UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 15-2038 (RC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2010, the Commission for Hope, Growth and Opportunity ("CHGO") was created with a single mission in mind: to "win" federal elections using "express advocacy," while ensuring "donors [are] never disclosed," AR 332–43, 427, a goal at odds with the Federal Election Campaign Act's ("FECA") disclosure rules. Unfortunately, due to the intransigence of three commissioners (the "controlling commissioners") of the Federal Election Commission ("FEC") who refused to find reason to believe that CHGO qualified as a political committee under the FECA and who rewarded CHGO's attempt to run out the clock on its violations, CHGO has been able to fulfill that goal in violation of federal law.

CHGO, however, need not succeed in its wanton evasion of its statutory obligations. The FEC has ample means to pursue enforcement against the group and has already gathered extensive evidence of its violations. Indeed, its investigation has already revealed the names of the donors that CHGO so desperately wanted to hide from the American public. The FEC could, today, do much to remedy CHGO's violations without expending any significant agency resources by simply releasing those names.

Of course, the FEC could also do much more by seeking enforcement against CHGO's officers who violated the FECA in their own right and who obstructed the FEC's investigation by destroying or failing to retain documents, provided false or misleading statements to the FEC (and to the Internal Revenue Service ("IRS")), obstructed the service of an FEC subpoena, tried to terminate the organization to frustrate the FEC's investigation, and frustrated the FEC's ability to impose a penalty by absconding with CHGO's remaining assets. The controlling commissioners, however, failed to consider any of these possibilities, relying instead on impermissible interpretations of law and arbitrary and capricious analyses to conclude that enforcement here would be futile and academic.

The controlling commissioners' dismissal of Plaintiffs' complaint, however, was contrary to law, and enforcement is very much possible. Accordingly, Plaintiffs respectfully request this Court grant Plaintiffs' motion for summary judgment and deny the FEC's cross-motion.

STATEMENT OF FACTS

Plaintiffs provide a full statement of the relevant facts in their opening memorandum. *See* Pls.' Mem. 2–30, ECF No. 19. The FEC does not dispute Plaintiffs' description of the record but conveniently omits much of the factual background from its description. Nonetheless, the records shows that:

(1) Scott Reed, a longtime political operative, founded CHGO in 2010, AR 90, 99, 327;

(2) Reed and Michael Mihalke then recruited the individuals who would be identified as CHGO's officers and directors while Mihalke's role would be obfuscated and Reed's role in CHGO would be covered up entirely, AR 119, 260, 264, 327, 363–64, 653, 1307, 1309, 1312;

(3) Reed nonetheless retained control of CHGO's political activities, AR 1309, 1312;

(4) CHGO's "goal" was to "impact" and "win" federal elections "using express advocacy," while assuring "donors [are] never disclosed," AR 332–43, 427;

(5) CHGO carried out that goal by spending millions of dollars on express advocacy ads and other political ads to support the election or defeat of federal candidates, AR 1496–1502;

(6) aside from procuring a study for an amount representing about .1% of CHGO's total expenditures, AR 46, 403, 690, 1485, and filing tax forms for CHGO, AR 264, the only activity in which CHGO was engaged, according to the descriptions of its officers' and vendors' work and the activity to which CHGO devoted the vast majority of its resources, was creating and disseminating political ads, AR 260, 276, 364, 654, 1234, 1309, 1168–69;

(7) despite this activity, CHGO never registered as a political committee, never filed disclosure reports for its express advocacy ads or its electioneering communications, and never

disclosed its donors, AR 204, 242–43;

(8) CHGO's lawyer, William Canfield, and others made false or misleading statements to the IRS and, later, to the FEC about CHGO when the FEC investigated CHGO's failure to comply with the FECA, *see, e.g.*, AR 45–50, 118–25, 198, 261, 383, 1548–54, 1559–73;

(9) Canfield and others destroyed or failed to retain evidence of CHGO's violations despite being on notice of their legal obligation to preserve them, AR 8, 42, 162, 199, 247, 276;

(10) those in charge of CHGO decided to terminate the group because of the pending FEC investigation, AR 600–01, 606–09;

(11) CHGO's remaining funds were distributed by Mihalke at Reed's command to Reed, Mihalke, and Wayne Berman even though the funds belonged to CHGO, there is no evidence either Reed or Mihalke had authority to transfer the funds on behalf of CHGO, and even though the three provided no services of reasonably equivalent value to earn the transferred sums, AR 653–54, 1302, 1309, 1311–12, 1559, 1575;

(12) Reed obstructed the service of a FEC subpoena on Meridian Strategies, LLC ("Meridian"), AR 324;

(13) as a result of this obstruction and evasions, the FEC did not have full knowledge of CHGO's financial activities until 2015, when it located a previously undisclosed vendor, AR 1159–62, 1168–75, 1178–1208, 1472–74; and

(14) as a result of this lack of complete data, the three controlling commissioners refused to find reason to believe CHGO was a political committee, and when finally confronted with the extensive evidence compiled by the FEC's Office of General Counsel ("OGC") of CHGO's violations, the controlling commissioners chose to dismiss the complaint on their belief that the statute of limitations had run and that enforcement against CHGO would be impossible, AR

1518–19.

That propriety of that dismissal is the subject of this suit.

ARGUMENT

I. The Standard of Review

Under the FECA, this Court reviews the FEC's dismissal of Plaintiffs' complaint to determine whether the dismissal was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). The FEC nevertheless claims that this Court has almost no role to play in resolving whether the dismissal of Plaintiffs' complaint was contrary to law, arguing that judicial review of FEC dismissals is so "highly deferential" that the Court is to be reduced to a mere rubber stamp. *See* FEC Mem. 29–30, ECF No. 21. The FEC is mistaken, however, and "courts must not abdicate the judicial duty to carefully review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence." *La Botz v. FEC*, 889 F. Supp. 2d 51, 60 (D.D.C. 2012); *see also Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 n.5 (D.C. Cir. 1987) ("*DCCC*") (Ginsburg, J.) (noting FECA's judicial review is a "necessary check against arbitrariness").

The FECA's "contrary to law" analysis has two prongs. First, the Court determines whether the dismissal is the "result of an impermissible interpretation" of law, *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986), an evaluation that is deferential only if the relevant interpretation warrants deference under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), which is not the case here. Second, if the dismissal rests on permissible interpretations of law, the Court determines whether the dismissal was nonetheless "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. While this latter prong of the analysis is deferential, it nonetheless requires a "searching and careful" inquiry that the controlling commissioners' statement of reasons here fails. *FEC v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986).

Further, the Court "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency." *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."). The dismissal thus stands or falls on the controlling commissioners' justification alone, not on any "*post hoc* rationalization" by the FEC's counsel. *La Botz v. FEC*, 889 F. Supp. 2d at 62.

A. The Controlling Commissioners' Legal Interpretations Are Subject to *De Novo* Review

In justifying their dismissal of Plaintiffs' complaint, the controlling commissioners' statement of reasons rested on a number of legal interpretations: first, the statute of limitations had run on some or all of Plaintiffs' claims and prevented FEC enforcement, AR 1516; second, CHGO "no longer existed," rendering enforcement "futile," AR 1519; and third, to a significantly lesser extent, that the case raised "novel legal issues" about the application of the "major purpose" test from *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), to determine whether a group should be excluded from political committee registration under the FECA, AR 1519. The Court owes no deference to any of those legal interpretations.

First, *Chevron* deference is only available where the agency interprets a statute over which it has expertise or its own regulations. With regard to the FEC, courts owe no deference to a FEC commissioner's interpretation of any statute other than the FECA, *see Ardestani v. INS*, 502 U.S. 129, 148 (1991), such as an interpretation of the general five-year statute of limitations that applies to FEC enforcement actions, *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000), or an interpretation of a general fraudulent conveyance statute. Similarly, courts owe no deference to a FEC commissioner's interpretation of the Constitution or judicial precedent, *Univ. of Great*

Falls v. NLRB, 278 F.3d 1335, 1341 (D.C. Cir. 2002), like *Buckley*'s "major purpose" test for political committees, *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (finding no deference warranted to FEC's interpretation of *Buckley*), *vacated on other grounds*, 524 U.S. 11 (1998). Judge Christopher R. Cooper of the District Court for the District of Columbia recently recognized this limit to the FEC's *Chevron* authority in refusing to afford the FEC any discretion for its interpretation of *Buckley*. *CREW v. FEC*, No. 1:14-cv-1419 (CRC), 2016 U.S. Dist. LEXIS 127308, at *19–21 (D.D.C. Sept. 19, 2016). Judge Cooper recognized that while *Akins* was vacated, "its reasoning has been adopted by subsequent D.C. Circuit panels," and "as an expression of the views of nine judges in this circuit, [*Akins*] is as persuasive as non-precedential authority can be." *Id.*

Second, *Chevron* deference is only appropriate where the agency decision on review has force of law. *United States v. Mead Corp.*, 533 U.S. 218, 221, 222–23, 231–34 (2001) (holding that if agency decision's "binding character as a ruling stops short of third parties," then it lacks "force of law," and *Chevron* deference is unwarranted); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) ("[T]he expressly non-precedential nature of the Appeals Office's decision *conclusively* confirms that the Department was not exercising through the Appeals Office any authority it had to make rules carrying the force of law. That is because the decision's 'binding character as a ruling stops short of third parties' and is 'conclusive only as between [the agency] itself and the [petitioner] to whom it was issued.'" (emphasis added) (citation omitted)). Accordingly, courts owe no deference to an interpretation of law reflected in a statement adopted by only three FEC commissioners, a non-majority of the commission, because such statement has no force of law. *See Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) (recognizing that a statement of reasons adopted

by less than a majority of FEC commissioners "would not be binding legal precedent or authority for future cases" because "[t]he [FECA] clearly requires that for any *official* Commission decision there must be at least a 4-2 majority vote").[1]

Moreover, even if an agency interprets a statute over which it has expertise in a decision that has force of law, the interpretation warrants deference only if the statute at issue is ambiguous (*Chevron*'s step one) and reflects a "reasonable choice within a gap left open by Congress" by that ambiguity (*Chevron*'s step two). *Chevron*, 467 U.S. at 843, 866. Thus, even if the FEC interprets the FECA or its regulation in a statement with force of law, "[i]f the FEC's interpretation unduly compromises the Act's purposes, it is not a reasonable accommodation under the Act, and it would therefore not be entitled to deference." *Orloski*, 795 F.2d at 164 (internal quotation marks omitted).

