**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, | ) | |
| Plaintiffs, | ) | Civ. No. 15-2038 (RC) |
| v. | ) | |
| FEDERAL ELECTION COMMISSION, | ) | SUMMARY JUDGMENT MEMORANDUM |
| 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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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

***Cases*** ***Page***

***Statutes and Regulations***

***Other Authorities***

## INTRODUCTION

Federal law grants broad discretion to administrative agencies like the Federal Election Commission ("Commission" or "FEC") in deciding whether to pursue enforcement actions to remedy alleged violations of the statutes they administer. After five years of investigation into the political activities of a group called the Commission on Hope, Growth and Opportunity ("CHGO"), the FEC exercised its discretion and declined to pursue further enforcement proceedings. For most federal agencies, that decision would be presumptively unreviewable. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985). For the FEC, the decision is reviewable only to determine whether it is contrary to law. 52 U.S.C. § 30109(a)(8)(C).

The Commission's dismissal decision easily meets the highly deferential standard of review applicable here. At the time of the Commission's final decision dismissing the CHGO matter, it had been more than five years since the first of the advertisements at issue had been aired, CHGO had conducted no activities in more than four years, and it had been more than three years since the group had formally ceased to exist. Any further enforcement action would have had to overcome difficulties in pursuing a defunct defendant, under the five-year statute of limitations, with personnel who disclaimed responsibility for the organization, and with witnesses who could not recall essential details about its operations. Even a conciliation agreement could not be concluded without anyone willing to represent the defunct CHGO. Faced with these evidentiary, legal, and logistical difficulties, a controlling group of FEC Commissioners voted to exercise prosecutorial discretion and dismissed the matter, explaining their decision in a detailed statement of reasons. Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and its executive director obviously disagree with the FEC's exercise of its discretion in declining to continue pursuing the reporting and registration violations they

had alleged. But the applicable legal standard is whether the Commission acted reasonably, based on the information before it at the time of decision, even if other reasonable decisions were also possible. Under the difficult circumstances involved here, the Commission clearly met that standard. Therefore, the Commission respectfully requests that this Court enter summary judgment in its favor.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

#### A. The Commission

The Commission is a six-member independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA" or "the Act"). 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 investigate possible violations of the Act, *id.* § 30109(a)(1)–(2); and to "have exclusive jurisdiction with respect to the civil enforcement of" FECA, *id.* § 30106(b)(1). FECA requires that the Commission make most decisions by majority vote and, for certain decisions including whether to go forward with enforcement proceedings, that it do so with "the affirmative vote of 4 members of the Commission." *Id.* § 30106(c).

#### B. FECA's Registration and Reporting Requirements

As a general matter, FECA requires groups that wish to finance certain kinds of election-related communications to comply with various public-disclosure requirements. These disclosures "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam). Public disclosure also "provides the electorate with information" concerning the

sources of election-related spending. *Id.* at 66. At the same time, however, it "is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute," thus implicating First Amendment scrutiny. *Id.* at 68. FECA balances these principles and creates a two-tiered reporting system whereby certain groups — known as "political committees" — must register with the Commission and publicly report more extensive information regarding their activities, while other groups need only report spending on particular communications that meet certain criteria.

**1. Regulation of Political Committees**

The Act requires that noncandidate groups qualifying as political committees register with the Commission, appoint a treasurer, keep records of the names and addresses of contributors, and file periodic reports identifying persons who made contributions to, or received disbursements from, the committee in excess of $200 per year, and other finance information. *See* 52 U.S.C. §§ 30103, 30104(a)-(b). To qualify as a political committee subject to these enhanced disclosure provisions, an entity must satisfy the criteria specified in FECA as narrowly construed by the Supreme Court.

Under FECA, a political committee is "any committee, club, association, or other group of persons" that "receives contributions" or "makes expenditures" of more than $1,000 during a calendar year. 52 U.S.C. § 30101(4)(A). "This broad definition, however, is less universally encompassing than at first it may seem, for [FECA's] definitional subsections limit" the scope of "the key terms 'contribution' and 'expenditure.'" *FEC v. Akins*, 524 U.S. 11, 15 (1998). Those terms cover "only those contributions and expenditures that are made 'for the purpose of influencing any election for Federal office.'" *Id.* (quoting statutory definitions recodified at 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i)).

In addition, in reviewing the constitutionality of FECA, the Supreme Court indicated that defining political committees "only in terms of amount of annual 'contributions' and 'expenditures'" might create overbreadth concerns by reaching "groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. To address this concern, the Court tempered FECA's statutory language by limiting the definition of political committee to "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." *Id.*

In sum, *Buckley* establishes that an entity like CHGO that is not controlled by a candidate must register and report as a political committee only if the entity crosses the $1,000 threshold of contributions or expenditures *and* has as its "major purpose" nominating or electing federal candidates. "Although *Buckley*" created "the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose." *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012) ("*RTAA*"). The Commission, in turn, has adopted a policy of determining political committee status through case-by-case adjudication rather than by promulgating a regulatory definition. *See Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007). Under this approach, the Commission makes a fact-specific determination by considering the group's activity, including its spending on "Federal campaign activity," its other spending, and any statements made by the organization. *Id.* at 5601. The Commission's decision to determine political committee status by case-by-case adjudication has been repeatedly upheld by the courts, including by courts in this district. *See RTAA*, 681 F.3d at 556; *Shays v. FEC*, 511 F. Supp. 2d 19, 23 (D.D.C. 2007).

### 2. Event-Driven Reporting Requirements

FECA imposes less extensive disclosure obligations on individuals and groups that do not meet the definition of a political committee. As relevant here, non-political committees need to make disclosures only in connection with spending on "independent expenditures" and "electioneering communications" above certain minimum thresholds.

#### a) Independent Expenditures

An "independent expenditure" is "an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate . . . ." 52 U.S.C. § 30101(17). Under Commission regulations, the phrase "expressly advocating" means "any communication that" (a) uses phrases such as "vote for," "re-elect," "support," "cast your ballot," "vote against," "defeat" or communications "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)," or (b) contains an "unambiguous" "electoral portion" and all "[r]easonable minds" would conclude it "encourages actions to elect or defeat" candidates. 11 C.F.R. § 100.22. Any entity that spends more than $250 to finance independent expenditures must file with the Commission a disclosure report that identifies, *inter alia*, the date and amount of each expenditure and anyone who contributed more than $200 "for the purpose of furthering an independent expenditure." *See* 52 U.S.C. § 30104(c)(1), (2)(A), (C). FECA requires these reports to be filed at least quarterly, unless the independent expenditures occur close in time to the date of an election, in which case they must be filed within 24 or 48 hours. *Id.* § 30104(a)(2), (c)(2), (g).

b) **Electioneering Communications**

FECA also requires the reporting of information regarding "electioneering communications." 52 U.S.C. § 30104(f)(1). An electioneering communication is "any broadcast, cable, or satellite communication" which "refers to a clearly identified" federal candidate and is made within 60 days before a general election or 30 days before a primary election, or a convention or caucus of a political party, and "is targeted to the relevant electorate." *Id.* § 30104(f)(3)(A).[1] Any entity that makes electioneering communications exceeding $10,000 in aggregate during any calendar year must report, *inter alia*, the date and amount of each disbursement, the identity of candidates mentioned, and the name and address of each donor who gave an aggregate of $1,000 or more to a segregated bank account if that account was used to make the disbursements. *Id.* § 30104(f)(1)-(2). If the disbursements were made by a corporation or labor union, the organization must identify the name and address of each person who contributed an aggregate of $1,000 or more over the course of the previous 12 to 24 months "for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9). Generally, electioneering communications must be disclosed within 24 hours after the person has "made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000." 52 U.S.C. § 30104(f)(4).

[1] By statute, communications may constitute either an express advocacy communication or an electioneering communication, but not both. Though communications could otherwise meet the criteria for both terms, express advocacy communications are an express exception from the "electioneering communication" definition. 52 U.S.C. § 30104(f)(3)(B)(ii).

### 3. Disclaimer Requirements

FECA also imposes specific requirements for disclaimers that must accompany covered political advertising. Independent expenditures and electioneering communications that are not authorized by a candidate or his or her authorized committee and that are broadcast on television must include statements that identify "the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." 52 U.S.C. § 30120(a)(3). Such a communication must also include the audio statement that the person making the disbursement "is responsible for the content of this advertising," conveyed either with an unobstructed full-screen view of a representative of the person making the disbursement or in a voiceover. *Id.* § 30120(d)(2). This information "shall also appear" onscreen "in a clearly readable manner." *Id.*

## C. FECA's Administrative Enforcement and Judicial Review Provisions

FECA provides that "[a]ny person who believes a violation . . . has occurred may file a complaint with the Commission" alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). The filing of an administrative complaint initiates a multiple-step administrative process to determine whether any civil FECA violations have occurred. Upon receiving a complaint, the Commission must notify any person alleged to have committed a FECA violation (*i.e.*, the "respondent") and provide fifteen days for a response. *Id.* § 30109(a)(3). After considering the complaint and any response, the Commission must then determine — by an affirmative vote of four Commissioners — whether to find there is "reason to believe" that the respondent has committed a violation of the Act and conduct "an investigation of such alleged violation." *Id.* § 30109(a)(2).

If the Commission conducts an investigation, it must then determine whether there is "probable cause to believe" that a FECA violation has occurred — a determination that also

requires an affirmative vote of at least four Commissioners. 52 U.S.C. § 30109(a)(4)(A)(i). After a finding of probable cause to believe that the respondent has committed a FECA violation, the Commission is statutorily required to "attempt, for a period of at least 30 days," but "not more than 90 days," to "correct or prevent such violation by informal methods of conference, conciliation, and persuasion." *Id.* To be accepted by the Commission, any conciliation agreement requires the affirmative vote of at least four Commissioners. *Id.* If the Commission is unable to reach a conciliation agreement, FECA authorizes — also with the support of four votes — the FEC to institute a de novo civil enforcement action in federal district court. 52 U.S.C. § 30109(a)(6)(A).

