ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5049

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR RESPONSIBILITY AND ETHICS IN WASHINGTON and MELANIE SLOAN,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia, Case No. 1:15-cv-02038-RC

BRIEF *AMICI CURIAE* OF CAMPAIGN LEGAL CENTER AND DĒMOS IN SUPPORT OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

(A) Parties and *Amici*. Plaintiffs Center for Responsibility and Ethics in Washington ("CREW") and Melanie Sloan were the plaintiffs in the district court, and the Federal Election Commission ("FEC") was the defendant in the district court. No person filed as *amicus curiae* before the district court.

(B) Rulings Under Review. The district court issued an order and accompanying memorandum opinion on February 22, 2017, ECF Dkt. Nos. 26, 27, in *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 15-cv-2038 (RC) (Hon. Rudolph Contreras). The district court's opinion is available at 2017 U.S. Dist. LEXIS 24253.

(C) Related Cases. *Amici curiae* are aware of no "related cases" as defined in D.C. Cir. R. 28(a)(1)(C).

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Hagelin v. FEC, 411 F.3d 237 (D.C. Cir. 2005) 20

In re Sealed Case, 223 F.3d 775 (D.C. Cir. 2000) 7, 8, 9, 11, 13

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Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996) 16

Kaufman v. Perez, 745 F.3d 521 (D.C. Cir. 2014) 15

King v. Burwell, 135 S. Ct. 2480 (2015) 15

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Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011) 6, 7

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Riordan v. SEC, 627 F.3d 1230 (D.C. Cir. 2010), *abrogated in part by Kokesh v. SEC*, 137 S. Ct. 1635 (2017) 16, 18

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SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc) 24

Sprint Nextel Corp. v. FCC, 508 F.3d 1129 (D.C. Cir. 2007) 9

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United States v. Banks, 115 F.3d 916 (11th Cir. 1997) 19

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Certification, MUR 6661 (Robert E. Murray *et al.*) (Apr. 14, 2016), http://eqs.fec.gov/eqsdocsMUR/16044394606.pdf 11

Comm'r Steven T. Walther, Motion to Set Priorities and Scheduling on Pending Enforcement Matters Awaiting Reason-to-Believe Consideration (July 14, 2015), https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-41-a.pdf. 30

Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. Times (May 2, 2015), https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html.. 33

FEC Reply Supp. Mot. to Dismiss, *CREW v. FEC*, 209 F.Supp.3d 77 (D.D.C. 2016) (No. 1:14-cv-01419-CRC), *appeal dismissed*, No. 16-5343 (D.C. Cir. Apr. 4, 2017) 13

FEC, *Archived Captions of Entire Meeting* (May 21, 2015), https://www.fec.gov/resources/updates/agendas/2015/transcripts/Open_Meeting_Captions_2015_05_21.txt 33

Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 Sup. Ct. Rev. 139 28

Marian Wang, *FEC Deadlocks (Again) on Guidance for Big-Money Super PACs*, ProPublica (Dec. 2, 2011), https://www.propublica.org/article/deadlocks-again-on-guidance-for-big-money-super-pacs/single 33

Matea Gold, *Trump's Deal with the RNC Shows How Big Money Is Flowing back to the Parties*, Wash. Post (May 18, 2016), https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html 34

Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 Election L.J. 167 (2009) 31

Nancy Cook, *He's Going to Be An Enabler*, Politico (Feb. 21, 2017), http://www.politico.com/magazine/story/2017/02/trump-mcgahn-white-house-lawyer-214801 29

Off. of Inspector Gen'l, Fed. Election Comm'n, *Root Causes of Low Employee Morale Study* (July 2016), https://transition.fec.gov/fecig .. 30

Office of Comm'r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* (Feb. 2017), https://assets.documentcloud.org/documents/3474279/Ravelreport-feb2017.pdf.. 11, 32, 34

Paul S. Ryan, Opinion, *Republican FEC Commissioner Admittedly Blocking Complaints Against Republicans*, The Hill (June 4, 2015), http://thehill.com/blogs/congress-blog/campaign/243828-republican-fec-commissioner-admittedly-blocking-complaints............................ 33

Policy Statement on En Banc *Endorsement of Panel Decisions* (Jan. 17, 1996), https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%Footnote/$FILE/IRONS.PDF.......... 14

Political Committee Status, 72 Fed. Reg. 5595-02 (Feb. 7, 2007) (Suppl. Explanation & Justification).. 25

Pub. Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* (Apr. 2015), https://www.citizen.org/sites/default/files/fec-deadlock-update-april-2015.pdf. 31

