose of rewarding good work, and Individual B uses that income to contribute to Candidate C, there is no violation of section 30122. But if Corporation A provides Individual B a $3,000 bonus for the purpose of reimbursing Individual B's contribution to Candidate C, a violation of section 30122 can be found, and indeed has. In both scenarios, the *purpose* of the transfer has always been the dispositive fact.

(AR 100.) Such a purpose-based distinction is rational. At least one court has indicated that, at least in the context of direct restraints on speech, a statute regulating First Amendment protected activity may not imposes civil penalties on a strict liability basis. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992) ("[W]e believe any statute that chills the exercise of First Amendment rights must contain a knowledge element.").

Moreover, as the controlling Commissioners pointed out (AR 100 n.12), another court considering a similar hypothetical reached a similar conclusion. In *United States v. Danielczyk*, the court considered a hypothetical involving "a proud parent of a politically active college student [who] reimburse[s] that student for her purchase of a ticket to a political fundraiser." 788 F. Supp. 2d 472, 483 (E.D. Va. 2011), *rev'd in part on other*

grounds, 683 F.3d 611 (4th Cir. 2012). The court found that the "proud-parent hypothetical would only implicate § [30122] where the parent's *purpose* was to circumvent his contribution limits through his daughter." *Id.* at 484 (emphasis added); *see also United States v. Whittemore*, 776 F.3d 1074, 1080 (9th Cir. 2015) (upholding a jury instruction stating section 30122 "prohibits conduit contributions, which occur when a person provides anything of value . . . to another person *for the purpose of* causing that other person to make a contribution in that other person's name" (emphasis added)); *Danielczyk*, 788 F. Supp. 2d at 483-84 (explaining that a statement in *McConnell*, 540 U.S. at 231-32, "plainly contemplated that § [30122] applied to [the] hypothetical, *if* the parent *intended* to circumvent his contribution limits via his daughter" (emphasis in original)).

The controlling Commissioners' effort to interpret section 30122 in the manner that reduced impingements upon First Amendment rights (AR 87 n.69 (collecting cases)) is supported by courts' instructions that the FEC act with sensitivity to such rights. *E.g.*, *Van Hollen*, 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."); *cf. Common Cause*, 842 F.2d at 445 ("[T]he Supreme Court has favored narrow interpretations of FECA requirements that implicate first amendment political speech." (collecting cases)); *Cablevision Sys. Corp. v. F.C.C.*, 649 F.3d 695, 713 (D.C. Cir. 2011) ("We . . . decline to strike down the Commission's order as fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective.") (internal quotation marks omitted).

Thus, even if the controlling Commissioners' purpose-based standard were ripe for review, it is not contrary to law or arbitrary or capricious.[11]

III. PLAINTIFFS' CHALLENGE TO THE COMMISSION'S HANDLING OF ITS ENFORCEMENT DOCKET IS WELL BEYOND THE SCOPE OF JUDICIAL REVIEW HERE

Unable to establish that the controlling Commissioners abused their discretion in *this* case, plaintiffs attempt to broaden the case to challenge those Commissioners' approach in enforcement cases generally, asserting that they have abdicated enforcement of FECA. (Pls.' Mem. at 40-42.) This assertion is baseless and improper for several reasons.

First, FECA's text limits judicial review of dismissals of an administrative complaint to "the complaint" at issue — it does not permit wide-ranging judicial oversight over the Commission's enforcement processes generally. 52 U.S.C. § 30109(a)(8)(C). Courts have rejected similar attempts by plaintiffs to mount "an across-the-board challenge" to FEC enforcement matters, holding that the "exclusive remedy" for aggrieved parties is to "challenge those particular decisions under the judicial review provision of FECA." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 164 F. Supp. 3d 113, 120 (D.D.C. 2015).

Second, plaintiffs' broad-based attack largely relies on extra-record material that was not considered by the Commission in making the underlying dismissal decisions on review here. Such material, and plaintiffs' arguments premised on such material, should thus be disregarded. Indeed, it is "black-letter administrative law that . . . a reviewing court 'should have before it neither more nor less information than did the agency when it made its

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[11] Similarly unpersuasive are plaintiffs' passing arguments that the controlling Commissioners "do not even attempt to argue that the federal political committee registration and reporting requirements were unclear." (Pls.' Mem. at 29.) But, as the focus of plaintiffs' own briefing makes clear, these are straw donor cases, not political-committee cases. As the FEC's Office of General Counsel explained, "an entity can be a conduit or a political committee, but not both." (AR 44.) All of the Commissioners accordingly reviewed the administrative complaints as alleging straw donor violations of section 30122. (AR 80 n.36; *see generally* AR 90-94.)

decision.'" *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). The record rule ensures that a court's review of any agency's action is conducted fairly, because to "review more than the information before the [agency] at the time [it] made [its] decision risks requiring [our] administrators to be prescient or allowing them to take advantage of post hoc rationalizations." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792. It also enables agencies to consider information that challengers to agency action deem relevant. *See id.*[12]

Third, even if FECA permitted such a broad-based attack on the Commission's enforcement authority, plaintiffs' abdication argument is meritless. Even if the Court could consider plaintiffs' extra-record evidence, which would be contested, an increase in the number of deadlocked decisions, without more, does not indicate that certain Commissioners are acting improperly. "An administrative official is presumed to be objective [and] mere proof that she has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption." *United Steelworkers, ALF-CIO-CLC v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980). Plaintiffs fail to demonstrate any inflexibility of Commissioners here and, even if they could,

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[12] Nor are most of plaintiffs' extra-record citations subject to judicial notice. (*See* Pls.' Mem. at 8, 40.) Plaintiffs submit news articles in support of widely debated and contested propositions, such as the extent to which section 501(c)(4) organizations are devoted to electoral advocacy. These are matters subject to reasonable dispute. *Cf.* Fed. R. Evid. 201(b)(2) (limiting judicial notice to facts that are "not subject to reasonable dispute").

Plaintiffs also cite to documents from past FEC matters that either are no longer or never were before the Court. Like authority from any agency, plaintiffs are of course free to cite those, as the Commission has. They also contend that the Commissioners' "rationale must be evaluated in light of all the information they reviewed in formulating their position." (Pls.' Mem. at 9 n.6.) True enough, but that does not mean plaintiffs need not clearly distinguish the challenges that are still pending from those the Court has dismissed. To the extent they are relevant, the existence of additional matters in which the Commissioners reached the same conclusion as in the still-pending matters demonstrates consistency, which indicates that the pending actions were handled reasonably and not arbitrarily.

the D.C. Circuit has rejected the argument "we should deny an agency *Chevron* deference because of our judicial assessment that it has been 'hostile' to certain ideas." *N. Broward Hosp. Dist. v. Shalala*, 172 F.3d 90, 94 (D.C. Cir. 1999). The Court reasoned:

> If an agency's "hostility" leads it to adopt an unreasonable interpretation of a statute, the interpretation will, if challenged, be rejected by the courts . . . . It is a far different thing to suggest that a court withhold deference to an agency's interpretation of a statute it administers on the basis of some sort of judicial "vote of no confidence" regarding the agency's actions on related matters.

Id. Rather, the D.C. Circuit found that, while Congress could address an agency's "'unremitting[] hostil[ity]'" to a particular statutory provision, courts could not. *Id.* "Absent such congressional intervention, administration of the [statute] is entrusted to [the agency], and our review is that prescribed by *Chevron*." *Id.*

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for summary judgment and deny plaintiffs' motion for summary judgment.

Respectfully submitted,

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