During the enforcement process, FECA authorizes administrative complainants to file a lawsuit challenging "a failure of the Commission to act on [a] complaint" within 120 days of its filing. *Id.* § 30109(a)(8)(A). And, if at any point the Commission decides to dismiss an administrative complaint — either because it determines that no violation has occurred or for any other reason — FECA permits "[a]ny party aggrieved" by such an order to file suit in this District against the Commission to obtain judicial review of the dismissal decision. *Id.*

## II. FACTUAL BACKGROUND

### A. Initial Complaints and CHGO Responses

The FEC's investigation into CHGO's activities began as a result of an administrative complaint filed by the Democratic Congressional Campaign Committee and its executive director on October 4, 2010 ("DCCC Complaint").[2] (Administrative Record ("AR") 1-6.) The DCCC Complaint alleged that CHGO, an organization registered under section 501(c)(4) of the

[2] The DCCC Complaint was designated Matter Under Review ("MUR") 3971.

Internal Revenue Code, had "broadcast television advertisements" in late-September 2010 "attacking" five incumbent members of the House of Representatives who were then running for reelection. (AR 1-2.) These advertisements violated FECA, according to this initial complaint, because CHGO had failed to report them as independent expenditures or electioneering communications under 11 C.F.R. § 104.20(b) and 11 C.F.R. § 109.10(c), and also because they did not include an oral disclaimer indicating the name of the entity "responsible for the content of this advertising," in violation of 11 C.F.R. § 110.11(c). (AR 4-5.)

CHGO's general counsel, William Canfield, initially sought to have the DCCC Complaint dismissed on procedural grounds. (AR 10-18, 21-22.) The Commission denied that relief, but provided CHGO with additional time to respond to the merits of the DCCC's allegations. (AR 23, 24.)

Before CHGO responded to the DCCC Complaint, CREW and its then-Executive Director Melanie Sloan, the plaintiffs in this lawsuit, filed an additional administrative complaint against CHGO on May 23, 2011 ("CREW Complaint").[3] (AR 25-38.) Like the DCCC, plaintiffs alleged that CHGO funded television advertisements that constituted independent expenditures and electioneering communications without reporting them to the FEC and that the advertisements failed to include FECA-compliant disclaimers. (AR 34-37.) The CREW Complaint, however, identified additional advertisements not described in the DCCC Complaint. Specifically, plaintiffs alleged that between "September 25 and November 2, 2010, CHGO spent

[3] The CREW Complaint was designated MUR 4971.

more than $2.3 million to broadcast television advertisements in 12 elections for seats in the House of Representatives." (AR 28.)

Plaintiffs' administrative complaint focused on five categories of advertisements produced by CHGO during the 2010 election cycle.[4] The first type of advertisement, titled "Song and Dance," depicted a chorus line with three of the dancers' faces replaced with the faces of President Obama, Nancy Pelosi, and a specific Democratic congressional candidate. (AR 29, ¶ 12.) While these images played on the screen, a narrator stated that "it's the worst economy in decades" but "instead of looking out for us," the featured congressional candidate "approved billions in deficit spending without missing a beat." (*Id.*) The narrator then encouraged the viewer to "pull the plug on this song and dance once and for all," and to "join" the featured congressional candidate's Republican opponent in his or her "fight against the big spenders in Washington." (*Id.*) The ad concluded by displaying an image of the Republican opponent next to printed text asking the viewer to "Fight back. Join [the Republican opponent]. Stop the big spenders in Congress." (*Id.*) Plaintiffs alleged that CHGO broadcast four versions of this advertisement, featuring four Democratic congressional candidates and their Republican opponents. (AR 29-30.)

The second type of advertisement plaintiffs identified in their administrative complaint was titled "Collectible Coin." This advertisement was a mock infomercial advertising a collectible coin bearing the faces of President Obama, Nancy Pelosi, and a specific Democratic congressional candidate commemorating President Obama "increasing our national debt to a

[4] Video files containing the advertisements are a part of the administrative record. (AR 39-40.)

staggering $13.4 trillion" and the Democratic candidate's "unwavering votes for the Pelosi agenda." (AR 29, ¶ 13; AR 210.) The advertisement then invited the viewer to call the Democratic candidate "to order yours today." (AR 29, ¶ 13.) After this, an image of the Republican opponent appeared on screen, and a new narrator said that the opponent "has a better idea — stop the spending and get America working again." (*Id.*) Text on the screen then invited the viewer to "Help" the Republican opponent. (*Id.*) Plaintiffs' administrative complaint alleged that CHGO broadcast five versions of this advertisement and a similar sixth version "in support of" a Democratic candidate in Idaho that "did not mention his opponent." (AR 29-31.)

A third CHGO advertisement plaintiffs identified was titled "Make America Work." (AR 30, ¶ 21.) Plaintiffs alleged that CHGO produced two versions of this advertisement featuring Democratic candidates and their Republican opponents. (AR 30-31.) The advertisement asserted that the Democratic candidate "squandered billions on a bogus stimulus bill as unemployment skyrocketed" and "led the charge with [Nancy] Pelosi for Obamacare, further crippling" the local economy. (AR 31, ¶21.) The advertisement then contrasted this with the Republican candidate, who the ads asserted believed that local individuals "know best how to create jobs and grow our economy" and asked the viewer to "help" the Republican candidate "make America work again." (*Id.*)

The final two advertisements identified in the CREW Complaint featured only one Democratic member of Congress each. The CHGO ad titled "What She Believes" contained video of then-Representative Carol Shea-Porter (D-NH) and accompanying text explaining that she voted for a stimulus package and health care bill, and added that "it gets worse" because she "voted for the Pelosi House agenda 93%" of the time. (AR 31, ¶ 25.) The advertisement encouraged viewers to call "Congresswoman Shea-Porter" and "let her know if what you believe

is what she believes." (AR 31, ¶ 25.) Plaintiffs also alleged that CHGO ran an advertisement titled "Queen Nancy" and featuring then-Congressman Allen Boyd (D-FL). (AR 32, ¶26.) This advertisement displayed images of Boyd and Nancy Pelosi, among others, and asserted that after Boyd "voted no on Obamacare, Queen Nancy shouted 'off with his head,' and Allen quickly changed his vote to yes." (*Id.*) The advertisement then suggested that viewers "Call Congressman Allen Boyd" and "Tell him to repeal Obamacare." (*Id.*; AR 216.)

Finally, plaintiffs alleged that each advertisement appeared with a written disclaimer: "Paid for by the Commission on Hope, Growth and Opportunity, a tax-exempt 501(c)(4) organization and not a federal political committee. This message is not coordinated with any candidate or committee." (AR 32, ¶ 27.)

Like the DCCC Complaint, the CREW Complaint alleged that these advertisements were either independent expenditures or electioneering communications that should have been, but were not, reported to the FEC. (AR 34-36.) Plaintiffs also alleged that the advertisements did not include required audio disclaimers. (AR 36.)

CHGO responded to the administrative complaints, through its attorney Canfield, on June 1, 2011. (AR 45-52.) CHGO asserted that it was "a tax-exempt, not-for-profit, social welfare organization" organized under section 501(c)(4) of the Internal Revenue Code. (AR 46.) To pursue this purpose, CHGO explained, it "conducts a public-outreach effort focused on macro-economic issues and functions as an economic 'think tank' regarding such federal policy issues as tax, trade, budget and economic growth." (AR 46.) In addition to CHGO's "cable television issue-oriented announcements that address macro-economic issues and set-forth the public positions previously taken by legislators on Capitol Hill," "CHGO also commissions macro-economic studies by prominent academic scholars." (AR 46; *see* AR 136-61.)

Regarding its advertising activities, CHGO explained that each communication with the public identified "CHGO as a 501c(4) [*sic*] social welfare organization and not a federal political committee," and that candidates for federal office were "only so referenced in the explicit context of that person's public record in support of or opposition to the . . . macro-economic policies espoused [by] CHGO." (AR 46-47.) CHGO denied any claim that it had violated any provision of FECA because "CHGO may not and does not engage in electoral politics at the federal level and all communications made to the public by CHGO are specifically issue oriented and do not advocate the election or defeat of any identified federal candidate." (AR 47.) Moreover, CHGO argued that any technical error with respect to disclosure of advertising under FECA was "made in good faith" because each advertisement contained a disclaimer explaining that CHGO paid for the advertisement and because records of CHGO-sponsored communications were publicly available in logs broadcasters maintain as required by the Federal Communications Commission. (AR 48-49.)

**B. Initial Analysis of the Office of General Counsel**

On August 31, 2011, the Commission's Office of General Counsel transmitted a consolidated, initial First General Counsel's Report considering both administrative complaints and analyzing whether the FEC should find reason to believe that CHGO had violated provisions of the Act. (AR 53-84.) This report reviewed CHGO's advertising and took the view that all of CHGO's broadcasts were either independent expenditures or electioneering communications covered by reporting and disclaimer requirements under FECA. (AR 59-72.) As a result, the report recommended that the Commission find reason to believe that CHGO had committed the reporting and disclaimer violations alleged in both the DCCC Complaint and the CREW Complaint. (AR 83-84.) The report also analyzed CHGO's activity to determine whether there

was reason to believe it had committed a FECA violation not alleged by either DCCC or plaintiffs — namely, whether CHGO was a political committee that was required to register and disclose its donors under the Act. (AR 72-83.) Based on a review of CHGO's website and publicly available press articles, the report concluded that there was such reason to believe, finding "based on the available information about CHGO's spending" that "the organization's major purpose appears to be federal campaign activity." (AR 82-83.)