R. Sam Garrett, Cong. Research Serv., R44319, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress* (Dec. 22, 2015), https://fas.org/sgp/crs/misc/R44319.pdf.......... 30, 31, 32

Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005).. 22

Statement of Vice Chair Ravel and Commissioner Weintraub on Judicial Review of Deadlocked Commission Votes, MUR 6396 (Crossroads GPS) (June 17, 2014), http://eqs.fec.gov/eqsdocsMUR/14044354045.pdf.. 9, 10, 11

GLOSSARY OF ABBREVIATIONS

CHGO	Commission on Hope, Growth, and Opportunity
CREW	Center for Responsibility and Ethics in Washington
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
IRS	Internal Revenue Service
JA	Joint Appendix
MUR	Matter Under Review
OGC	Office of General Counsel of the FEC

STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center is a nonprofit, nonpartisan organization that works to strengthen the laws governing campaign finance. *Amicus curiae* Dēmos is a nonprofit, nonpartisan organization working for an America where everyone has an equal say in our democracy and an equal chance in our economy. *Amici* engage in litigation, research, and advocacy to support money-in-politics reforms. Each has participated as *amici* or counsel in numerous campaign finance cases, including *Citizens United v. FEC,* 558 U.S. 310 (2010), *Randall v. Sorrell*, 548 U.S. 230 (2006), and *McConnell v. FEC*, 540 U.S. 93 (2003). *Amici* have a demonstrated interest in the issues raised here.

All parties have consented to *amici*'s participation.

INTRODUCTION & SUMMARY OF ARGUMENT

The Commission on Hope, Growth, and Opportunity ("CHGO") is what one might call a quantum committee: it popped into existence, quickly spent millions on campaign ads, and disappeared. The record shows that CHGO was required by law to register as a political

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[1] No party or party's counsel authored any part of this brief, and no person, other than *amici*, contributed money to fund its preparation or submission.

committee and to disclose its spending. But its founders failed to do either. Instead, they fraudulently dissolved the organization to evade FEC enforcement. Rather than making CHGO abide by the law, the FEC deadlocked until three Commissioners declared that the statute of limitations had run out.

In upholding their decision not to act, the district court did not ask whether the Commissioners were actually right about their claims. (They were not.) Instead, the court took at face value the FEC's post hoc litigation position that the law was too uncertain to go forward. This claim, too, is wrong—and at odds with what the Commissioners themselves said. This Court should reassert the proper standard of review for FEC suits, and make the Commissioners reconsider under a correct understanding of the laws they purported to apply.

First, the Commissioners' refusal to act against CHGO was contrary to law. The district court erred in deferring to the legal interpretations of three Commissioners, when FECA requires *four* votes to make decisions with the force of law. This Court's prior decisions granting *Chevron* deference to three-Commissioner blocs came before the revolution *United States v. Mead Corp.*, 533 U.S. 218 (2001), worked

in administrative law, and conflated three-three deadlocks with later, unconnected votes to close case files. Even if *Chevron* deference were still generally appropriate, this Court should not defer to the Commissioners' interpretation of the statute of limitations, regarding which the FEC has no expertise or enforcement power.

Whatever the level of deference, however, the Commissioners were wrong to claim that the statute of limitations had passed, because the relevant statute unambiguously does not apply to orders requiring disclosure and registration. The Commissioners also acted contrary to law in arguing that they could not pursue a case against a defunct organization, because they could have obtained the relevant documents from CHGO's former agents; and that CHGO may not have been a political committee, because any determination compliant with FECA would have found CHGO to be such a committee. Given these incorrect interpretations, the Commissioners acted contrary to law.

Second, the district court erred by abandoning its duty to resolve the interpretive issues before it. Instead, the court found that the Commissioners rationally concluded that the law was unclear. By moving immediately to the prosecutorial discretion inquiry, the court

failed to determine—as it must under this Court's precedents—whether the statutory readings that the Commissioners proffered were permissible. The district court's mode of analysis would also prevent groups like CREW from ever bringing citizen suits, and would allow recalcitrant Commissioners to use the same alleged legal uncertainties to avoid enforcement while never actually resolving those uncertainties.

Finally, this Court should look at this case in its broader context. The recent history of the FEC is one of crippling deadlock and delay. Since 2008, a three-Commissioner bloc has voted in lockstep to thwart enforcement of campaign finance law. Complaints languish for years, and deadlocked votes prevent the Commission from taking action even in cases like this one, where an investigation reveals compelling evidence of a violation. The delay-and-deadlock strategy seen here is part of a larger pattern of abuse. This Court should not reward the FEC for refusing to enforce the laws as Congress wrote them.