As discussed further below, the dismissal at issue here was based on the controlling commissioners' interpretation of laws like a general statute of limitations, a general fraudulent conveyance statute, and *Buckley*'s major purpose test. Further, the interpretations were adopted

[1] Although Judge Cooper recently stated that *Chevron* deference could be owed to an interpretation adopted by only three commissioners in certain circumstances, *CREW*, 2016 U.S. Dist. LEXIS 127308, at *17 n.5, that statement was dicta. Judge Cooper went on to find that the commissioners' statement on review there did not warrant deference because it interpreted the Constitution and judicial precedents, *id.* at *20, and ruled that the two other interpretations at issue failed even an arbitrary and capricious standard of review, *id.* at *40, or had not actually been reached by the commissioners, *id.* at *42. Judge Cooper further relied on *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), to hold that *Chevron* deference was available to an interpretation not adopted by a majority of commissioners. *In re Sealed Case*, however, decided before *Mead*, erroneously ignored the fact that the three FEC commissioners' statement on review lacked force of law, but rather relied only on the existence of the FEC's general rule making authority to afford the statement deference. 223 F.3d at 780. Nevertheless, even if an agency has general rule-making authority, a statement without force of law logically cannot be an "exercise of that authority." *Mead*, 533 U.S. at 227; *Fogo De Chao*, 769 F.3d at 1137. *In re Sealed Case* is in direct conflict with *Mead*, and therefore was effectively overruled by *Mead*. *See Am. Fed'n. of Gov't Emps. v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002) (holding "plain error" to rely on pre-*Mead* case law to analyze *Chevron* deference).

by only three commissioners, and therefore do not have force of law. Additionally, the interpretations frustrate the purposes of the FECA. Accordingly, the Court owes those interpretations no deference. Rather, under the first prong of FECA's "contrary to law" analysis, the Court determines whether the controlling commissioners' interpretations of law on which the dismissal rested conflict with the Court's *de novo* interpretations of law. *See CREW*, 2016 U.S. Dist. LEXIS 127308, at *21. If the controlling commissioners' proffered interpretation differs from the Court's, then the interpretation was impermissible and the dismissal was contrary to law.

B. The Court Reviews the Controlling Commissioners' Other Justifications Under an Arbitrary or Capricious Standard

Even if the controlling commissioners' interpretations were permissible, the Court may still find the dismissal contrary to law if it the dismissal was "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. In carrying out that analysis, the Court applies the same standards as apply under the Administrative Procedure Act ("APA"). *See La Botz*, 889 F. Supp. 2d at 60 (citing *Motor Vehicle Mfrs. Assoc. of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), a case applying APA's standards for arbitrary and capricious analysis in reviewing a FEC dismissal).

"To survive review under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Tripoli Rocketry Ass'n v. ATF*, 437 F.3d 75, 81 (D.C. Cir. 2006). An agency's decision is arbitrary and capricious if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the

product of agency expertise." *State Farm*, 463 U.S. at 43. "An agency cannot . . . merely . . . insist[] that its conclusions are rational and supported by the record." *San Luis Obisbo Mothers for Peace v. U.S. Nuclear Reg. Comm'n*, 789 F.2d 26, 48 (D.C. Cir. 1986); *see also McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1190 n.4 (D.C. Cir. 2004) (holding "conclusory" agency justifications are arbitrary and capricious). Moreover, an agency "by definition, abuses its discretion when it makes an error of law." *Crossroads GPS v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) (internal quotation marks omitted); *see also Rose*, 806 F.2d at 1089 (arbitrary and capricious agency decisions "include[e] sensible by legally flawed actions"); *Water Quality Ins. Syndicate v. United States*, 522 F. Supp. 2d 220, 228–29 (D.D.C. 2007) (holding agency decision was arbitrary and capricious because it was based on legal error).

Further, "[o]ne of the core tenets of reasoned decision-making is that 'an agency [when] changing its course . . . is obliged to supply a reasoned analysis for the change." *Republic Airline, Inc. v. U.S. Dep't of Transp.*, 669 F.3d 296, 299 (D.C. Cir. 2012) (quoting *State Farm*, 463 U.S. at 42); *see also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2008) (holding agency may not "depart from a prior policy *sub silentio*" and "must show that there are good reasons for the new policy").

Finally, "[s]howing that reasoned decision-making supports an agency's action 'depends on the specific facts of a particular case.'" *Sierra Club v. Salazar*, No. 10-cv-1513 (RBW), 2016 WL 1436645, at *15 (D.D.C. Apr. 11, 2016) (quoting *Dist. Hosp. Partners LP v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015)). Accordingly, to survive arbitrary and capricious review, the FEC must show more than that similar dismissals on purportedly similar grounds survived such review: the FEC must show that the facts in this case rationally support dismissal.

C. Section 30109 Imposes No Additional Deference

The FEC appears to argue that section 30109(a)(8) imposes its own deferential review, in

addition to the possible deference under prong one (*Chevron*) or prong two (arbitrary and capricious review) of the contrary to law analysis, discussed above. FEC Mem. 29 (arguing section 30109(a)(8) review is "highly" or "extremely deferential"). But section 30109(a)(8) imposes no deference above and beyond that available under *Chevron* for certain legal interpretations, or deference under an arbitrary and capricious analysis. Rather, the FECA asks only whether the FEC's dismissal is "contrary to law" and, if so, authorizes judicial relief.

The cases on which the FEC relies support this point. Those decisions either grant deference under the *Chevron* doctrine, *see Chevron*, 467 U.S. at 843 n.9 (relying in part on deference discussed in *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981), to establish deference doctrine); *Common Cause*, 842 F.2d at 448 (noting review is "limited" when analyzing action under "*Chevron*'s second prong"), or recognize the deference afforded when a court reviews whether any agency decision was "arbitrary and capricious," *see Hagelin v. FEC*, 411 F.3d 237, 266 (D.C. Cir. 2005) (noting deference under arbitrary and capricious analysis"); *Orloski*, 795 F.2d at 167 (same). Section 30109 imposes no additional deference beyond what could be warranted under either of these two doctrines.

D. Prosecutorial Discretion Does Not Alter This Standard of Review

The FEC further argues that the FEC's discretion is absolute because the controlling commissioners in passing cited *Heckler v. Chaney*, 470 U.S. 821 (1985), a decision finding that an agency's refusal to enforce was committed to its prosecutorial discretion and thus presumed to be unreviewable, *id.* at 832. Under *Heckler*, an agency's exercise of prosecutorial discretion may be justified by its reasoned evaluation of "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831. The controlling

commissioners, however, failed to justify dismissal based on any of these factors, and their terse invocation of prosecutorial discretion does not alter the Court's standard of review here.

First, it is important to note that while *Heckler* found that an agency's refusal to enforce is "presumptively unreviewable," that "presumption may be rebutted [by the relevant] substantive statute." *CREW*, 2016 U.S. Dist. LEXIS 127308, at 23 n.7 (quoting *Heckler*, 470 U.S. at 832). The FECA rebuts that presumption here by expressly providing for judicial review of the FEC's decision to dismiss a plaintiff's administrative complaint. *Id.* (citing 52 U.S.C. § 30109(a)(8)(C)).

Of course, the FEC may still "evaluate its own resources and the probability of the investigatory difficulties," *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011), *vacated on other grounds*, 725 F.3d 226 (D.C. Cir. 2013), considerations that are typically described as prosecutorial discretion, *see Heckler*, 470 U.S. at 831. That evaluation, however, is at least subject to arbitrary and capricious analysis under the contrary to law test. *See La Botz v. FEC*, 61 F. Supp. 3d 21, 33 & n.5 (D.D.C. 2014) (subjecting dismissal for prosecutorial discretion to "contrary to law" analysis; noting an exercise of prosecutorial discretion may be arbitrary and capricious); *Nader*, 823 F. Supp. 2d at 65 (prosecutorial discretion must be based on "reasonable grounds"); *Antosh v. FEC*, 599 F. Supp. 850, 856 n.5 (D.D.C. 1984) ("While the Commission is vested with some prosecutorial discretion, its actions cannot escape review." (citation omitted)). Therefore, like any agency justification subject to arbitrary and capricious analysis, dismissal on the basis of prosecutorial discretion must be adequately stated and explained to justify the dismissal. *Chenery Corp.*, 318 U.S. at 94. A "terse" reference to prosecutorial discretion or citation to *Heckler* is insufficient. *Robertson v. FEC*, 45 F.3d 486, 493 (D.C. Cir. 1995).

Finally, to the extent that any exercise of prosecutorial discretion to dismiss rests on an

impermissible interpretation of law, the dismissal is contrary to law under the FECA and warrants reversal. *La Botz*, 61 F. Supp. 3d at 33 (noting FEC's prosecutorial discretion evaluated to see whether it rests on "impermissible interpretation" of law); *see also Akins*, 101 F.3d at 738 ("If [enforcement discretion] were to mean that an agency's *legal* determination was not reviewable, that would virtually end judicial review of agency action."). The Court owes no deference beyond what might be warranted under *Chevron* when reviewing an agency interpretation of law, regardless of whether the agency interrupts that statute directly or under the guise of an exercise of prosecutorial discretion. Rather, as long as the dismissal "result[s]" from the impermissible interpretation, as determined *de novo* by this Court where appropriate, the dismissal is contrary to law, even if that interpretation is only used to inform the FEC's exercise of prosecutorial discretion. *Orloski*, 795 F.2d at 161. Indeed, to allow the FEC to repackage a misinterpretation of law as an exercise of discretion would undermine the FECA's provision for judicial review and risk collapsing all contrary to law review into review for abuse of discretion. *Cf. id.* (specifying two distinct forms of review).