Shortly after issuing its initial First General Counsel's Report, the Office of General Counsel withdrew it "in order to provide further analysis of issues" implicated by the report. (AR 116.) In the interim, the Office of General Counsel informed CHGO that it was considering the new political-committee violation not alleged in any complaint and asked CHGO for comment on specific news articles describing CHGO's activities. (AR 85-115, 117.)

On October 14, 2011, CHGO responded to the Commission, denying that it was a political committee and objecting to any FEC consideration of news articles in analyzing its conduct. (AR 118-25.) Specifically, CHGO argued, through Canfield, that it was not a political committee required to register with the Commission because it was engaged solely in "issue advocacy" and that its advertising had only the purpose to "educate the public on specific macro-economic issues" being considered by Congress. (AR 123-24.) CHGO reiterated its position that none of its advertisements contained any express advocacy, such as requests to "'vote for' or 'vote against'" a candidate, and that instead they focused on the positions Members of Congress had taken on various economic issues. (AR 123.) Therefore, CHGO argued, it was not a political committee. (AR 125.) CHGO also objected to the Commission giving any weight to the news articles, which it argued were "replete with factual inaccuracies, devoid of factual analysis, and given to editorial comment and presumption." (AR 123.) Among other items,

CHGO took issue with several of the articles' assertions that it was "founded" by Scott Reed, a longtime Republican political operative. (AR 119.) Instead, CHGO insisted that its founders were those individuals listed on its application for 501(c)(4) tax-exempt status with the IRS: Canfield, James S. "Steve" Powell, CHGO's Executive Director and President, and James D. "Jim" Warring, its treasurer. (AR 119; *see* AR 1550.)

**C. Plaintiffs' Amended Administrative Complaint**

Before the Office of General Counsel was able to complete its consideration of CHGO's latest response, plaintiffs filed an amended administrative complaint with the Commission on April 26, 2012. (AR 164-96.) In addition to again alleging that CHGO violated FECA by failing to report its independent expenditures and electioneering communications and failed to include proper disclaimers in its television advertising, plaintiffs also for the first time alleged that CHGO violated FECA by failing to register as a political committee. (AR 174-78.) As support for this new claim, plaintiffs relied on CHGO's 2010 Form 990 tax return, which reported $4,770,000 in total spending on $4,801,000 in revenue from contributions. (AR 182-96.) Plaintiffs noted that CHGO reported paying a company called Meridian Strategies $4,319,825 for "media placement," $275,000 for "media production," and $105,175 for "advertising and technology." (AR 170, ¶ 30; AR 189.) Based on data obtained from the Campaign Media Analysis Group ("CMAG"), an independent group that tracks the estimated cost of air time for political advertisements, plaintiffs surmised that CHGO had spent $2,314,000 to broadcast the advertisements identified in the amended administrative complaint, or 53% of the amount it paid to Meridian Strategies for media placement. (AR 176, ¶ 59.) Using this same 53% ratio, which plaintiffs "assum[ed]" also applied to CHGO's reported media production costs, plaintiffs estimated that CHGO spent $145,000 to produce the advertisements. (AR 177, ¶¶ 60-61.) Thus,

plaintiffs estimated that CHGO had spent at least $2,459,000 on the production and placement of the advertisements cited in the amended administrative complaint. (*Id.*) Because this figure was 51.5% of its total spending, plaintiffs contended that CHGO had the major purpose of nominating or electing federal candidates and so it should be considered a political committee under FECA. (AR 177-78.)

On May 21, 2012, Canfield responded to the amended administrative complaint on behalf of CHGO, indicating that CHGO continued to rely on the arguments made in its previous responses. (AR 198.) Canfield also explained, however, that CHGO was an "inactive client" and that he did not expect to provide legal services to the organization in the future. (*Id.*)

**D. First General Counsel's Report**

The Office of General Counsel issued its final First General Counsel's Report on December 27, 2013, incorporating the allegations from plaintiffs' amended administrative complaint and CHGO's additional responses. (AR 201-41.) The Office of General Counsel again recommended that the Commission find that all of the CHGO advertisements identified in the amended administrative complaint were either independent expenditures or electioneering communications that should have been reported to the Commission, and that they did not include proper disclaimers. (AR 208-23.)

The Office of General Counsel also recommended that the Commission find that CHGO should have registered with the FEC as a political committee. (AR 223-39.) The Office of General Counsel stated that it appeared that CHGO satisfied the statutory threshold in 2010 by making $1,000 in expenditures to broadcast several communications that the Office concluded "contain[ed] express advocacy," including versions of the Song and Dance, Collectible Coin, and Make America Work advertisements. (AR 231.)

The Office of General Counsel also recommended that the Commission conclude that CHGO's major purpose was the nomination or election of federal candidates. Based on its categorization of the advertisements identified in the amended administrative complaint, the Office of General Counsel noted that CHGO "allegedly spent over $1.7 million on express advocacy communications and over $530,000 on non-express advocacy communications that support or oppose a clearly identified federal candidate," which accounted for "all of CHGO's known advertisements." (AR 238.) At the same time, the Office of General Counsel acknowledged that these figures did not reflect "the full extent of CHGO's spending during the 2010 calendar year." (AR 233.) Therefore, although the Office of General Counsel suggested that "a substantial part" of the $4.5 million CHGO reported spending on media-related expenses in its tax return "may relate to federal campaign activity," it stated that it was "unclear at this stage whether" CHGO's election-related spending was a majority of its budget. (AR 238.) The report did not rely on Reed's association with CHGO.

The Commission voted on whether to find reason to believe CHGO committed FECA violations on September 16, 2014. The Commission unanimously found reason to believe that CHGO had violated 52 U.S.C. § 30104 by failing to report the communications cited in the administrative complaints as independent expenditures or electioneering communications, and the Commission authorized an investigation into those alleged violations. (AR 244-45.) There were not four Commissioner votes, however, to find reason to believe that the disclaimers included in CHGO's advertising were insufficient or that CHGO should have registered as a political committee. (AR 244.) Instead, the Commission unanimously decided to "take no action at th[at] time" on those alleged violations. (AR 245.) In a "Factual and Legal Analysis" explaining the Commission's vote, the Commission observed that the "Amended

[Administrative] Complaint raises the additional question of whether CHGO satisfies the definition of 'political committee,'" leaving that question open. (AR 256.)

**E. The Commission's Initial Investigation**

Based on the Commission's finding of reason to believe that CHGO had violated FECA's reporting requirements, the Office of General Counsel launched a formal investigation into the organization's activities. It began by contacting Canfield on October 15, 2014. (AR 257.) In response, Canfield explained that "nothing ha[d] happened" with CHGO since 2011, and that he had not been paid by the group since that time. (*Id.*)

Commission investigators then contacted Powell, CHGO's former President and Executive Director. During an interview on November 25, 2014, Powell explained that his primary role for CHGO was "writing and producing the T.V. ads that CHGO ran" during the 2010 election cycle. (AR 260.) Powell acknowledged that he also worked at Meridian, the CHGO vendor, during that time in an "of counsel" position. (*Id.*) As Powell explained, Meridian was responsible for placing the advertisements that CHGO produced. (*Id.*) Powell also expressed that the five categories of advertisements that the Commission had analyzed were "likely" all of the ads that CHGO had aired during the 2010 election cycle, which had concluded more than four years earlier. (AR 261.)

Commission staff also interviewed James Warring, an accountant who was listed in CHGO's IRS filings as its treasurer and non-voting director, on December 10, 2014. (AR 264-66.) Warring explained that his firm had done "accounting and tax work" for CHGO, including producing the organization's IRS tax returns for fiscal years 2010 and 2011. (AR 264.) According to those records, CHGO terminated in 2011 and filed its final IRS Form 990 tax return that year, which was Warring's last contact with the organization. (AR 265.)

Finally, Warring noted that — other than these tax returns — he did not have financial records relating to CHGO and explained that his firm does not retain client records of that type. (*Id.*)

Throughout these stages of the investigation, Commission staff encountered difficulty in obtaining CHGO's records. Powell, for example, stated that he was "not in possession of any financial records relating to" CHGO's advertisements, nor did he possess records "relating to their production or placement." (AR 261.) Commission investigators again spoke with Canfield on February 5, 2015. (AR 275.) During this interview, Canfield reiterated that CHGO had "stopped existing at the end of 2010" and "went out of business a long time ago." (*Id.*) He also explained that any records related to CHGO's advertising spending had likely long since been destroyed. (AR 276.) Canfield suggested that Warring's accounting firm would have used these records to prepare CHGO's tax returns, and then shipped the records back to the mail room of the law firm in Washington, D.C. from which Canfield rents office space. (*Id.*) At some point after receiving those records, the mail room staff — who "would not be familiar with CHGO" — likely "tossed" the records. (*Id.*) Canfield insisted, however, that the spending reflected on CHGO's 2010 Form 990 tax return "accurately represent[ed] the total expenditures made by CHGO," and that the only remaining way to confirm this would be to "go to each television station" where the advertisements "aired and request the" records relating to the advertising buys. (*Id.*) After the phone conversation, Canfield wrote to the Commission investigators by email to confirm that CHGO "had terminated its activities" in 2010 "and did not intend to conduct any further business," and that Canfield "no longer considered CHGO as [his] client and no longer served as its" general counsel. (AR 277.)

Many witnesses indicated that the passage of time affected their ability to remember specifics about the 2010 election cycle. Powell, CHGO's President, noted that "[t]hese events

took place five years ago" and he could only answer "to the best of his recollection." (AR 363.) Reed indicated "that he had been involved with too many political committees since 2010 to have a clear recollection" about his work with CHGO "at this point." (AR 653.)