ARGUMENT

I. The Controlling Bloc Acted Contrary To Law By Manufacturing "Litigation Risk" Where It Does Not Exist

The district court erroneously granted summary judgment to the FEC. The no-action bloc acted "contrary to law" in refusing to address

CHGO's disclosure and registration violations. *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). FEC decisions are reversible if: "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of [the law], . . . or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Id.* The no-action Commissioners impermissibly interpreted both the applicable statute of limitations and FECA's political committee and enforcement provisions. Neither deference nor prosecutorial discretion excuses this refusal to follow the law.

A. Neither bloc receives deference when the FEC deadlocks on an enforcement action.

The district court committed its first error by deferring to the legal interpretations of the three Commissioners who blocked action against CHGO. JA876. That the court below committed this error is understandable: it was relying on this Court's precedents. Those precedents, however, are out of step with current doctrine. This Court should clarify that it will not defer to deadlock.

i. Under Mead*, interpretations issued during a deadlocked vote are not* Chevron*-worthy.*

In finding that the FEC permissibly refused to pursue a case against CHGO, the district court stated that the reasoning of a three-Commissioner bloc receives *Chevron* deference. JA876; *see Common Cause v. FEC*, 842 F.2d 436, 439-40 (D.C. Cir. 1988). This Court has deferred to no-action Commissioners because, it has said, "those Commissioners constitute a controlling group for purposes of the decision," and "their rationale necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*").

However, the no-action Commissioners' interpretations in this case lack the force of law and cannot receive *Chevron* deference. In *Mead*, the Supreme Court limited *Chevron* deference to circumstances where "Congress delegated authority to the agency generally to make rules carrying the force of law," *and* "the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. Since *Mead*, both the Supreme Court and this Court have confined *Chevron* deference to agency legal interpretations carrying the force of law. *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United*

States, 562 U.S. 44, 57 (2011); *Anna Jacques Hosp. v. Burwell*, 797 F.3d 1155, 1166 (D.C. Cir. 2015).

It has been seventeen years since this Court last deferred to a legal position taken by no-action Commissioners in a three-three deadlock. *See In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000). *Sealed Case* was decided before *Mead*, which held that agency legal interpretations lacking the force of law are "beyond the *Chevron* pale." 533 U.S. at 234. *Sealed Case* considered only whether FEC probable cause determinations had some "legal effect," not whether such determinations, when arrived at by three-three deadlocks, generated legal interpretations with the "force of law." *See* 223 F.3d at 780.[2] By contrast, this Court appropriately determined that FEC advisory opinions are entitled to *Chevron* deference under *Mead* because "they have binding legal effect on the Commission." *FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 185 (D.C. Cir. 2001).

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[2] *Sealed Case* came after *Christensen v. Harris County*, 529 U.S. 576 (2000), which took a step toward *Mead*'s ultimate holding. But it was *Mead* that limited deference to agency interpretations promulgated in the exercise of authority to announce rules with the force of law. 533 U.S. at 226-27; *see Mayo*, 562 U.S. at 56-58.

It is undisputed that in crafting FECA, "Congress delegated authority" to the FEC to "make decisions having the force of law," satisfying the first prong of the *Mead* inquiry. 533 U.S. at 226-27; *Sealed Case,* 223 F.3d at 780. However, statements from a three-Commissioner bloc fail *Mead*'s second prong, which requires the relevant interpretation to be "promulgated *in the exercise of that authority*." *Mead*, 533 U.S. at 227 (emphasis added). This is because Congress only grants actions by *four* Commissioners the force of law. 52 U.S.C. § 30106(c). Unlike advisory opinions, deadlocks do not meet the statutorily required four-vote threshold for agency decisionmaking. 52 U.S.C. § 30109(a). This Court noted as much in *Common Cause*, when it pointed out that a statement of reasons by a three-judge bloc "would not be binding legal precedent or authority for future cases." 842 F.2d at 449 n.32.

The fact that Congress only grants actions by *four* Commissioners the force of law is crucial to *Mead*'s deference inquiry, because "the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's . . . action as within, or outside, its delegation to the agency of 'gap-filling' authority." *Long Island Care at*

Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007). And, as this Court has acknowledged, "[t]o ignore [the four-vote] requirement would be to undermine the carefully balanced bipartisan structure which Congress has erected." *Common Cause*, 842 F.2d at 449 n.32.

Courts, therefore, may not defer to one side of an evenly divided FEC dispute. Congress did not intend for—and FECA does not authorize—either bloc to make law without a fourth vote. *Cf. Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131-32 (D.C. Cir. 2007).

ii. Prior cases failed to distinguish between deadlocked votes to proceed and affirmative votes to close case files.