Accordingly, the controlling commissioners' citation to *Heckler* does not alter the Court's standard of review. The Court must still review the controlling commissioners' proffered rationale for dismissal to determine whether dismissal resulted from an impermissible interpretation of law or, if it did not result from an impermissible interpretation, to determine if dismissal nonetheless was arbitrary and capricious.

II. The Court May Take Notice of Extra-Record Facts

In reviewing the controlling commissioners' statements of reasons, this Court sits as an "appellate tribunal" over the FEC. *La Botz*, 889 F. Supp. 2d at 59 n.3. As an appellate tribunal, the Court may take judicial notice of certain legislative facts outside the administrative record "to enable it to understand the issues clearly." *Beach Commc'n, Inc. v. FCC*, 959 F.2d 975, 987

(D.C. Cir. 1992) ("'[I]t may sometimes be appropriate to resort to extra-record information to enable judicial review of agency action to become effective.' . . . In the instant case, we require additional 'legislative facts' . . . ." (citations omitted)), *rev'd on other grounds* 508 U.S. 307 (1993); *see also Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 298 (D.N.M. 2015) ("To the extent that materials go towards elucidating the standard by which the Court should judge the facts of this case, rather than elucidating the facts themselves, the Court may look to, and the parties may cite to, evidence outside the record."); *cf.* FED. R. EVID. 201 advisory committee's note ("'In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion.' . . . This is the view which should govern judicial access to legislative facts." (citation omitted)). Accordingly, the Court may consider the materials submitted in Plaintiffs' opening brief and herewith if it finds those materials instructive on the proper interpretations of law.

Further, the Court may consider materials outside the record where the controlling commissioners "failed to explain administrative action so as to frustrate judicial review," *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010), or where controlling commissioners' good faith is in question, *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 825 (1971). By asserting that the controlling commissioners terminated enforcement against CHGO because the FEC does not have the resources to prosecute, the FEC has introduced a ground which the controlling commissioners so failed to explain that judicial review of that ground has been frustrated, and the FEC has further put the controlling commissioners' good faith and credibility at issue by advancing a ground that is controverted by all available evidence.

In support of their motion and this reply, Plaintiffs submit a number of materials to show that the controlling commissioners' unreasonably narrow reading of *Buckley*'s "major purpose"

test and the FEC's enforcement powers have led to an explosion of dark money, and have led and will lead to continued and future harm to voters and Plaintiffs. Plaintiffs further submit materials herewith to show the lack of credibility in any assertion about the inability of the FEC to seek enforcement against CHGO. The Court may take notice of these materials.[2]

III. The Controlling Commissioners' Legal Interpretations are Impermissible

As discussed above, the controlling commissioners purported to justify their dismissal of Plaintiffs' complaint on the basis of a number of legal interpretations: they interpreted the statute of limitations to bar enforcement, they interpreted a number of provisions of federal law to bar enforcement against CHGO because it was purportedly defunct, and they interpreted the "major purpose" test under *Buckley* to at least raise "novel legal issues" about CHGO's political committee status. The interpretations used to justify dismissal, however, are impermissible and therefore the dismissal was contrary to law.

A. The Statute of Limitations Has Not Run

One reason the controlling commissioners cited for dismissing Plaintiffs' complaint is that the "statute of limitations effectively expired" on CHGO's violations of the FECA. AR 1516. In reaching that conclusion, the controlling commissioners must have interpreted 28 U.S.C. § 2462, the five-year limitations statute that applies to FEC enforcement actions. The controlling commissioners' interpretation, however, was impermissible and therefore the dismissal was contrary to law.

As a preliminary matter, the controlling commissioners' interpretation of section 2462 is not entitled to deference, and therefore the FEC's insistence that the interpretation was

[2] To the extent the Court believes this creates a genuine dispute of material fact, then it should deny both motions for summary judgment and permit discovery, including depositions of the controlling commissioners.

"reasonable" is beside the point. FEC Mem. 39. Section 2462 is a statute of general applicability, one over which the FEC enjoys no expertise. *See Proffitt*, 200 F.3d at 860 (courts owe no deference to agency interpretations of section 2462). Thus, the controlling commissioners' interpretation must be more than reasonable to justify dismissal. It must be right. The interpretation, however, was neither right nor reasonable.

The FEC concedes that, at least as to CHGO's violation of the FECA's political committee rules, the controlling commissioners did *not* find that the statute of limitations had run. FEC Mem. 39 & n.9 (arguing the statute of limitations has only run to "event-driven disclosure and disclaimer violations").[3] That concession is fatal to the controlling commissioners' justification for dismissal. After all, they not only dismissed CHGO's event-driven disclosure violations and disclaimer violations, but also dismissed CHGO's political committee violations. AR 1503. Accordingly, the running of the statute of limitations cannot justify the dismissal of all of CHGO's violations.

The controlling commissioners were also incorrect, moreover, to interpret section 2462 to bar enforcement of any of Plaintiffs' claims. That is because, first, the FEC retains equitable enforcement powers even after the expiration of the statute of limitations, and second, CHGO's egregious and fraudulent conduct tolled any statute of limitations on its claims.[4]

[3] The controlling commissioners' statement of reasons is hardly a model of clarity on this point. They lump all enforcement together and treat all enforcement as "effectively foreclosed." AR 1519. For example, while the FEC argues that the statute of limitations applies to disclaimer violations, the controlling commissioners do not even discuss those violations except to briefly note that Plaintiffs alleged them. AR 1516. The controlling commissioners provide no explanation for why those violations were dismissed. The complete lack of explanation itself renders the dismissal of the disclaimer violations contrary to law. *Siegel v. SEC*, 592 F.3d 147, 164 (D.C. Cir. 2010) (inadequately explained justification is arbitrary and capricious).

[4] In the opening brief, Plaintiffs further argued that the continuing nature of CHGO's political committee violations tolled the statute of limitations on that violation. Pls.' Mem. 38–39. As the

1. The FEC Retains Equitable Enforcement Powers

First, the FEC retains equitable enforcement powers even after the statute of limitations expires on its ability to impose civil penalties. *FEC v. Christian Coal.*, 965 F. Supp. 66, 71 (D.D.C. 1997) (holding section 2642 "provides no . . . shield from declaratory or injunctive relief" sought by the FEC); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20–21 (D.D.C. 1995) (same). The FEC does not dispute that it has such authority, arguing instead only that there is a "split of authority on the question" and that litigation risk created by that split complicates enforcement and justifies dismissal. FEC Mem. 47. It is irrelevant, however, whether the controlling commissioners either erroneously interpreted section 2462 to bar enforcement or erroneously credited unpersuasive judicial decisions that misinterpreted section 2462 to conclude that pursing such relief would be risky. Under either way of framing the issue, the controlling commissioners' dismissal would be the "result of an impermissible interpretation" of law, and is thus contrary to law under the FECA. *Orloski*, 795 F.2d at 161. By failing to argue that the controlling commissioners were correct to credit the split in authority barring all FEC enforcement, the FEC concedes that the dismissal was contrary to law.

Furthermore, the split is not nearly as "considerable" as the FEC argues. FEC Mem. 47. The FEC points to *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996), a case in which the Ninth Circuit held, in the course of three sentences, that *Cope v. Anderson*, 331 U.S. 461 (1947), foreclosed the FEC from seeking injunctive relief that was "connected to the claim for legal relief." *Williams*, 104 F.3d at 240.[5] *Williams*'s summary reliance on *Cope*, however, has been

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FEC now concedes that the statute of limitations has not run on that claim, Plaintiffs' do not devote additional briefing to that point.

[5] Notably, the only injunctive relief awarded by the district court in *Williams* was an injunction against "similar violations of the Act for a period of 10 years [from] the date of this order." Order, *FEC v. Williams*, No. CV-93-06321-ER-B (C.D. Cal. Jan. 31, 1995). The equitable relief at issue in *FEC v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10 (D.D.C. 1996), a case which

widely criticized. *United States v. Telluride Co.*, 146 F.3d 1241, 1248 n.13 (10th Cir. 1998); *United States v. Banks*, 115 F.3d 916, 919 n.6 (11th Cir. 1997).

As explained in *Christian Coalition*, *Williams*'s mistake rested on conflating the doctrines of "concurrent jurisdiction" and "exclusive jurisdiction." 965 F. Supp. at 71. *Cope v. Anderson* considered the effect of a statute of limitations on the concurrent jurisdiction of equitable power, where equity mere serves to compliment a legal right. *Id.* The FEC's equitable power, however, rests on the exclusive jurisdiction of equity to grant injunctive relief. *Id.* Quoting the Supreme Court, Judge Joyce Hens Green explained how a statute of limitations impacts the differing forms of equity:

> "[W]hen the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations . . . . But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable . . . ."

Id. at 72 (quoting *Russell v. Todd*, 309 U.S.280, 289 (1940)). Accordingly, *Williams*'s reliance on *Cope* was mistaken, and it is unpersuasive authority on the question of the effect of section 2462 on the FEC's equitable powers. The controlling commissioners' reliance on *Williams* and cases like it—even if only to assess litigation risk—means the dismissal resulted from an impermissible interpretation of law.

The FEC nonetheless argues that equitable enforcement is limited to remedying "future risk of harm." FEC Mem. 46. The FEC, however, is mistaken. While some forms of equitable relief are forward-looking and thus must be justified by a showing of future risk of harm, *see*

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also mistakenly relied on *Cope* to deny equitable relief, was of a similar nature, *id.* at 13 (reviewing a "permanent injunction commanded the NRTWC to refrain from similar vigilantism in the future"); *id.* at 14 (relying on *Cope* to find section 2642 barred equitable enforcement powers). The relief the FEC could grant here need not be so limited nor connected to legal relief.