Commission investigators were, however, able to obtain many records regarding CHGO's activities from witnesses. On May 19, 2015, the Commission unanimously voted to authorize investigators to subpoena CHGO-related records from Canfield, Warring, Powell, an employee of Warring's accounting firm, and Michael H. Mihalke, the principal of Meridian. (AR 278-23.) During the early summer of 2015, the Commission received hundreds of pages of financial records, tax returns, and communications relating to CHGO's activities. These materials included a CHGO planning document outlining the group's goal of making "an impact" by focusing on "key issues including financial reform, energy, taxes, pharmaceuticals, health care and other key concerns, with the primary focus on the policies of the current Congress and the Obama Administration specific to job creation, business growth and economic recovery." (AR 332.) CHGO planned to "focus its messaging on market research and strategically driven, compelling creative that will engage the public directly with a documented, substantiated approach." (AR 333.) A PowerPoint presentation indicated that CHGO's "mission" was to "advance the principle that sustained and expanding economic growth is central to America's economic future" and that the political landscape was ripe for an "[i]ssue focus on economy, anti-business policies." (AR 337-38.)

Some of these documents suggested that CHGO intended to engage in some express advocacy to further its policy goals. For example, the planning document stated that one of CHGO's goals was to "make an impact" on the group's "key issues" by "using express advocacy in targeted Senate races," and it listed states that were "potential targets" for the organization.

(AR 332.) One CHGO fundraising letter also indicated that the organization intended to "focus[] on running independent expenditure campaigns." (AR 427.)

These records also revealed the timing and circumstances regarding CHGO's termination. E-mails between Canfield, Mihalke, and Warring reflect that the decision was made to wind down CHGO in late March 2012. (AR 607.) Warring's firm then outlined the steps needed for CHGO to file its final tax return indicating the termination of the organization. (*Id.*) Canfield wrote that it was "important" to terminate CHGO "ASAP." (AR 609.) Mihalke agreed, saying that shutting CHGO down would "make things less complicated moving forward" and citing "an outstanding matter at the Federal Elections [*sic*] Commission." (AR 609.) CHGO's 2011 Form 990 was filed on May 4, 2012. (AR 1575.)

**F. Second General Counsel's Report**

On July 23, 2015, the Office of General Counsel issued its Second General Counsel's Report, summarizing the evidence it had collected at that point of the investigation. (AR 926-43.) The Second General Counsel's Report again recommended that the Commission find reason to believe that CHGO had violated FECA's disclaimer and event-driven reporting provisions, for the reasons explained in the earlier report. (AR 938-40.) Similarly, the Second General Counsel's Report again recommended that the Commission find reason to believe that CHGO was a political committee subject to more extensive registration and reporting requirements. (AR 932-38.) Based on the figures submitted by plaintiffs and recited in the First General Counsel's Report, the Office of General Counsel concluded that CHGO's expenditures were well in excess of the $1,000 statutory threshold. (AR 934.) The Office of General Counsel also recommended that the Commission find that CHGO's major purpose in 2010 was the nomination or election of federal candidates. (*Id.*) To reach this conclusion, the Office of

General Counsel first considered how much CHGO had spent "for 'federal campaign activity'" as compared to "'activities that [a]re not campaign related.'" (AR 935 (quoting *Rules and Regulations: Political Committee Status*, 72 Fed. Reg. at 5605; alteration in original).) The Office of General Counsel acknowledged that it was "not able to definitively itemize CHGO's spending on independent expenditures versus electioneering communications." (AR 935.)

The Office of General Counsel noted, however, that CHGO reported payments of $4.59 million to Meridian for media placement and production on its 2010 Form 990. Based on witness statements that *all* of CHGO's advertising was identified in the amended administrative complaint, the Office of General Counsel argued that the full amount of money CHGO paid to Meridian involved "federal campaign activity." (*See* AR 928, 935.) Despite incomplete records, the Office of General Counsel attempted to further break down this amount between independent expenditures and electioneering communications. Relying on the media-spending estimates compiled by CMAG, the Office of General Counsel calculated that 77% of CHGO's advertising spending (or 74% of its total expenditures) went to advertisements that the Office classified as independent expenditures. (AR 935-36.) But those estimates were incomplete because CMAG estimated that CHGO spent $2.2 million on advertising, while CHGO itself reported more than double that figure. (AR 928, 935.) The Office of General Counsel could not account for the discrepancy, except to note that all CHGO witnesses claimed to lack any records detailing the organization's media spending. (AR 931.) To account for the limitations in the data, the Office of General Counsel suggested that the Commission assume that the unaccounted-for spending was made at the same 77% ratio between independent expenditures and other advertising. (AR 935-36.)

The Office of General Counsel then analyzed the CHGO organizational and fundraising documents. (AR 936.) The Office of General Counsel acknowledged that this evidence was mixed. CHGO's Articles of Association and its response to plaintiffs' complaints asserted that CHGO's "purpose was to educate the public on matters of economic policy formulation." (AR 936; *see also* AR 580 ("It is the intent of the Commission to become a public advocate for the continuing education of all American citizens concerning the importance of continued economic growth to America's economic future.").) The Office of General Counsel observed, however, that CHGO's planning document and the PowerPoint presentation, among other documents, suggested that the organization in fact had "an electioneering purpose." (AR 937.) At the same time, the Office of General Counsel noted that CHGO must have altered its advertising strategy at some point, as its planning materials suggested that CHGO planned to influence Senate races when in fact its advertising featured candidates for the House. (*Id.*)

The Commission did not immediately complete voting on the recommendations contained in the Second General Counsel's Report. (*See* AR 1519.) In the interim, the Office of General Counsel continued its investigation by seeking records of CHGO's advertising purchased from individual local television stations. Through these records, Commission investigators discovered that Meridian had used a sub-vendor, New Day Media Services, LLC ("New Day"), to handle all payments for placement of CHGO's advertising. (*See* AR 1162, 1166, 1308.) The Office of General Counsel interviewed the owner and operator of New Day, Karen Boor, on August 25, 2015. Boor explained that she had placed CHGO advertisements based on instructions from Mihalke at Meridian. (AR 1169.) Mihalke would "give her a set of markets," and then Boor would handle the actual negotiation and placement of the advertising. (*Id.*) In exchange, Boor received an approximately 10% commission. (*Id.*) Boor also provided

investigators with bank records reflecting payments New Day received from Meridian, and the amounts New Day paid to each television station for placing the advertisements. (AR 1178-208.)

Commission investigators had also uncovered that a man named Wayne Berman had done some fundraising solicitations on behalf of CHGO, and therefore they contacted him for additional information. (AR 427.) Through counsel, Berman stipulated that his association with CHGO was to offer "informal and infrequent fundraising advice" and that he had not received any compensation for this work. (AR 1302.)

In the final step of the investigation, the Office of General Counsel interviewed Mihalke on September 21, 2015, and obtained Meridian's bank records. (AR 1307.) Mihalke confirmed that Meridian was the "exclusive" vendor for CHGO in managing, producing, and placing television and print advertisements for CHGO. (AR 1307.) Although Meridian utilized a number of sub-vendors for CHGO work, Mihalke also confirmed that Boor's firm, New Day, was "the only vendor hired by Meridian for the placement of CHGO TV ads." (AR 1307-08.) Mihalke explained that Meridian put together plans for CHGO advertising purchases based on instructions from CHGO's board of directors. (AR 1309.) CHGO's board and Scott Reed also had to approve the final content and placement of all advertising. (AR 1309.) For this work, Mihalke received a "media placement commission" of approximately $300,000. (AR 1308.) When questioned about the amount of media spending reflected in CHGO's 2010 Form 990, Mihalke explained that this figure reflected "gross media spending," which included net advertising buys as well as any payments to sub-vendors and commissions. (AR 1309.)

Commission investigators noted an apparent discrepancy in the amount of media spending CHGO reported in its tax returns ($4,319,825) and CHGO's payments to Meridian as

reflected in Meridian's bank records ($3,200,000). (AR 1311.) Mihalke explained that, after Meridian had placed all of the advertising CHGO produced, it was left with a remainder of approximately $1.1 million in CHGO funds that Meridian intended to transfer back to CHGO. (AR 1311-12.) Mihalke asserted that he informed Reed about the remainder, and that Reed instructed Mihalke that these funds would be evenly divided between Reed, Mihalke, and Berman as a "fundraising commission." (*Id.*) According to Mihalke, the distribution of these funds happened in 2011. Mihalke could not recall whether this conversation happened by telephone, in person, or by other means, and he did not have any records confirming the conversation. (*Id.*) Mihalke did confirm that this "fundraising commission" was separate from the $300,000 commission he received for placing CHGO advertisements. (*Id.*)

**G. Third General Counsel's Report**

The Office of General Counsel summarized this new information in a Third General Counsel's Report dated September 24, 2015. (AR 1467-93.) As with the previous reports, the Office of General Counsel recommended that the Commission find reason to believe CHGO violated FECA's reporting and disclaimer provisions. (AR 1486-88.) It also reaffirmed its prior recommendation to find reason to believe that CHGO failed to register as a political committee. (AR 1482-86.) Now able to associate specific advertisements with precise spending because of the bank records it had recently received, the Office of General Counsel estimated that 85% of CHGO's total spending in 2010 was for versions of the advertisements identified in plaintiffs' complaint. (AR 1484.) The Office of General Counsel also estimated that — using the categorization of the advertisements it had set forth in the First General Counsel's Report — 61% of CHGO's total spending in 2010 was for independent expenditures. (AR 1485.)

As the Office of General Counsel explained in a separate memorandum circulated to the Commissioners, these calculations included more than just CHGO's actual expenses to pay for airtime and production costs. (AR 1494-02.) They also included funds CHGO paid in commissions to Meridian, Mihalke, and Boor that were not correlated with specific advertising. (*See* AR 1501-02.) The Office of General Counsel assigned these general payments to either independent expenditures or electioneering communications based on the assumption that they should be assigned using the proportion of CHGO advertisements that it had classified as independent expenditures or electioneering communications. (AR 1501-02.)

The Office of General Counsel also provided alternative proposals for how it could calculate CHGO's spending to account for the $1.1 million in unspent funds that Mihalke asserted were distributed to Reed, Berman, and himself as a fundraising commission. (AR 1485-86.) If those funds were excluded entirely from both CHGO's advertising spending and its overall spending, the express advocacy spending the Office of General Counsel identified would account for 76% of its overall spending during its organizational lifetime. (AR 1485.) If that $1.1 million was included in the denominator of CHGO's overall spending but excluded from the numerator of CHGO's express advocacy spending, the Office of General Counsel calculated the express advocacy spending as accounting for 56% of its total spending during its entire existence. (AR 1486-87.)

The evidence described in the Third General Counsel's Report also indicated that excluding both the $1.1 million "fundraising commission" *and* the general, uncategorized commissions to CHGO's vendors, what the Office of General Counsel calculated as CHGO's express advocacy spending would fall below 50% of its total spending during its organizational lifetime. (*See* AR 1501-02.) Specifically, if all known generalized commissions are excluded,

CHGO spent $2,241,557.98 — or approximately 47% — on communications the Office of General Counsel deemed to be independent expenditures out of CHGO's total lifetime spending of $4,801,000. (*See* AR 1501-02, 1485.)

**H. Commission Vote to Dismiss**

The Commission voted on the recommendations in the Third General Counsel's Report on October 1, 2015. (AR 1503.) Only three of the six Commissioners supported the recommendations. (*Id.*) Therefore, unable to obtain the affirmative votes of four Commissioners necessary to proceed with further enforcement proceedings, the Commission voted five to one to close the file. (AR 1504.)

The three Commissioners who voted against finding reason to believe, Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, issued a Statement of Reasons on November 6, 2015. (AR 1516-20.) As these Commissioners voted not to proceed with enforcement, they are considered the "controlling group" whose "rationale necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). The Statement of Reasons explained that, as of the time of the Commission's final vote, the "case did not warrant the further use of Commission resources" and should be dismissed as an exercise of its "discretion." (AR 1516, 1519.) The Statement of Reasons indicated that during the Commission's investigation "it became apparent that CHGO was a defunct organization that had no money, and apparently no officers or directors to bind it in a legal agreement," and concluded that "further enforcement action in this matter was a pyrrhic exercise." (AR 1516, 1519.) The Statement of Reasons noted that the event-driven reporting violations were "obvious" but also explained that the "five-year statute of

limitations" applicable to the claims plaintiffs asserted against CHGO had "effectively expired" and that "any conciliation effort would be futile." (AR 1516, 1519.)

The Statement of Reasons also explained why the controlling group viewed the evidence available to the Commission as insufficient to support a finding of reason to believe that CHGO was a political committee at earlier stages of the enforcement process. The Statement noted that the First General Counsel's Report contained only "an incomplete spending breakdown" of CHGO's advertising activities and relied on the assumption that CHGO's unaccounted-for spending matched the proportion of the spending for which there were clearer records. (AR 1518.) The Statement of Reasons explained that the controlling group of Commissioners was "not prepared to extrapolate the breakdown of CHGO's total spending ($4.7 million) based on the $2.2 million subset of spending alleged in the complaint." (AR 1518 n.13.) In addition, the Statement indicated that these Commissioners "did not agree" with the Office of General Counsel's express advocacy analysis of CHGO's advertising. (*Id.*)

The Statement of Reasons also pointed out that the Office of General Counsel's later investigatory efforts "did not definitively resolve whether there was reason to believe CHGO was a political committee." (AR 1519.) In particular, the Statement of Reasons observed that the Second and Third General Counsel's Reports "raised novel legal issues" such as how to account for "vendor commissions and other general payments to officers or directors or vendors" in the political-committee analysis. (AR 1519 n.16.) With five years already having passed from the date that CHGO would have been required to first report the advertisements at issue, the Statement of Reasons concluded that these issues were "academic" and "the most prudent course was to close the file consistent with the Commission's exercise of its discretion in similar matters." (AR 1519.)

## ARGUMENT

### I. STANDARD OF REVIEW

#### A. Judicial Review Under 52 U.S.C. § 30109(a)(8) Is "Highly Deferential" to the Commission's Decision to Dismiss the Administrative Complaint

This action arises under a provision of FECA, 52 U.S.C. § 30109(a)(8), which permits "any party aggrieved by an order of the Commission dismissing a complaint" to seek judicial review of that order in this district. This Court may set aside the Commission's dismissal order only if it is "contrary to law." *Id.* § 30109(a)(8)(C). Under that standard, the Commission's decision to dismiss cannot be disturbed unless it was based on "an impermissible interpretation of the Act" 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." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 39 (1981). 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 proceeding." *Id.* Instead, the contrary-to-law standard is "[h]ighly deferential" to the Commission's decision. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (internal quotation marks omitted); *see also Orloski*, 795 F.2d at 167 (noting that the contrary-to-law standard is "extremely deferential" to the agency'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*, 470 U.S. at 831 ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."); *see also La Botz v. FEC*, 61 F. Supp. 3d 21, 33 (D.D.C. 2014) ("The prosecutorial discretion afforded to

the FEC is considerable." (internal quotation marks omitted)). This is so 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.") (citing *Heckler*, 470 U.S. at 831-32); *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 superintendence 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.

In addition, although "an agency is required to adequately explain its decision" in an administrative matter, it need not do so with perfect analytical precision. *Van Hollen v. FEC*, 811 F.3d 486, 496-97 (D.C. Cir. 2016). "It is enough that a reviewing court can reasonably discern the agency's analytical path," *id.* at 497, even if the decision is "of 'less than ideal clarity.'" *Nader*, 823 F. Supp. 2d at 58 (quoting *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990)).

**B. Section 30109(a)(8) Review Is Based Solely on the Administrative Record**

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 decision.'" *Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 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)). Thus, section 30109(a)(8) review is based solely on the administrative record, and the plaintiffs may not supplement that record with factual materials not before the agency decision makers at the time the decision was made. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (stating that judicial review must be limited to the administrative record "already in existence, not some new record made initially in the reviewing court").[5] 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.*

Plaintiffs in this case have already acknowledged that the Court is limited to the administrative record here. (*See* Joint Meet and Confer Statement at 1 (Docket No. 11) (stating

[5] This case does not fall within the "small class of cases" where district courts may consult extra-record evidence. *Hill Dermaceuticals*, 709 F.3d at 47. Those exceptions apply only in challenges to the "procedural validity" of the agency's action, which the plaintiffs do not challenge in this lawsuit. *Id.*; *see also Silver State Land, LLC v. Beaudreau*, 59 F. Supp. 3d 158, 165-66 (D.D.C. 2014) (noting that "the familiar rule that judicial review of agency action is normally to be confined to the administrative record exerts its maximum force when the substantive soundness of the agency's decision is under scrutiny" (quotations and alterations omitted)).

that "this action" is one "for 'review on an administrative record.'" (quoting LCvR 16.3(b)(1))).) Nevertheless, plaintiffs improperly rely on more than a dozen factual exhibits that were not before the Commission in the underlying matter under review, MUR 4971. (*See* Decl. of Stuart C. McPhail, Exhs. 1-14 (Docket No. 19-1).)[6] Plaintiffs did not submit these extra-record materials to the Commission and it thus had no occasion to consider them. The exhibits have no place in this action and the Court should disregard them. *Hill Dermaceuticals*, 709 F.3d at 47.

Moreover, the extra-record evidence is irrelevant and largely not subject to judicial notice. Plaintiffs have offered this material primarily in support of their purported "statement of facts" regarding the "fallout of CHGO's strategy," in which they cite the activities of other groups, some of which are entirely unconnected to CHGO. (Pls. Mem. at 29-30.) This is pure question-begging. Whatever the validity of plaintiffs' assertions about so-called "dark money" as a general matter, their application to this case assumes that the Commission's decision not to find reason to believe that CHGO should have registered as a political committee was contrary to law. Any materials regarding other supposed dark-money groups sheds no light on the validity of the Commission's decision as to CHGO. Nor do these extra-record materials address the reasons provided by the Statement of Reasons in explaining why the administrative complaint was dismissed. And the news articles are submitted in support of widely debated and contested propositions, such as the extent to which section 501(c)(4) organizations are devoted to electoral

[6] Plaintiffs' Exhibits 15 and 16 consist of documents from past FEC matters. Like authority from any agency, plaintiffs are of course free to cite those and even include them in an appendix for the Court's convenience. Citation to such authorities is distinguishable from the creation of a new record in this reviewing Court that plaintiffs attempt through their other exhibits.

advocacy and whether contributions to such entities "curries favor" with elected officials. (*Id.* at 30.) These are matters that are subject to reasonable dispute.