SEC v. Brown, 740 F. Supp. 2d 148, 156–57 (D.D.C. 2010) (looking to risk of future harm to justify ban on defendant's holding position as officer or director of company in the future); *Nat'l Right to Work Comm.*, 916 F. Supp. at 13, 14 (noting failure to show defendant "will ever conduct such clandestine surveillance of its opponents again" undermines justification for injunction ordering defendant "to refrain from similar vigilantism in the future"), that is not true for all equitable relief. Some equitable relief is remedial and, therefore, backward looking. Such relief may be justified solely on the basis of a showing of past wrong. *See, e.g.*, *United States v. Phillip Morris, Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005) ("Disgorgement, on the other hand, is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo. It is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct." (citations omitted)); *see also United States v. Phillip Morris USA, Inc.*, 801 F.3d 250, 262 (D.C. Cir. 2015) (holding "correcting . . . misinformation . . . focuse[s] on remedying the effects of past conduct"); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (rejecting suggestion the SEC must show risk of future harm to justify equitable relief). The FEC may seek backward focused equitable relief, for example, by having CHGO correct the absence of disclosure that its violations created and by disgorging funds with which Reed, Mihalke, and Berman wrongly absconded.

Further, the FEC is wrong to assert that there is no risk of future harm here. First, voters are continually harmed by being denied information that is relevant to elections in which they will vote. Six members of Congress for whom CHGO ran ads in 2010 remain in federal office today. *See* AR 209–20, 1496–1500 (listing races in which CHGO ran ads); Decl. of Stuart McPhail in Supp. of Pls.' Mot. for Summ. J., Ex. 1 ("MSJ Decl."), ECF No. 19-1 (listing as

current members Mick Mulvaney, Mike Kelly, Andy Harris, Todd Young, Lou Barletta, and Scott Tipton). Each of those candidates is up for reelection, or election to another federal office, in 2016. Exhibit 1.[6] Voters are entitled to know who contributed to CHGO to understand who financially supported these candidates in the past and who may be supporting them through other vehicles now, and who may have been rewarded for their support by those same candidates during their time in office. *See Buckley*, 424 U.S. at 66–67 (listing reasons voters deserve to know who financially backs their candidates). Thus voters continue to suffer and will suffer future harm by being denied all of the information to which the FECA entitles them.

Further, as noted in Plaintiffs' opening brief, CHGO's flagrant conduct created a roadmap for organizations to hide contributors' support for candidates, a roadmap which groups continue to exploit in elections. Pls.' Mem. 29–30. That includes at least one group represented by CHGO's counsel, Canfield. *Id.* (describing activities of Arizona Future Fund, a group that, like CHGO, spent heavily on elections, lied to federal authorities about its activities, and terminated upon investigation); MSJ Decl., Ex. 9, 10. CHGO's founder, Scott Reed, also remains heavily involved in politics and is in a position to engage in the same misbehavior he engaged in with CHGO. AR 653 (noting Reed is currently the "senior political strategist with the U.S. Chamber of Commerce"). There is clear risk of future harm. *S.E.C. v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994) ("In order to determine whether a reasonable likelihood of future

[6] Exhibits are attached to the Declaration of Stuart C. McPhail in Support of Plaintiffs' Reply, filed herewith. The Court may take judicial notice of such government records, *Veg-Mix, Inc. v. Dep't of Ag.*, 832 F.2d 601, 607 (D.C. Cir. 1987), and may consider them outside of the record to determine whether the FEC failed to consider important facts if and when it considered the risk of future harm by terminating enforcement against CHGO. *Esch v. Yuetter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (court may supplement record where "agency failed to consider factors which are relevant"). While most of these candidates are running for reelection, Todd Young is running for Senate.

violations exists, the court considers whether a defendant's violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant's business will present opportunities to violate the law in the future." (internal quotation marks omitted)).

In sum, the FEC retains equitable enforcement powers that it may use against CHGO to remedy any violation for which the statute of limitations has otherwise run. Accordingly, as the controlling commissioners misinterpreted section 2462, and that misinterpretation resulted in dismissal, the dismissal was contrary to law.

2. CHGO's Fraudulent Concealment Tolled the Statute of Limitations

In addition to allowing the FEC to seek equitable relief beyond five years, section 2462 does not prevent any kind of relief because the statute has been tolled by CHGO's fraudulent concealment. Once again, the FEC does not dispute that the conduct at issue tolled the statute of limitations, but argues only that it was not "unreasonable" for the FEC not to pursue the argument. FEC Mem. 43. The FEC mistakes its burden: it must show that the controlling commissioners' interpretations of section 2462 and the fraudulent concealment doctrine which resulted in the dismissal were correct. *Orloski*, 795 F.2d at 161 (so long as dismissal is the "result of an impermissible interpretation," then dismissal is contrary to law). If the controlling commissioners were not correct, then those interpretations are impermissible and the dismissal resulting from them is contrary to law, regardless of whether the controlling commissioners' interpretations were or were not unreasonable.[7]

[7] The doctrine of fraudulent concealment is judicially created, and thus its interpretation involves the interpretation of judicial precedent, for which the controlling commissioners enjoy no *Chevron* deference. *Univ. of Great Falls*, 278 F.3d at 1341. Further, as with the discussion of equitable enforcement, the controlling commissioners never actually discussed the question of tolling. Thus, their conclusion on the statute of limitations is conclusory on that matter, and the

In support of the controlling commissioners, the FEC notes that the Ninth Circuit rejected its appeal to fraudulent concealment in *Williams.* FEC Mem. 44. In that case, the Ninth Circuit found the FEC could not prove fraudulent concealment because the evidence of the unlawful conduit contributions were disclosed on reports filed with the FEC. *Williams*, 104 F.3d at 241 (noting "[t]he reports required by FECA provide sufficient information to FEC" and that "[t]here is no allegation that the 22 contributions by Williams' employees and friends were not listed in the campaign reports, or [that the reports] otherwise contained false information"). *Williams*, however, does not support the controlling commissioners here.

First, *Williams* found that "section 2462 is subject to equitable tolling." *Id.* at 240. Thus, as a legal matter, *Williams* is consistent with holding that CHGO's fraudulent concealment could toll section 2462. Second, *Williams* is entirely distinguishable on its factual finding that equitable tolling was inappropriate in the case before it. There, the defendant had filed the requisite FEC disclosure reports, providing the FEC with sufficient information to determine that the defendant was using the reported individuals as straw donors. *Id.* at 241. CHGO, on the other hand, never filed a single disclosure report as required. AR 204, 242–43. Had it done so, the total sums it spent on express advocacy and electioneering communications would have been readily apparent back in 2010. But because it had not, and because the officers of CHGO gave false, misleading, or incomplete answers to the investigators and because they destroyed or failed to retain relevant documents, the FEC was unable to attain a complete understanding of the amounts CHGO spent on ads until 2015 when it located a previously undisclosed vendor. AR 1159–62, 1472–74. It was the OGC's inability to exactly determine these sums that led the

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FEC's arguments about it are impermissible post hoc rationalizations. *See La Botz v. FEC*, 889 F. Supp. 2d at 62.

controlling commissioners to refuse to find reason to believe CHGO was a political committee—the issue that would serve as the basis of a potential future lawsuit. AR 1518–19.[8]

The FEC simply fails to show that the controlling commissioners' implicit interpretation of the tolling doctrine that resulted in the dismissal was correct. The mere fact that the FEC might face legal arguments in opposition to its enforcement, FEC Mem. 45, hardly shows those arguments are correct or justifies the FEC's abandoning enforcement. The controlling commissioners impermissibly interpreted the tolling doctrine and section 2462, and therefore the dismissal that resulted from those interpretations was contrary to law.

B. No Law Bars Enforcement Against CHGO

The controlling commissioners further dismissed Plaintiffs' complaint against CHGO because they thought any further enforcement would be "futile," implicitly interpreting various laws to support that conclusion. AR 1519. They cited as the reasons for this conclusion that CHGO "no longer existed," it "had no money," and there were no "agents of CHGO with whom the Commission could conciliate." *Id.* On each point, the controlling commissioners' interpretation of applicable laws is impermissible or their conclusions irrelevant, and the FEC's arguments do nothing to remedy those failings.

As an initial matter, Plaintiffs note this case presents a rather unique situation. For all of

[8] CHGO's agents did far more than fail to "divulge[e] all of the information" known to them, as the FEC contends. FEC Mem. 45 (citing *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 130 F.3d 1083, 1087–88 (D.C. Cir. 1997)). They destroyed or failed to retain relevant evidence that they were ordered to preserve, AR 8, 42, 162, 199, 247, 276, obstructed the service of a subpoena, AR 324, filed false statements under penalty of perjury, AR 1548–49, 1559–73, and made false or misleading statements to FEC investigators, AR 46–48, 118–61, 198, 261. Those acts are textbook fraudulent concealment. *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998) (holding "affirmatively misleading statements" toll the statute of limitations); *In re Vitamins Antitrust Litig.*, No. MISC 99-197 (TFH), 2000 WL 1475705, at *3 (D.D.C. May 9, 2000) (holding "providing false information to law enforcement authorities" and destruction of documents are affirmative acts of concealment).

the FEC's expressed concern about "investigatory difficulties" attendant in investigating a purportedly defunct organization about actions that occurred many years ago, FEC Mem. 37, 49, the FEC could provide some relief without conducting any additional investigation. That is because the OGC already conducted an extensive investigation of CHGO, an investigation which disclosed CHGO's central mission and the full extent of its activities which conclusively show that it is political committee.[9] That investigation has also revealed a central component of what CHGO has so far refused to disclose: the identities of CHGO's contributors. The FEC has in its possession documents which clearly show CHGO's contributors, although the copies of those documents provided to Plaintiffs have that information redacted. *See, e.g.*, AR 403, 410–13, 422, 426, 427, 466–68, 486; *see also* Def. FEC's Am. Certified List of Contents of the Admin. Records 3, 7, ECF No. 18-1 (noting the FEC redacted information from documents identifying donors that were provided to Plaintiffs). Thus, the FEC could, today, find CHGO failed to file required reports and is a political committee, and then release the information it gathered in its investigation and that CHGO failed to disclose. No additional investigation or agency resources would be required beyond posting unredacted copies of CHGO's documents on the FEC website.