## II. THE COMMISSION'S DISMISSAL OF PLAINTIFFS' ADMINISTRATIVE COMPLAINT WAS NOT CONTRARY TO LAW

As explained in the Statement of Reasons, the controlling group of FEC Commissioners properly determined — in the exercise of the Commission's broad discretion — that pursuing further enforcement action against CHGO would likely be a fruitless endeavor. This decision not to proceed was based primarily upon the conclusions that (1) any enforcement action would be complicated by the fact that CHGO was a defunct entity with no remaining assets, officers, or directors; (2) the five-year statute of limitations on CHGO's reporting violations had "effectively expired" in any event, rendering any conciliation effort "futile" and enforcement avenues not involving civil penalties "an academic exercise"; and (3) this matter was a poor vehicle to decide "novel legal issues" implicated by plaintiffs' allegations. (AR 1519.) In other words, even assuming the Commission could obtain a conciliation agreement or prevail in enforcement litigation, any such victory would come at too great a cost to justify the endeavor — the very definition of a pyrrhic victory. (*Id.*) Expressly invoking the Commission's prosecutorial discretion and actions in matters it saw as similar, the controlling group of Commissioners thus reasonably determined that the "most prudent course was to close the file." (*Id.*)

### A. The Commission's Exercise of Prosecutorial Discretion Not to Pursue This Matter Further Against a Long-Defunct Entity Was Lawful

The controlling group of Commissioners reasonably determined that CHGO's defunct status would complicate any enforcement action and made proceeding with it an inefficient use of limited Commission resources. The Commission has the authority to elect not to pursue an enforcement action against an entity on the grounds that it is no longer in active existence.

*Nader*, 823 F. Supp. 2d at 64-66. In *Nader*, the Commission exercised its prosecutorial discretion not to pursue allegations that each of various groups involved in the 2004 presidential election had "failed to register with the FEC as political committees," *id.* at 65, which is also one of plaintiffs' allegations in this lawsuit. There, as here, the Commission concluded that each of the groups at issue "was either defunct or had ceased operations." *Id.* at 65. On judicial review of that decision, the district court granted summary judgment to the Commission, holding that it was reasonable for the FEC not to pursue enforcement against the groups as a matter of prosecutorial discretion, even where allegations indicated that they "may have engaged in political activity that would have obligated them to register as political committees." *Id.*

As an initial matter, although plaintiffs at various points appear to doubt that the controlling group based its decision on prosecutorial discretion (*see* Pls. Mem. at 33, 34), there is no question that the Statement of Reasons adequately invoked the doctrine as the basis of the dismissal decision. The Statement of Reasons expressly stated that Commissioners voted to "close the file consistent with the Commission's exercise of its *discretion* in similar matters." (AR 1519 (emphasis added).) The Statement of Reasons also cited relevant judicial precedent upholding agency decisions not to prosecute as a matter of discretion, as well as prior Commission matters the controlling group of Commissioners saw as analogous. (AR 1519 (citing *Heckler*, 470 U.S. at 832).) This explanation is clearly sufficient for this Court to "reasonably discern the agency's analytical path." *Van Hollen*, 811 F.3d at 497.

The administrative record plainly supports the conclusion in the Statement of Reasons that CHGO was defunct. CHGO filed its 2011 Form 990 with the IRS indicating that it had terminated more than three-and-a-half years prior to the Commission vote in MUR 4971, and there is no evidence that CHGO has engaged in activity of any kind since 2011. (AR 1575,

1587.) This tax return also supports the determination that CHGO has no remaining assets. (AR 1587.) None of the witnesses interviewed during the Commission's investigation into CHGO would take responsibility for the organization. For example, its former general counsel, Canfield, repeatedly explained that CHGO was no longer his client and denied any ongoing responsibility for its activities, noting that the entity had ceased to exist "a long time ago." (AR 275.) Under these circumstances, it was not unreasonable for the controlling group to determine that any enforcement action would be hindered by CHGO's inactive status.

Plaintiffs' arguments that this Court should overturn the Commission's exercise of prosecutorial discretion with regard to CHGO's defunct status depend mainly on mere disagreements with the controlling group's assessment of disputed evidence and the Commission's enforcement priorities. Citing "the general lack of credibility in CHGO's representations," plaintiffs assert that it was arbitrary and capricious for the Commission to conclude that CHGO lacked assets based on CHGO's IRS filings because Mihalke stated that he had divided $1.1 million in unused CHGO funds between himself and Reed and Berman, two individuals who were not officially affiliated with CHGO. (Pls. Mem. at 40-41.) But Mihalke's statement plainly contradicts Berman's factual offering to the Commission, which said he served only in an uncompensated role. (AR 1302.) While plaintiffs prefer to rely on Mihalke's statement, the truth of the matter would likely be hotly contested should the Commission proceed to enforcement litigation. The controlling group was well within its discretion to conclude that the difficulties of further enforcement outweighed the benefit of resolving any disputed facts.

Plaintiffs' assertion that CHGO cannot have ceased to exist because political committees must file a statement with the FEC prior to termination is circular reasoning. (Pls. Mem. at 39.) An entity need only file such a statement *if it is a political committee*. 52 U.S.C. § 30103(d).

FECA has no termination requirements for non-profit entities that fall outside its scope. Thus, the idea that CHGO needed to file a termination report assumes that CHGO was, in fact, a political committee, which the Commission has never determined. And it is far from being "indisputabl[e]" that CHGO was a political committee (Pls. Mem. at 40), since CHGO itself disputed that conclusion throughout the investigation. (AR 123-25.)

As the Statement of Reasons recognized, the Commission has previously exercised its discretion not to pursue enforcement claims against defunct entities. (AR 1519.) For example, in MUR 6597, the Commission unanimously concluded that "it would not be an efficient use of [the] Commission's resources to pursue any allegations against" an entity which "appear[ed]" to be "defunct" and to have "no assets." FEC, Factual & Legal Analysis at 16, MUR 6597 (Kinde Durkee) (Dec. 20, 2013), http://eqs.fec.gov/eqsdocsMUR/15044365089.pdf. Similarly, in MUR 5089, the Commission exercised its prosecutorial discretion to take no further action on claims that a respondent fraudulently misrepresented itself as speaking for another — "amongst the most egregious transgressions" of FECA — in light of "the age of the case" and "the fact Respondents apparently are no longer active in federal politics." FEC, Statement of Reasons at 2, MUR 5089 (Matta Tuchman for Congress) (Apr. 4, 2004), http://eqs.fec.gov/eqsdocsMUR/00000E91.pdf; *see also* FEC, Factual & Legal Analysis at 1-2, MUR 6021 (Americans for Jobs) (Apr. 26, 2010), http://eqs.fec.gov/eqsdocsMUR/10044271411.pdf ("The available information indicates that Americans for Jobs is either defunct or has ceased operations. . . . Thus, among other reasons, the age of the alleged violations would create problems of proof and raise obstacles under the five-year statute of limitations. Under these circumstances, the Commission has determined to exercise its prosecutorial discretion and dismiss the allegations . . . .").

Plaintiffs rely on MUR 6413, but that FEC enforcement matter is easily distinguishable. (*See* Pls.' Mem. at 40; *see also* AR 1543.) MUR 6413 involved an entity that had dissolved a mere four months before a conciliation agreement was reached, and the advertisements at issue were aired less than five years before the agreement was executed. *See* FEC, Conciliation Agreement, MUR 6413 (Taxpayer Network) (May 16, 2014), http://eqs.fec.gov/eqsdocsMUR/14044353947.pdf. In addition, conciliation was possible there because the Commission had a respondent willing to accept authority for the conciliation process. *Id.* at 1. Here, by contrast, CHGO had been defunct for years and no individual who had previously been associated with the group would accept responsibility for negotiating such an agreement, which effectively negated any possibility of conciliation.

Thus, contrary to plaintiffs' suggestion, the Commission has no established "policy" of always pursuing remedies against dissolved corporations regardless of the factual circumstances presented in a particular enforcement case. (Pls. Mem. at 40.) Nor does the fact that the Commission sometimes obtained remedies from corporations that have dissolved mean that it must do so in all cases or that the prospects of doing so compel the agency to pursue further proceedings in the specific context of this case. The very nature of prosecutorial discretion is that, considering agency resources and priorities, some potential violations will be worth pursuing and others will not. *See Nader*, 823 F. Supp. 2d at 63 (stating that the Commission was reasonable in concluding "that there was not enough 'there' there to warrant a complex investigation"); *La Botz*, 61 F. Supp. 3d at 35. And while plaintiffs plainly believe that the Commission should have exercised its discretion differently, "the FEC is in a better position to evaluate its own resources and the probability of investigatory difficulties than" are private plaintiffs. *Nader*, 823 F. Supp. 2d at 65.

Plaintiffs also fault the Commission for failing to pursue enforcement against former CHGO associates in their individual capacities. (Pls. Mem. at 40-41.) While the Commission certainly has the authority to pursue individuals in their personal capacity in certain circumstances, that does not compel it to do so in all cases. *Combat Veterans for Congress Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 15 (D.D.C. 2013) ("In light of the great deference accorded to the FEC's decisions not to prosecute, the Court cannot conclude the agency abused its discretion in choosing not to pursue [a committee's treasurer] in his personal capacity for willful or reckless failure to file reports.").[7] Plaintiffs' administrative complaint in this case does not allege that any individuals affiliated with CHGO violated FECA in their personal capacities, and no individuals received the administrative process that would be a prerequisite to the type of enforcement action plaintiffs now seek. *See* 52 U.S.C. § 30109(a)(1)-(2). In essence, plaintiffs simply disagree with the way the Commission has elected to use its enforcement powers.

Nor did the controlling group interpret FECA to require a conciliation agreement as a prerequisite of enforcement, as plaintiffs contend. (Pls. Mem. at 42.) The Commission surely had additional tools it could have deployed in an enforcement action against CHGO. The controlling group recognized this, acknowledging that further enforcement proceedings were possible, if "academic," and that a potential victory would be "pyrrhic." (AR 1519.) The

[7] Contrary to plaintiffs' assertion, *Combat Veterans* did not "hold[ a] treasurer liable for failure to file reports required by the FECA" in his personal capacity. (Pls. Mem. at 42.) In fact, the district court in that case held that the FEC did not abuse its discretion in declining to pursue a treasurer in his individual capacity, which is precisely the opposite of the argument plaintiffs make in this case. The D.C. Circuit affirmed that holding "for the reasons given" by the district court. 795 F.3d 151, 159 (D.C. Cir. 2015), *reh'g en banc denied*, No. 13-5358 (Oct. 16, 2015).

controlling group concluded that, even assuming the violations plaintiffs alleged could be proved, it was unlikely that CHGO would ever pay a fine and the other potential remedies were insufficient to justify proceeding any further. While plaintiffs apparently disagree with that decision, their mere disagreement with the Commission's enforcement priorities does not provide a reason to overturn the Commission's dismissal. *Cf. Rose*, 806 F.2d at 1091.[8]

### B. The Analysis in the Statement of Reasons Regarding the Statute of Limitations Applicable to Plaintiffs' Claims Was Reasonable

The controlling group also reasonably concluded that further administrative action was unwarranted because the statute of limitations had expired on the alleged event-driven reporting and disclaimer violations.[9] FEC enforcement actions are governed by 28 U.S.C. § 2462, which

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[8] The controlling group's rationale is also sufficient to answer plaintiffs' argument that the Commission might have been able to recover some of the funds purportedly "fraudulently transferred" from CHGO to three individuals. (Pls. Mem. at 40-41.) Plaintiffs contend the Commission could seek disgorgement of funds from the persons to whom surplus funds were purportedly disbursed, but cite no instances of the FEC ever engaging in such an action. (Pls. Mem. at 41.) Moreover, even assuming there might have been reason to believe this transfer was "fraudulent" as plaintiffs claim — a conclusion the Commission did not reach — plaintiffs' argument again amounts to a mere disagreement with the Commission's exercise of its discretion and its assessment of potential difficulties in further pursuing enforcement. *See Nader*, 823 F. Supp. 2d. at 65.

[9] Although plaintiffs appear to conflate all of their claims into the same analysis, the Statement of Reasons suggested only that the claim that CHGO failed to report its independent expenditures and electioneering communications was time barred, as opposed to plaintiffs' broader claim regarding CHGO's political-committee status. (*See* AR 1516 (noting that the controlling group advocated conciliation regarding the "obvious disclosure violations . . . while time still remained"); AR 1518 (stating that the "statute of limitations would expire for the alleged reporting violations"); AR 1519 (stating that the "obvious violations became time barred in October" 2015).) As these references show, the Statement of Reasons did not suggest that the statute of limitations barred further enforcement action on the political-committee claim. Of course, to the extent that CHGO ceased to exist in 2011 — five years ago — proving that it had been violating political committee requirements after that time would also need to surmount

requires "an action . . . for the enforcement of any civil fine, penalty or forfeiture" to be "commenced within five years from the date when the claim first accrued." *See FEC v. Christian Coalition*, 965 F. Supp. 66, 69 & n.4 (D.D.C. 1997) ("The applicable statute of limitations [for claims actions for civil penalties under FECA] is provided under 28 U.S.C. § 2462.").[10] Statutes of limitations promote the "'basic policies'" of "'repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). Rather than being unreasonable, the dismissal in this action plainly furthers such policies.

**1. The Controlling Group of Commissioners Reasonably Concluded That the Statute of Limitations Had Expired**

The analysis behind the controlling group's conclusion that the statute of limitations has run on plaintiffs' reporting claims is straightforward. The advertisements that form the basis of plaintiffs' administrative complaint aired between September 25 and November 2, 2010. (AR 166.) Assuming each advertisement was an independent expenditure or electioneering communication that CHGO was required to disclose in a report filed with the FEC, the violation would have occurred when those reports were due — *i.e.*, within 24 to 48 hours of the

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likely statute of limitations defenses or inquiries from a court reviewing any request for a default judgment.

[10] Plaintiffs fault the Statement of Reasons for declining to cite section 2462 (Pls. Mem. at 34), but there can be no doubt that was the statutory provision being applied. The controlling group explained that the relevant statute of limitations expired after five years (AR 1516) and plaintiffs do not claim that they had any trouble determining which statute of limitations the Statement was referring to. Under the circumstances, this explanation is sufficient for this Court to "reasonably discern the agency's analytical path." *Van Hollen*, 811 F.3d at 497.

advertisement, depending on the type of communication. *See* 52 U.S.C. §§ 30104(f)(1), (g)(1)-(2); 11 C.F.R. § 104.20. The final Commission vote in this matter occurred on October 1, 2015 (AR 1503), about one month before the statute of limitations would expire — a period that would have been at best challenging for the Commission to fulfill the mandatory conciliation and other statutory prerequisites to filing suit (*see* 52 U.S.C. § 30104(g)(4)–(6), *supra* pp. 7-8). Now, nearly six years after the events in question, the time period is plainly closed.

There is no basis to extend the statute of limitations on these claims that would so clearly be available to the Commission that it was unreasonable to decline to pursue the claims. Plaintiffs argue that the statute of limitations may be equitably tolled, either because the claims at issue are continuing violations or because CHGO and its agents engaged in fraudulent concealment. Neither of these doctrines renders the Commission's dismissal contrary to law.

**a) It Is Not Clear the Continuing Violations Doctrine Would Apply**

First, plaintiffs do not establish that the event-driven reporting and disclaimer violations alleged here are "continuing violations" that would prevent the statute of limitations from running. A continuing violation "is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." *Keohane v. United States*, 669 F.3d 325, 329 (D.C. Cir. 2012) (internal quotation marks omitted). But this doctrine "does not . . . make actionable either a discrete unlawful act or the 'lingering effect of an unlawful

act.'" *Earle v. District of Columbia*, 707 F.3d 299, 306 (D.C. Cir. 2012) (quoting *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007)).[11]

Even assuming plaintiffs' allegations correctly made out independent-expenditure and electioneering-communication reporting and disclaimer violations, the "character" of CHGO's conduct was clear at least as of October 2010, when the first administrative complaint was filed in this case and five years before the administrative decision under review here. At that point, the Commission was aware of the content of CHGO's advertisements, copies of which were included with the DCCC Complaint. The Commission had within its knowledge many of the facts that could bear on whether the advertisements at issue were independent expenditures or electioneering communications that should have been reported, as well as whether they included deficient disclaimers.

Plaintiffs suggest that any violation of a disclosure statute is always a continuing violation. (Pls. Mem. at 38-39.) But that is not true for all reporting violations, as courts in this district have recognized. *See Christian Coalition*, 965 F. Supp. at 70; *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 17 (D.D.C. 1995). If plaintiffs were correct, the Commission would not be time-barred from seeking civil penalties for any reporting violations.

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[11] The D.C. Circuit has "occasionally recognized" a separate articulation of the continuing violation doctrine that would prevent the statute of limitations from running where "the text of the pertinent law imposes a continuing obligation to act or refrain from acting." *Earle*, 707 F.3d at 307. That articulation does not appear to apply to one-time FECA disclaimer and reporting provisions, which require independent expenditures and electioneering communications to contain appropriate disclaimers and impose discrete obligations to report those communications at a particular time. *See* 52 U.S.C. §§ 30104(c)(2), (f)(1), 30120(a)(3), (d)(2). Violations of those provisions occur at the moment a covered communication is made without a sufficient disclaimer or is not reported.

In fact, plaintiffs' cases do not establish the rule that they suggest. (Pls. Mem. at 38-39 (citing *Postow v. OBA Fed. Savings & Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 919 F. Supp. 1 (D.D.C. 1994)).) The court in *CityFed* considered a requirement that a federally insured savings institution maintain a minimum level of capital. *CityFed*, 919 F. Supp. at 6. Because it set a floor on capital, the savings institution was in continuous violation of the requirement at each moment it failed to maintain its assets at the minimum level. *Id.* FECA's disclaimer and event-driven reporting rules, by contrast, set specific obligations at discrete, albeit occasionally recurring, points in time.

Nor does *Postow* have any applicability to plaintiffs' allegations against CHGO. That case held that a lender must make the disclosures required by the Truth in Lending Act at the time credit was extended in a commitment letter, not at the time of settlement. *Postow*, 627 F.2d at 1374. With respect to the statute of limitations, the court held only that "if the disclosure is not" made at the time of the commitment, "the violation continues *up to the time of settlement*." *Id.* at 1380 (emphasis added). *Postow* does *not* suggest that an alleged nondisclosure violation continues forever, such that no statute of limitations would ever bar enforcement.

**b) Declining to Pursue a Fraudulent-Concealment Theory Was Not Unreasonable**

The dismissal here also was not contrary to law by virtue of not pursuing the fraudulent-concealment theory plaintiffs propose. As an initial matter, despite four statements from different Commissioners and more than three reports and memoranda from the Office of General Counsel addressing the alleged violations, not one analysis found that fraudulent concealment applied to the facts here. It was thus hardly unreasonable for the controlling group to have declined to do so.

Fraudulent concealment was not recommended below as a doctrine enabling pursuit of violations more than five years old for good reason, as such a theory would pose considerable litigation risk. In order to establish fraudulent concealment in this context, "the plaintiff must show that the defendant engaged in an act of concealment separate from the wrong itself." *Sprint Comm. Co., L.P. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996). But even a defendant's "deliberate concealment of material facts" relating to its wrongdoing tolls the statute of limitation only "until plaintiff discovers, or by reasonable diligence could have discovered, *the basis of the lawsuit*." *Smith v. Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979) (emphasis added). When the Commission did attempt to pursue a fraudulent concealment theory in the past in connection with allegations of concealed conduit contributions, the Ninth Circuit rejected that attempt on the basis of the information that had been available to the Commission through disclosure reports. *FEC v. Williams*, 104 F.3d 237, 241 (9th Cir. 1996). Here, the Commission would need to convince a court that it had been unaware of the facts underlying a potential enforcement action after October 2010. The factual "basis" of plaintiffs' complaint related to CHGO's advertising activities and spending in connection with the 2010 general election. The complaints in MURs 6391 and 6471 extensively detailed CHGO's political spending, and the Commission would need to show in litigation that the information was not comparable to what had been available to the Commission in *Williams*. It was therefore reasonable for the Commission not to take to court the argument that the statute of limitations had been tolled throughout the period after the Commission had received the administrative complaints, in spite of any lack of cooperation from CHGO or affiliated witnesses.