Administratively authorizing the posting of such information would not be unprecedented. The FEC has released investigative information to correct disclosure violations in the past without seeking a court order. *See, e.g.*, *CREW v. FEC*, 475 F.3d 337, 339–40 (D.C. Cir. 2007) (discussing case where FEC revealed through its website investigatory files disclosing information about an in-kind contribution without seeking court approval); *see also* 11 C.F.R. § 5.2 (requiring FEC to "make the fullest possible disclosure of records to the public"). Of

[9] Despite the fact that CHGO falsely denied that it is a political committee, FEC Mem. 36, CHGO qualifies as a political committee under any reasonable interpretation of *Buckley*. *See infra* Part III.C.

course, the FEC could also seek a default judgment against CHGO if it thought a court order was necessary, something which would likely incur little or no cost if CHGO is, as the controlling commissioners' surmise, truly nonexistent and without money to pay for counsel. Finally, there is no legal block on the FEC sharing this information. While FEC investigations are confidential while they proceed, that statutory bar to disclosure ceases once the investigation is closed. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702, 50702–03 (Aug. 2, 2016) (discussing *AFL-CIO v. FEC*, 333 F.3d 168, 174, 179 (D.C. Cir. 2003) for proposition that 52 U.S.C. § 30109(a)(12)(A)'s confidentiality provision "merely . . . prevent[s] disclosure of the fact that an investigation is pending," and outlining policy to release certain documents once an investigation is completed subject to balancing against the disclosed parties' First Amendment interests in non-disclosure). Moreover, as there has been no conciliation attempt (and, according to the controlling commissioners, none is possible), the confidentiality provision associated with such negotiations does not apply. *See* 52 U.S.C. § 30109(a)(4)(B)(i). Finally, contributors to a political committee enjoy no First Amendment rights against disclosure, *see Buckley*, 424 U.S. at 84 (finding no constitutional bar to disclosure provisions of FECA, including disclosure of contributors to political committees); *SpeechNow v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (same), thus there is no First Amendment concern created by the FEC's disclosure of CHGO's contributors.

Releasing the names of CHGO's contributors would not only finally provide voters with the identities of those who financially backed numerous federal candidates—including the identity of the single donor who contributed $4 million to CHGO's political activities, AR 683—it would act as a powerful deterrent to future actors who know that the FEC might disclose their identities in the event it discovers wrongdoing. Accordingly, given the ease with which the FEC

could remedy many of the violations at issue here without the expenditure of any significant agency resources, enforcement against CHGO is hardly futile or inefficient, and the burdens to which the FEC has cited are irrelevant.

Nonetheless, even putting aside the ease with which the FEC could do much to resolve this matter, the FEC's arguments here do not show that any other action against CHGO would be futile or impossible. First, the FEC cites nothing to support the controlling commissioners' conclusory statement that CHGO no longer exists as a legal entity. Rather, the FEC misstates the rules for political committee termination. FEC Mem. 35–36.[10] Under the FECA, any group that is a political committee continues to exist until it files the requisite termination report with the FEC, or the FEC otherwise terminates it. 52 U.S.C. § 30103(d). Of course, only political committees need to file the report, but a group becomes a political committee whenever it satisfies the FECA's political committee standards and is not carved out by *Buckley*'s major purpose test. *See, e.g.*, 52 U.S.C. § 30101(4)(a) (defining "political committee" as any "committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 in a calendar year"); *Buckley*, 424 U.S. at 79 (carving out from FECA's political committee rules those groups without the major purpose to nominate or elect federal candidates). There is no requirement that the FEC make a formal determination that a group is a political committee for it to be classified as one under the FECA and for it to incur the obligations

[10] To the extent the FEC may be said to be interpreting the termination requirements under the FECA, the FEC's litigation position is not entitled to any *Chevron* deference. *Village of Barrington, III v. Surface Tranp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) ("[W]e give no deference to agency litigation positions raised for the first time on judicial review." (internal quotation marks omitted)). Further, even if the legal interpretation were adopted by the controlling commissioners, the fact that it is reflected in a statement of reasons without force of law would deny the interpretation *Chevron* deference. *Mead*, 533 U.S. at 221, 222–23, 232–34.

required of political committees. A group need not even register to trigger political committee burdens; registration is simply an independent duty of such committees. *See* 52 U.S.C. § 30103(a) (imposing duty on groups already qualified as "committees" to file a "statement of organization"); *see also* Certification, MUR 5754 (MoveOn.org) (July 19, 2006), *available at* http://eqs.fec.gov/eqsdocsMUR/000058A6.pdf (finding group that had not registered as political committee in violation of FECA also failed to file reports required of political committees). Thus, because CHGO *was* and *is* a political committee—even if the FEC has not yet concluded as much—it could not legally terminate until it followed the requirements under the FECA.[11]

Further, the FEC does not dispute that it has taken remedial action against defunct groups in the past. FEC Mem. 37 (discussing MUR 6413 (Taxpayer Network)); *see also* Pls.' Mem. 40. Thus, the FEC concedes that CHGO's status, even if it is defunct, does not legally bar enforcement against CHGO, and the controlling commissioners' interpretation of the law otherwise was impermissible.

Nor does the FEC substantiate the controlling commissioners' implicit conclusion that the Commission could not seek enforcement against any of CHGO's officers, even if the FEC could not seek enforcement against CHGO as an entity. They note only that they have chosen not to pursue such individuals in the past, FEC Mem. 38, but cite no authority showing the FEC cannot seek enforcement against these individuals simply because they were not named in Plaintiffs' administrative complaint (an understandable omission as CHGO largely concealed the

[11] The controlling commissioners never discussed CHGO's need to file a termination report before it could cease to exist, and therefore their conclusion, in addition to being impermissible, was arbitrary and capricious. *State Farm*, 463 U.S. at 43 (holding arbitrary and capricious for agency to "entirely fail[] to consider an important aspect of the problem"); *Siegel*, 592 F.3d at 164 (holding decision not "adequately explained" is arbitrary and capricious); *Quantum Entm't, Ltd. v. U.S. Dep't of Interior*, 597 F. Supp. 2d 146, 153 (D.D.C. 2009) (agency's "incomplete" consideration of a statute rendered decision arbitrary and capricious).

activities of its agents). To the contrary, the FEC has authority to add individuals to an enforcement proceeding on its own. 11 C.F.R. § 111.3(a) (FEC may bring enforcement proceeding on its own); *see also* First General Counsel's Report 2, MUR 6054 (Buchanan for Congress) (May 26, 2009), *available at* http://eqs.fec.gov/eqsdocsMUR/12044310819.pdf (adding respondents to those first identified by CREW in administrative complaint where investigation revealed additional responsible individuals). The fact that the FEC has not begun an administrative process with any such individuals simply has no relevance to the question of whether the FEC could begin that process now. *Cf.* FEC Mem. 38. The FEC could name, for example, CHGO's treasurer in an enforcement proceeding and seek conciliation whereby the treasurer would file CHGO's missing reports. The FEC cites no authority barring that possibility, yet the controlling commissioners completely failed to consider it.

The FEC also provides no support for the controlling commissioner's conclusion that CHGO has no assets reachable by the FEC, implicitly interpreting the federal fraudulent conveyance statute, 28 U.S.C. § 3304(b)(1), to provide the FEC no power to disgorge the $1.1 million in CHGO's residual funds that Reed, Mihalke, and Berman took. Rather, the FEC only meekly contends that Berman's statement that he received no payment for his work with CHGO contradicts Mihalke's assertion that Berman took a share of CHGO's residual $1.1 million. FEC Mem. 35. Of course, a fairly simple investigation could confirm whether Berman received that money, but, regardless of whether he did, that has no bearing on whether the FEC could disgorge Mihalke and Reed's ill-gotten gains. Nor does the FEC explain why CHGO's lack of money should prevent the FEC from seeking disclosure from CHGO under its equitable powers. *See*

Pls.' Mem. 41 (discussing FEC disclosure remedy against organization with "limited funds").[12]

Finally, the FEC admits that the potential lack of any agents who might negotiate a conciliation agreement on behalf of CHGO—one of the facts cited by the controlling commissioners to support dismissal—is irrelevant to FEC enforcement. FEC Mem. 38–39. The FEC is not limited to asking investigated parties to voluntarily agree to sanctions; rather, the FEC has "additional tools it could have deployed in an enforcement action against CHGO." *Id.* at 38.

In sum, the controlling commissioners misinterpreted laws to conclude that CHGO could not be the subject of an enforcement action, that it had no funds that could be reached by the FEC, and that it could not seek to remedy violations by a defunct group without assets. Thus, the controlling commissioners' dismissal of the enforcement proceeding against CHGO on the basis of futility results from impermissible interpretations of law, particularly in a situation such as this, where the FEC could immediately and without any additional action on CHGO's part disclose CHGO's contributors and remedy many of CHGO's violations.