While plaintiffs describe a litany of bad conduct allegedly committed by CHGO and those associated with it during the FEC's administrative enforcement process, many of these

events would not have affected the analysis underlying plaintiffs' claims. Plaintiffs make much of the fact that CHGO's general counsel denied that Scott Reed was a "founder" of CHGO when other evidence suggests he was involved with CHGO's advertising strategy. (Pls. Mem. at 37.) Even if the evidence on this point is actually contradictory, whether Reed founded CHGO or not is irrelevant to whether CHGO's advertisements were of the kind that should have been disclosed and at best a very minor consideration in determining whether CHGO's major purpose was the election or nomination of federal candidates. Those analyses involve consideration of the content of CHGO's key documents and advertising, its receipts and expenditures, and other indications of purpose that can be gleaned from evidence. *See Rules and Regulations: Political Committee Status*, 72 Fed. Reg. at 5601-02. Whether any particular individual was the "founder" of an organization or merely an informal advisor is hardly dispositive as to political-committee status.

Plaintiffs also cite arguments from CHGO's counsel that it engaged solely in issue advocacy and therefore was not a political committee, and they note that other witnesses were not completely forthcoming. (Pls. Mem. at 37.) But "merely . . . cooperating with" an investigation "without divulging all of the information" known to be relevant is not an affirmative act of concealment sufficient to establish fraudulent concealment. *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 130 F.3d 1083, 1087-88 (D.C. Cir. 1997). Any attempt to pursue a fraudulent concealment theory would thus have to overcome argument that the legal arguments deployed by attorney Canfield while CHGO remained in existence did not compel the Commission to proceed with enforcement.

#### c) The Conclusion in the Statement of Reasons That the Passage of Time Would Hinder Enforcement Efforts Was Reasonable

Even if some of plaintiffs' claims remained timely more than five years after MUR 4971 was initiated, that still would not mean that the Commission's decision to dismiss the plaintiffs' administrative complaint was contrary to law. The Statement of Reasons did not imply that all enforcement avenues were totally foreclosed. Instead, the controlling group's analysis was much more limited, noting that the statute of limitations on the reporting violations was "effectively foreclosed" and that even if victory could be achieved, it would be "pyrrhic." (AR 1519.) Thus, the essence of the Statement's discussion of the statute of limitations was that difficulties in obtaining relief meant that the case "did not warrant the further use of Commission resources." (AR 1516.) This analysis remains valid even if not all potential claims against CHGO are time-barred, because the "passage of time, even within the [limitations] period, will obviously impair investigations." *Nader*, 823 F. Supp. 2d at 66. As in the *Nader* case, the Commission's consideration of the effect the long passage of time would have on its enforcement prospects was reasonable.

### 2. The Potential Availability of Equitable Relief After Expiration of the Statute of Limitations Expires Does Not Render the Commission's Dismissal Here Contrary to Law

The controlling group of Commissioners reasonably determined that pursuing equitable remedies in this case would not be an efficient use of Commission resources. As an initial matter, requests for declaratory or injunctive relief against CHGO here would appear to conflict with the rule that equitable relief is only available upon a showing of "future risk of harm." *See SEC v. Brown*, 740 F. Supp. 2d 148, 157 (D.D.C. 2010); *see also FEC v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10, 15 (D.D.C. 1996) (holding that the FEC could not pursue

injunctive relief after expiration of the statute of limitations because there was no "evidentiary support" for the position "that the NRTWC will ever" conduct similar activities; "there is nothing in the record before the Court indicating that the NRTWC has in fact done so since, or that it has sinister designs for the future"). Plaintiffs have shown no risk that CHGO will conduct future violations. Nor could they, because CHGO is a defunct entity that ceased operations in 2010 and was wound down in 2011.

In addition, the Commission would face considerable litigation risk pursuing equitable remedies for conduct outside the statute of limitations given a split of authority on the question. Some courts have concluded that the expiration of the statute of limitations does not bar the Commission from seeking equitable relief, *see Christian Coalition*, 965 F. Supp. at 71, while others have held that it does, *see Williams*, 104 F.3d at 240.

But even if the Commission had some basis for seeking alternative avenues of enforcement against CHGO or its former agents, it remains within the FEC's discretion to elect not to pursue them. *In re Barr Labs., Inc.*, 930 F.2d at 76; *Rose*, 806 F.2d at 1091. As explained above, that is all that happened in this case.

### C. The Conclusion That This Case Was a Poor Vehicle to Resolve Novel Legal Issues Regarding Political-Committee Status Was Reasonable

As another reason supporting the decision to dismiss plaintiffs' complaint as an exercise of prosecutorial discretion, the Statement of Reasons noted that CHGO's conduct raised "novel legal issues" regarding the test to determine whether a group is a political committee. (AR 1519.) The proper approach to determine political committee status is within the Commission's discretion, but has been intensely debated within the Commission and is currently the subject of litigation. *See, e.g., CREW v. FEC*, No. 1:14-cv-1419 (CRC) (D.D.C. filed Aug.

20, 2014); *Public Citizen v. FEC*, No. 1:14-cv-148 (RJL) (D.D.C. filed Jan. 31, 2014); AR 1513-14, 1518, 1524-27. This Court need not settle that debate in this case, as the controlling group's reasoning did not depend on a finding that CHGO was not a political committee. But the fact that the proper approach to determining "major purpose" is a developing area of law — and one already being tested in other cases — is a reasonable basis for the controlling group to conclude that this is a poor vehicle to decide those legal issues in light of the other legal and evidentiary barriers to enforcement that the Statement of Reasons cited. *See N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (agency acted within its discretion to settle an "enforcement action without resolving any of the legal issues raised in the" action); *see also La Botz*, 61 F. Supp. 3d at 35; *Nader*, 823 F. Supp. 2d at 65 (deferring to FEC's evaluation of "the strength of [a] complaint, its own enforcement priorities, the difficulties it expects to encounter" and "its own resources").

The precise issue the Statement of Reasons identified was how "vendor commissions and other general payments to officers or directors or vendors" should be accounted for in the "political-committee-status-analysis." (AR 1519.) Plaintiffs suggest that this issue is immaterial because CHGO's express advocacy spending would be a majority of its total spending regardless of how vendor commissions are accounted for. (Pls. Mem. at 44 & n.23.) But Plaintiffs appear to believe that the analysis in the Statement of Reasons implicated only the $1.1 million allegedly distributed to Mihalke, Reed, and Berman. It is true that, accepting the Office of General Counsel's legal conclusions regarding the communications, excluding those alleged payments alone would not reduce the express advocacy spending that Office identified to under 50% of CHGO's overall spending. But the controlling group did not concur in the analysis of all the communications, and those are not the only payments that would be affected by the legal

issue the controlling group of Commissioners identified. The Statement of Reasons also questioned whether and how generalized vendor commissions should be considered in the analysis. (AR 1519 n.16; *see* AR 1480-81; AR 1501 (including commissions paid to CHGO principals and vendors in total for media placement for independent expenditures).) Excluding these generalized commissions from CHGO's alleged expenditures would reduce its total estimated spending on express advocacy to less than 50% of its total spending. *See supra* pp. 26-27.

The Statement of Reasons explained that whether a group made a majority of its expenditures on express advocacy is an important consideration in determining political committee status. (*See* AR 1518; AR 1527 (a group's express advocacy spending over its entire existence is "the truest measure of the organization's major purpose").) Thus, given disputes within the Commission about that approach and several pending challenges on the question, it was not unreasonable for the controlling group to consider potential legal difficulties in evaluating whether pursuing enforcement would be an efficient use of agency resources in this matter. *Heckler*, 470 U.S. at 831 (noting that an agency generally must assess "whether the agency is likely to succeed if it acts"); *Nader*, 823 F. Supp. 2d at 65 (approving the Commission's evaluation of "the probability of investigatory difficulties" in dismissing an administrative complaint).

## III. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT PROVIDE A CAUSE OF ACTION IN THIS CASE

Although plaintiffs do not separately argue the point, their court complaint also cites the Administrative Procedure Act ("APA") as a basis for overturning the Commission's dismissal decision. (*See* Compl. ¶ 1 (citing 5 U.S.C. § 706).) That provision, however, provides no

support for plaintiffs' arguments. *See CREW v. FEC*, No. 1:14-cv-01419 (CRC), 2015 WL 10354778, at *5 (D.D.C. Aug. 13, 2015). FECA grants the FEC "exclusive jurisdiction" over civil enforcement of campaign finance laws. 52 U.S.C. § 30106(b). And FECA contains its own system of judicial review over the FEC's decision to dismiss a complaint. *Id.* § 30109(a)(8)(A). This "comprehensive judicial review provision precludes review of FEC enforcement decisions under the APA." *CREW*, 2015 WL 10354778, at *5. This Court, therefore, should reject plaintiffs' arguments to the extent they rely on the APA.

## CONCLUSION

"Statutes of limitations are intended to 'promote justice'" in part by preventing cases from being brought after "'evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli*, 133 S. Ct. at 1221 (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). The controlling group reasonably applied these factors to determine that further enforcement against CHGO, a long-defunct entity, was not a worthwhile use of Commission resources. For the foregoing reasons, it was not contrary to law for the controlling group to decline to bring an action under the circumstances presented here. This Court should grant the Commission's motion for summary judgment and deny plaintiffs' motion for summary judgment.

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