C. There Still Is No Justification for Dismissal on the Merits

The controlling commissioners' brief discussion of the substance of the allegations against CHGO also failed to justify their dismissal of Plaintiffs' complaint, and the FEC's attempt to characterize their comments as providing sustainable grounds for dismissal both defies logic and has no legal basis. The FEC does not even dispute that the controlling commissioners failed to justify their refusal to find reason to believe CHGO engaged in reporting and disclaimer violations, violations both the FEC and the controlling commissioners admit were "obvious." FEC Mem. 39 n. 9; AR 1516. For this reason alone, the controlling commissioners' decision to

[12] Like the general statute of limitations, the FEC enjoys no expertise with regards to section 3304, and therefore the controlling commissioners' interpretation of it warrants no *Chevron* deference. *Proffitt*, 200 F.3d at 860 (no deference owed to agency interpretation of statute of "general applicability").

dismiss the case was neither permissible nor reasonable. On the remaining violation, the FEC contends that the controlling commissioners could have reasonably questioned CHGO's political committee status because, if much of CHGO's political spending is ignored, it is possible to conclude CHGO's major purpose was not nominating or electing federal candidates. That argument has no logical or legal basis.[13]

The FEC argues that the controlling commissioners concluded that commissions paid by CHGO to its vendors raised "novel legal issues," and if those commissions are excluded from the calculation of CHGO's political spending, CHGO might no longer qualify as a political committee under Buckley's "major purpose" test. That test limits the application of the FECA's political committee rules to those groups that have the major purpose of electing or nominating a candidate, which can be determined by looking at how much of the group's total expenditures are devoted to election-related political activity. CREW, 2016 U.S. Dist. LEXIS 127308, at *40. According to the FEC, if those commissions are excluded in their entirety from the qualifying political activity, as well as all other money CHGO spent on political activity that is not express advocacy, then the amount CHGO spent on political activity would be less than 50% of its total expenditures, the threshold the controlling commissioners considered necessary to conclude a group had the major purpose to nominate or elect candidates. The FEC, however, is wrong to exclude all non-express advocacy spending, and the purported "novel" legal issues would not be determinative on the question of CHGO's major purpose. Those supposed issues, therefore, cannot justify dismissing the enforcement proceeding against CHGO.

To reach the conclusion that CHGO's political spending may have been less than half of

[13] The FEC also notes that CHGO disputes its political committee status, FEC Mem. 36, but nowhere suggests that a respondent's refusal to concede it violated the statute is dispositive on whether a violation in fact occurred.

its total expenditures, the FEC categorically excludes all of CHGO's spending for ads that did not expressly advocate voting for or against candidates. That includes spending on air time and production costs for electioneering communications and commissions related to those ads. As Judge Cooper recently held, however, that interpretation of *Buckley*'s major purpose test is impermissible. *See CREW*, 2016 U.S. Dist. LEXIS 127308, at *37–38. Spending on electioneering communications cannot be categorically excluded from the calculation of an organization's political activity, and, at a minimum, "*many* or even *most* electioneering communications indicate a campaign-related purpose." *Id.* at 37.

As a result, the controlling commissioners were wrong to categorically exclude CHGO's spending on air time and production for electioneering communications. Moreover, the sole apparent basis for the controlling commissioners' contention that the commissions raised novel legal issues was that they thought they had to exclude a portion of the commissions that might have compensated individuals for work that was not limited to express advocacy, but also compensated them for their work on CHGO's electioneering communications. AR 1519 n.16, FEC Mem. 48–49. Yet as Judge Cooper made clear, there is no legal basis to categorically exclude sums spent on CHGO's electioneering communications—communications which were nearly identical in tone and substance to its express advocacy, AR 209–20—and thus no basis to conclude that sufficiently significant portions of the relevant commissions could be excluded.

Even if it were permissible to limit the FEC's analysis to express advocacy, there still would be no basis to conclude that CHGO did not spend over 50% of its assets on such communications. That is because at least part of the commissions went to cover work spent on express advocacy. Rather than entirely exclude those commissions from the calculation of CHGO's political expenditures, both logic and related FEC regulations support a proportional

allocation of the commissions. When even the minimally relevant portion of those sums are counted, CHGO's spending easily exceeds the 50% mark.

The commissions that the FEC claimed raised novel legal issues are: (1) the $347,293 commission paid to Karen Boor of New Day Media, CHGO's ad placement vendor; (2) the $312,032 paid to Mihalke for his "placement commission"; and (3) the $1.1 million purported "fundraising commission" collected by Reed, Mihalke, and Berman. *See* FEC Mem. 48–49; AR 1501–02. In all, CHGO spent $4,770,000 in 2010, AR 1484, and OGC concluded that CHGO spent $2,062,625 in 2010 on air time for independent expenditures expressly advocating the election or defeat of House candidates and $178,932 to produce those ads ($2,241,557 in total, or about 47% of CHGO's total spending alone), AR 1501. As a result, the only way to reduce CHGO's political spending to less than 50% of its total expenditures would be to exclude nearly all of these three commissions from CHGO's relevant political spending, while still counting them in CHGO's total disbursements. There is no logical or legally justifiable basis to do that.

As a matter of common sense, the commissions should be allocated between the types of ads Boor and Mihalke worked on to earn the money. Both Boor and Mihalke devoted significant amounts of time creating and disseminating both express advocacy ads and electioneering communications, and money paid to them as vendors are costs that are attributed to the reportable cost of creating and disseminating those ads. *See, e.g.*, 11 C.F.R. § 104.20(a)(2)(i) (describing costs for electioneering communications); Instructions for Preparing FEC Form 5 at 3, *available at* http://www.fec.gov/pdf/forms/fecfrm5i.pdf (stating reporting expenses for independent expenditure include "production costs"). Boor's commission appears to have paid on a per-ad basis, and thus can be attributed directly to each ad buy. If her commission is allocated proportionally between express advocacy and electioneering communications ads

based on the payments made directly to TV stations for placing each type of ad, $250,050.72 of her commission is directly attributable to express advocacy. AR 1501. Adding that amount alone to the money CHGO spent to produce and air express advocacy would make CHGO's political expenditures more than 50% of its total spending. In addition, while Mihalke's commission does not appear to have been paid on a per-ad basis, he and Meridian were "CHGO's exclusive media vendor" and the commission was for the "placement" of ads. AR 1308, AR 1485. Logically, his commission should also be allocated proportionally. Applying the same formula used for Boor's commission, the part of the Mihalke's commission directly attributable to express advocacy was $225,355.97. AR 1501. As a result, including only those portions of Boor's and Mihalke's commissions that are clearly attributable to express advocacy ads (plus CHGO's spending on production and air time of those ads), CHGO's political spending is well over the 50% threshold.

Nor are these issues as novel as the controlling commissioners and the FEC claim. Allocating the commissions in this manner accords with FEC regulations on allocating joint expenses that cover more than one reportable event. *See* 11 C.F.R. § 106.1 (requiring expenses covering more than one candidate to be "attributed to each such candidate according to the benefit reasonably expected to be derived"); *see also id.* § 106.1(2) (excluding certain types of expenses unless "the expenditures can be directly attributed" to an ad).[14] In fact, section 106.1's allocation method has been used to determine whether an organization has spent enough money on political activity to qualify as a political committee. Factual and Legal Analysis 6–13, MUR 6683 (Fort Bend) (July 29, 2014), *available at*

[14] Although the regulation discusses allocating only "expenditures"—a term of art that excludes electioneering communications—the FEC has used that regulation to order allocation of expenses that cover both expenditures and other disbursements. FEC Advisory Opinion 2003-37 at 3, available at http://saos.fec.gov/saos/searchao?AONUMBER=2003-37, *superseded in part by* 2004 Political Committee Status Regulations, 69 Fed Reg. 68056, 68063 (Nov. 23, 2004).

http://eqs.fec.gov/eqsdocsMUR/14044363331.pdf.

Thus, the commissions do not raise a novel issue. Even under the controlling commissioners' impermissible construction of *Buckley*, the commissions should be proportionally allocated between spending on express advocacy and electioneering communications. Even if there were some novel legal issue about how the commissions should be allocated, there is no reasonable allocation method that could justify excluding enough of the commissions to drop CHGO's political spending to less than 50% of its total expenditures. Accordingly, the controlling commissioners' interpretation of *Buckley* to exclude the money CHGO spent on electioneering communications, and their exclusion of all of the commissions paid to Boor and Mihalke for placing express advocacy ads and the entirety of the $1.1 million taken from CHGO, is not a permissible or even reasonable interpretation of judicial precedent. Accordingly, to the extent the controlling commissioners dismissed Plaintiffs' complaint against CHGO based on an interpretation of the *Buckley*'s major purpose test that put CHGO's political committee status in question, that interpretation is impermissible.

IV. The Dismissal, Even if an Exercise of Prosecutorial Discretion, Was Arbitrary and Capricious

As discussed above, the dismissal resulted from a number of impermissible interpretations of law, each rendering the dismissal contrary to law in violation of the FECA. Nonetheless, even assuming the interpretations were permissible or that the dismissal did not result from them, the dismissal was still arbitrary and capricious and thus still contrary to law. The controlling commissioners' determinations were conclusory and the FEC's attempts to bolster them are unavailing. Further, the purported exercise of prosecutorial discretion does not alter the standard of review, and is unsupported by the record and contradicted by available evidence. The FEC's supposed invocation of prosecutorial discretion also amounts to an

improper abdication of the FEC's duty to enforce, and its invocation based on an alleged desire to husband resources is necessarily contrary to law because upholding such a dismissal would render a provision of the FECA a nullity.

A. The Controlling Commissioners Failed to Articulate a Satisfactory Explanation for Dismissal

The controlling commissioners' dismissal of the investigation against CHGO rested on conclusory assertions that CHGO's supposed status and lack of resources rendered enforcement academic and pyrrhic. AR 1519. The controlling commissioners, however, failed to "articulate a satisfactory explanation for [their] action including a rational connection between [those] facts found and the choice made" to dismiss. *Tripoli Rocketry Ass'n*, 437 F.3d at 81. As noted above, the FEC already possesses much of the information that CHGO was required to disclose as a political committee or file with disclosure reports. The FEC could simply and efficiently release that information on a finding that there is reason to believe, and indeed probable cause to believe, that (a) CHGO was a political committee, but it failed to satisfy its statutory obligations, or (b) that CHGO failed to file its disclosure reports and disclose contributors for its ads. The FEC would not need to investigate CHGO any further to provide such a remedy. Of course, the FEC could also investigate further and seek additional enforcement remedies by, for example, disgorging the $1.1 million fraudulently conveyed from CHGO or by naming CHGO officials as individual respondents and seeking enforcement against them. Given these options, none of the claimed justifications for dismissal—CHGO's purported non-existence, its lack of assets, or the refusal of anyone to voluntarily negotiate on CHGO's behalf—are rationally connected to dismissal. The controlling commissioners simply "failed to consider an important aspect of the problem" by considering none of these possibilities. *State Farm*, 463 U.S. at 43.

The controlling commissioners attempted to bolster their decision to dismiss by

identifying other cases in which the FEC dismissed an action because of the staleness of the investigation or the defunct status of the respondent. AR 1519 n.17. But the analysis of whether an agency's actions were arbitrary and capricious is fact-specific and cannot be satisfied by pointing to the fact that an agency acted in the same way in another case. *Dist. Hosp. Partners LP*, 786 F.3d at 57 (noting arbitrary and capricious analysis "depends on the specific facts of a particular case"). Thus the mere fact that the FEC has dismissed other cases where a respondent was defunct or had little money does not establish that it was not arbitrary and capricious for it dismiss the investigation against CHGO.

The precedent cited by the controlling commissioners does not even support dismissal here. Indeed, in only one case, MUR 6021, does the FEC cite a judicial decision upholding dismissal as reasonable. *Nader*, 823 F. Supp. 2d at 65. But even in that case, the court upheld the FEC's dismissal of a complaint brought against a group for failing to register as a political because (1) the group actually had registered as a political committee, *id.*; and (2) an FEC investigation "would 'encounter difficulties with obtaining relevant documents' and 'stale witness memories'" due to the age of the alleged wrongs, *id.* (quoting General Counsel's Report in MUR 6021). Further, the court noted that the plaintiff had "not provided any evidence or presented any arguments that suggest abuse of [prosecutorial] discretion." *Id.* Here, in contrast, CHGO never registered as a political committee, and the FEC need not obtain additional documents or interview additional witnesses: as discussed above, the FEC could simply release the identities of CHGO's contributors. Plaintiffs also provide evidence and arguments that the controlling commissioners abused any prosecutorial discretion they might possess.

The other FEC precedents cited by the controlling commissioners and in the FEC briefing are similarly distinguishable on their facts and therefore cannot justify the controlling

commissioners' dismissal of enforcement proceedings against CHGO.

- In some of the cases, the FEC dismissed allegations against a defunct group but went after the group's principal or other primary wrongdoer in the group's place. *See* Conciliation Agreement ¶ 41, § VI, MUR 5358 (Morgan for Congress) (June 7, 2004), *available at* http://eqs.fec.gov/eqsdocsMUR/00005C11.pdf (dismissing claim against candidate's campaign committee where FEC reached conciliation agreement with candidate); Factual & Legal Analysis 2, 15–16, MUR 6597 (Kinde Durkee) (Dec. 20, 2013), *available at* http://eqs.fec.gov/eqsdocsMUR/15044365089.pdf (taking no action against group where FEC proceeded to enforce FECA against group's founder for violations committed using the group).
- In another, the FEC similarly dismissed a claim because the information released in the investigation remedied the violation and where the respondents were no longer involved in politics. *See* Statement of Reason 2, MUR 5089, (Matta Tuchman for Congress) (Apr. 2, 2004), *available at* http://eqs.fec.gov/eqsdocsMUR/00000E91.pdf (true authorship of misleading mailer clarified by investigation showing respondent was source).
- In other cases, the FEC actually found there was no substantive violation to investigation or the violation was *de minimus*. *See* Factual and Legal Analysis 5, MUR 6638 (Todd Long for Congress) (Feb. 10, 2014), *available at* http://eqs.fec.gov/eqsdocsMUR/14044351884.pdf (finding respondent likely did not violate FECA); First General Counsel's Report 11, MUR 6236 (MN-06 Congressional Victory Committee) (October 19, 2009), *available at* http://eqs.fec.gov/eqsdocsMUR/10044274289.pdf (dismissing where violation

consisted of transfer of funds that was one day too early).

- In another, the FEC dismissed because the respondents' "whereabouts [were] unknown" and they were judgment proof as they were already delinquent on paying fines. *See* First General Counsel's Report 19, MUR 5218 (Russ Francis) (Aug. 29, 2003), *available at* http://eqs.fec.gov/eqsdocsMUR/00000550.pdf (noting FEC would just be one in a "long line of unpaid creditors").

Enforcement against CHGO is simply incomparable to these cases. The FEC has not sought enforcement against anyone associated with CHGO for its violations, CHGO's violations have not been remedied and at least two individuals associated with remain active in politics, *see* AR 653; Pls.' Mem. 29–30, CHGO's violations are serious and obvious, the whereabouts of CHGO's officers are known, and the FEC could do much to remedy CHGO's violations regardless of whether CHGO is judgment proof.

Moreover, while the FEC tries to distinguish MUR 6413, a case cited by the Plaintiffs in which the FEC sought enforcement against a defunct group with few assets, the FEC nowhere cites the controlling commissioners for this point. That is because the controlling commissioners failed to articulate any basis to distinguish MUR 6413, and thus they failed to "supply a reasoned analysis for the change" from precedent. *Republic Airline, Inc.*, 669 F.3d at 299. Nor are the FEC's attempts to distinguish MUR 6413 convincing. As with CHGO, the group there was purportedly defunct, and the ads at issue were approximately five years old, yet the FEC was able to find a violation and ensure proper disclosure. Conciliation Agreement, MUR 6413 (Taxpayer Network) (May 19, 2014), *available at* http://eqs.fec.gov/eqsdocsMUR/14044353947.pdf. The FEC relies on the fact that, in MUR 6413, it was able to negotiate a conciliation with an associate of the group, but the presence of an individual able to negotiate on

behalf of the group is not determinative of the FEC's enforcement powers. The FEC concedes that its enforcement powers are not limited to negotiating conciliations. FEC Mem. 38. The Commission could name individual respondents to the investigation and pursue conciliation with them and it could simply release the wrongfully withheld information that the FEC now possesses. Finally, MUR 6413 shows an organization's defunct status is not alone sufficient to justify dismissal.

In sum, the controlling commissioners failed to rationally connect the purported facts on which they relied to their decision to dismiss the investigation against CHGO. As such—and in addition to the fact that the dismissal resulted from impermissible interpretations of law—the dismissal was arbitrary and capricious thus contrary to law.

B. The FEC's Prosecutorial Discretion Does Not Justify Dismissal

The FEC also relies heavily on the controlling commissioners' terse citation to *Heckler* and passing conclusion that the case "did not warrant the further use of Commission resources" to argue that the dismissal was permissible. The invocation of prosecutorial discretion, however, does not alter the Court's analysis, *see supra* Part I.D., and does not justify dismissal.

1. The Controlling Commissioners Failed to Adequately Explain Their Invocation of Prosecutorial Discretion

Like any other justification for dismissal, a dismissal for prosecutorial discretion must be "adequately explained." *Siegel*, 592 F.3d at 164; *see also La Botz*, 61 F. Supp. 3d at 33 n.5; *Nader*, 823 F. Supp. 2d at 65. Here, the controlling commissioners merely stated, in conclusory fashion, that the "prudent course was to close the file consistent with the Commission's exercise of its discretion." AR 1519. That explanation is hardly adequate, particularly because, as noted above, the authority cited to support the exercise of that discretion is inapposite and does not explain why enforcement in *this case* was unwarranted.

The FEC for its part argues that the "difficulties of further enforcement" and "litigation risk" possible in this case support the controlling commissioners' conclusion that it would be imprudent to enforce the law. FEC Mem. at 35, 44. Of course, *every* contested enforcement action involves risk and difficulties. The FEC's argument simply advocates an abdication of the FEC's enforcement role, and an agency may not "abdicat[e]its statutory responsibilities" under the guise of prosecutorial discretion. *Heckler*, 470 U.S. at 833 n.4. Furthermore, as explained above, the FEC could provide at least a partial but substantial remedy without incurring any of the purported difficulties or risks by simply releasing the identities of CHGO's contributors.

Moreover, the controlling commissioners' belief that CHGO's violations do not "warrant" whatever FEC resources would be needed to enforce the law is conclusory. The controlling commissioners provide no facts to support that conclusion, but "merely . . . insist[] that [their] conclusions" about the proper use of FEC resources "are rational and supported by the record." *San Luis Obisbo Mothers for Peace*, 789 F.2d at 48. Mere insistence unsupported by fact, however, is arbitrary and capricious. *Id.* Indeed, if the controlling commissioners' unreviewable subjective judgment that the case does not "warrant" FEC resources—a judgment with which three other commissioners vehemently disagree—is sufficient to justify dismissal, then judicial review would be reduced to a mere rubber stamp and courts could not carry out their duty "to carefully review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence." *La Botz*, 889 F. Supp. at 60 (internal quotation marks omitted).

For its part, the FEC here construes the controlling commissioners' subjective judgment that enforcement is not warranted to convey an objective evaluation of the FEC's capacity to pursue enforcement against CHGO. FEC Mem. 33. The available evidence also casts doubt on

any such objective evaluation and places the good faith of the controlling commissioners' in doubt, assuming, as the FEC does here, that they relied on such conclusions to support dismissal. First, the OGC itself – the agency staff that would investigate CHGO and is very familiar with the FEC's resources – repeatedly recommended pursuing an investigation of CHGO, even into 2015. AR 54, 204, 926, 1467. Indeed, that staff has already conducted a thorough investigation of CHGO revealing extensive evidence of wrongdoing—more than enough to support even a probable cause finding and judicial enforcement if needed. AR 1467–81. Second, three other commissioners of the FEC who are equally aware of the FEC's resource and capabilities dispute any conclusion by the controlling commissioners that the FEC could not or should not pursue CHGO. AR 1511–15, 1528–1616.

Any claim that the FEC does not have the resources to pursue enforcement against CHGO also is undermined by the fact that the FEC historically has engaged in many more enforcement actions than it does currently. A recent report by Public Citizen, summarizing official data provided by the FEC, has found that the number of enforcement votes before the Commission decreased from 1036 votes in 2003 to only 209 votes in 2015. *See* Public Citizen, Roiled in Partisan Deadlock, Federal Election Commission is Failing 1 (July 19, 2016), *available at* http://www.citizen.org/documents/fec-deadlock-update-april-2015.pdf (noting the corresponding number of deadlocks increased from 9 to 42 in the same period, representing an increase in the percent of enforcement votes resulting in deadlock from .9% of such votes to 21% of such votes).[15] A similar analysis of MURs closed by the commission shows a plummet in closed cases 2009 to 2016. *See* Stephen Stock *et al.*, Dysfunction at the Federal Election

[15] The Court may take notice of this evidence and the other documents cited in this section because they summarize authority from the agency, which the FEC has conceded the Court may look to even if it is not referenced in the record. FEC Mem. 32 n.6.

Commission, NBC Bay Area (Sept. 19, 2016), *available at* http://www.nbcbayarea.com/investigations/Dysfunction-at-the-Federal-Elections-Commission-394042431.html (summarizing official enforcement data collected from the FEC).

In the end, the controlling commissioners' decision that enforcement against CHGO is unwarranted represents not an individualized assessment of the case against CHGO, but a general abdication of the duty to enforce the FECA's political committee rules against politically active nonprofits, so-called dark money groups. As then-FEC Chair Ann Ravel and Commissioner Ellen L. Weintraub noted in their statement of reasons in CHGO, the controlling commissioners' dismissal has caused the agency to "fall[] far short of [its] responsibility" to "Congress, the courts, and most importantly, the American people, to enforce the laws as they exist, not as [they] would like them to be." AR 1515. That observation was echoed by Commissioner Steven T. Walther who noted in his separate statement of reasons that the dismissal, if upheld, would make it "very difficult . . . for the FEC to ever be able to effectively enforce issues on finding political committee status—and the reporting value—the right of the voter to be informed—will not be vindicated." AR 1545.

Indeed, the controlling commissioners' practice bears out this complete abdication. In the fifteen cases Plaintiffs could identify where one of the controlling commissioners voted on the OGC's positive recommendation to find reason to believe that a respondent failed to register as a political committee in violation of the FECA, the controlling commissioners voted to find reason to believe in only four of those cases, or about a quarter of the time. Ex. 2. Notably, in all but one case where the controlling commissioners rejected the recommendation of the OGC and issued a statement of reasons to explain their vote, the controlling commissioner made a passing reference to prosecutorial discretion in boilerplate footnotes to justify dismissal and

frustrate judicial review, *id.*—hardly a sign that the invocation of prosecutorial discretion demonstrates a reasoned analysis contextually tailored to each individual case. *Cf. Burwell*, 786 F.3d 57 (non-arbitrary analysis must be contextually tailored to each case).

Further, a closer look at the controlling commissioners' few affirmative votes to find reason to believe shows they do not demonstrate a reasonable but prudent interest in enforcing the law. In three of the four cases in which one of the controlling commissioners voted to find reason to believe, the political nature of the group was not contested. *See* First General Counsel's Report 1–2, MUR 6315 (Greene) (Dec. 22, 2010), *available at* http://eqs.fec.gov/eqsdocsMUR/12044322956.pdf (finding candidate's principal campaign committee failed to timely register, noting candidate admitted fault); Conciliation Agreement ¶¶ 10–11, MUR 6106 (MN Corn Growers) (Feb. 11, 2009), *available at* http://eqs.fec.gov/eqsdocsMUR/29044224651.pdf (finding state PAC's focus was federal because a majority of its contributions went to federal candidates); Conciliation Agreement ¶¶ 16–18, MUR 6317 (Utah Defenders) (Mar. 22, 2012), *available at* http://eqs.fec.gov/eqsdocsMUR/12044312684.pdf (deciding whether mailer which group was admittedly founded to produce was express advocacy). Further, in one of those three (MUR 6315), although the controlling commissioners agreed there was reason to believe a violation occurred, they still voted to take no action on that violation, splitting the Commission and frustrating enforcement. Certification, MUR 6315 (Nov. 29, 2012), *available at* http://eqs.fec.gov/eqsdocsMUR/12044322988.pdf. In sum, in the eight years in which at least one of the controlling commissioners has a held seat, where a group's major political purpose was at issue, the controlling commissioners voted to find reason to believe and pursue to final enforcement in only a single case, less than 7% of the cases in which the OGC recommending finding reason to believe. During this same time, spending by dark

money organizations—organizations that very likely have to register as political committees under the FECA—has ballooned. Pls.' Mem. 29–30. Enforcing the FECA's political committee rules in a single case five years ago when dark money groups have become ubiquitous does not demonstrate a reasonable attempt to enforce the law.

An agency may not invoke prosecutorial discretion to abdicate its enforcement duties. *Heckler*, 470 U.S. at 833 n.4. For that reason and the numerous other reasons explained here, the controlling commissioners' invocation of prosecutorial discretion was arbitrary and capricious, and therefore the dismissal that resulted from it was contrary to law.

2. The FEC's Prosecutorial Discretion Cannot Nullify the FECA's Citizen-Suit Provision

The invocation of prosecutorial discretion based on a subjective decision that enforcement is not warranted or an efficient use of resources is also especially problematic under the FECA, particularly if that rationale is joined only by a partisan faction of the Commission. That is because interpreting the FECA's contrary to law standard to uphold a dismissal based on a lack of agency resources to enforce the statute, for example, would nullify a unique provision of the Act: the citizen-suit provision contained in section 30109(a)(8)(C).[16] "It is a cardinal principle of statutory construction," however, "that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or

[16] While other statutory schemes include citizen-suit provisions, they typically require only that the citizen give notice to the agency before filing suit. *See, e.g.*, 33 U.S.C. § 1365 (allowing citizen suit to enforce environmental statute on 60 days notice to EPA). The FECA, however, requires a citizen first file a complaint with the FEC and the citizen may only file suit after the FEC dismisses it in a manner "contrary to law." 52 U.S.C. § 30109(a)(8)(C). The FECA, in that way, is more akin to the federal civil right statutes that require individuals to first file a charge with the EEOC before bringing suit. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). The EEOC's exercise of prosecutorial discretion does not bar citizen enforcement, however; it merely results in a right-to-sue letter that permits a civil suit by the complainant. 42 U.S.C. § 2000e-5(f)(1). Under the FECA, the right-to-sue notice is a judicial finding that the dismissal was contrary to law.

insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). The FECA's contrary to law standard, therefore, should not be interpreted to allow dismissals for prosecutorial discretion.

A brief reflection shows that dismissals for prosecutorial discretion render the citizen-suit provision superfluous. The FECA's citizen-suit provision provides that a complainant may bring a civil action directly against the respondents if the FEC dismissal is "contrary to law," and the FEC does not correct its error after judicial reversal. 52 U.S.C. § 30109(a)(8)(C). Accordingly, citizen suits may only be brought where the FEC dismisses the citizen's administrative complaint and that dismissal is contrary to law. In other words, a judicial finding that a dismissal is not contrary to law bars citizen-suit enforcement. Upholding an FEC dismissal on the basis of prosecutorial discretion, therefore, bars citizen-suit enforcement in those very cases for which citizen-suit enforcement is designed.

The citizen-suit provision, like the judicial review provision generally, was included to ensure that the FEC "does not shirk its responsibility." *DCCC*, 831 F.2d at 1134 (quoting 125 Cong. Rec. S. 36,754 (1979)).[17] Under-enforcement was a reasonable concern given that the structure of the Commission—evenly divided between Republicans and Democrats—created serious risks of partisan gridlock. The citizen-suit provision would guard against gridlock and under-enforcement, particularly where the only cited reason for dismissal was a lack of desire or resources to enforce. That is because, "[i]f [an] [agency's] failure to act results from the desire of the [agency] to husband federal resources for more important cases, a citizen suit against the

[17] In the same passage, the quoted Senator went on to suggest that an "evenly divided" Commission is "not subject to review any more than a similar prosecutorial decision by a U.S. attorney." *DCCC*, 831 F.2d at 1134. The D.C. Circuit, however, rejected that suggestion, finding that both 3-3 splits and 6-0 votes were both subject to judicial review. *Id.*

violator can still enforce compliance without federal expense." *Sierra Club v. Whitman*, 268 F.3d 898, 905 (9th Cir. 2001). In other words, allowing a citizen suit would preserve the FEC's "budget flexibility," the justification the FEC asserts for prosecutorial discretion. FEC Mem. 30.

The FECA, however, only allows a citizen suit after a court has ruled a dismissal is contrary to law. 52 U.S.C. § 30109(a)(8)(C). Thus, if an FEC dismissal based on a desire to "husband federal resources" is not contrary to law, then a citizen could never file suit to "enforce compliance without federal expense," *Whitman*, 268 F.3d at 905, and the citizen-suit provision would be nullified. Indeed, it would be difficult to imagine a situation in which a citizen suit could ever proceed if three commissioners could render a dismissal consistent with the FECA merely by citing their lack of interest in enforcement. Accordingly, as a court cannot uphold a FEC dismissal on the basis of prosecutorial discretion without rendering a section of the FECA a nullity, the contrary to law analysis does not sanction such dismissal.

CONCLUSION

CHGO's mission was to influence federal elections while keeping its donors secret, in violation of the FECA. Because of CHGO's flagrant and egregious disregard for the law and contempt for the FEC investigation, and because of the inexcusable and unlawful abdication of their statutory duties to enforce the FECA by the controlling commissioners, CHGO has been able to fulfill that mission. The controlling commissioners' dismissal of enforcement proceedings against CHGO, however, was contrary to law. The dismissal resulted from impermissible interpretations of law and reflects an arbitrary and capricious exercise of the FEC's enforcement powers to excuse CHGO's flagrant and egregious conduct. Plaintiffs accordingly respectfully request this Court act to ensure an informed electorate by reversing the dismissal, putting an end to CHGO's wanton disregard for the law, and tearing up the road map CHGO created for groups to evade their obligations under the FECA.

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Respectfully submitted,

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