This Court's decisions deferring to the views of no-action Commissioners also conflate deadlocked substantive enforcement votes with later, "ministerial" votes to close cases.[3] This error, in turn, stems from a mistaken belief that a deadlock automatically ends FEC involvement in a case, and therefore has legal effect. *See Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016) (FECA "compels FEC to dismiss complaints in deadlock situations"); *Sealed Case*, 223

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[3] Statement of Vice Chair Ravel and Commissioner Weintraub on Judicial Review of Deadlocked Commission Votes 4 n.26, MUR 6396 (Crossroads GPS) (June 17, 2014), http://eqs.fec.gov/eqsdocsMUR/14044354045.pdf ("Ravel & Weintraub Statement").

F.3d at 780 ("[T]he no-action decision here . . . precludes further enforcement."); *NRSC*, 966 F.2d at 1476 (deference applies "when the Commission deadlocks 3-3 and so dismisses a complaint"). Even if this were true, the rationale behind the *deadlock* would not trigger deference under *Mead*. *See supra* Part I.A.i. Regardless, neither the text of FECA nor FEC procedure gives deadlocks any legal effect.

FECA itself distinguishes between enforcement votes and votes on whether to dismiss a case. *See* 52 U.S.C. § 30109(a)(1). The statute places the procedures for a dismissal vote in a different subsection from those for other enforcement votes. *Id.* § 30109(a)(1)-(6). Moreover, like votes to take enforcement actions, dismissing a case requires a majority—four members—of the Commission. *Id.* § 30106(c). Therefore, under FECA, "[a] 3-3 deadlocked vote on an enforcement matter results in no action whatsoever." Ravel & Weintraub Statement at 4 n.26.

The belief that deadlocked votes dismiss cases is also wrong as a matter of FEC practice. Because it takes four votes either to investigate or to dismiss a case, the FEC does not treat a deadlock on the former as the equivalent of a vote for the latter. Instead, under "procedural Commission rules," matters resulting in deadlocked votes are

"automatically . . . placed on the next Executive Session agenda," to be voted on again. *Id.* Thus, while 37.5% of MURs closed in 2016 saw at least one deadlocked vote, only 12.5% were closed *because* of deadlock.[4]

Rather than operating like a not-guilty verdict, as this Court has previously assumed, *see Sealed Case*, 223 F.3d at 780, a deadlocked vote operates like a hung jury, allowing the pro-enforcement Commissioners to try again. Commissioners often hold multiple votes to proceed on different combinations of offenses in the same case, to see if any garners a majority. *See, e.g.*, Certification, MUR 6661 (Robert E. Murray *et al.*) (Apr. 14, 2016), http://eqs.fec.gov/eqsdocsMUR/16044394606.pdf; Ravel Report at 14 (ten votes over four years on set of five complaints). Commissioners may also deadlock on an enforcement vote, come to a compromise, and later vote to proceed while meting out lesser punishments. Ravel Report at 10.

Alternatively, Commissioners may deadlock and then ask the Office of General Counsel ("OGC") to investigate the allegations further,

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[4] Office of Comm'r Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 10 (Feb. 2017), https://assets.documentcloud.org/documents/3474279/Ravelreport-feb2017.pdf ("Ravel Report").

in anticipation of voting again once the investigation ends. That is what happened here. The Commissioners voted four times on three occasions over the course of a year. JA476-77, 871-73. They deadlocked twice on each of the two claims against CHGO, in different combinations of votes—but instructed OGC to keep investigating after all but the final vote. *Id.* Far from precluding further action, the deadlocks provided the impetus for further scrutiny.

The fact that deadlocks resolve no legal issues dooms any claim for *Chevron* deference. "[T]he expressly non-precedential nature" of a decision "conclusively confirms" that it is not an exercise of authority "to make rules carrying the force of law." *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014). A determination whose "binding character as a ruling stops short of third parties" thus does not "set a rule of law" that merits deference under *Mead*. *Id*. Because a deadlocked FEC vote does not set a precedent even for the accused party—much less a precedent that applies to third parties—this Court was mistaken in deferring to three-Commissioner blocs. *See, e.g.*, *Sealed Case*, 223 F.3d at 780.

Indeed, the FEC itself has admitted that Commission deadlocks cannot establish interpretations with the force of law. In a recent court filing, the FEC stated:

> [L]egal analyses articulated by a group of *three* FEC Commissioners in such a statement of reasons, or anywhere else, *could not* amount to an agency policy . . . .[T]hese required statements from declining-to-go-ahead Commissioners in three-three dismissals are "*not law*" and . . . "would not be binding legal precedent or authority for future cases." *Common Cause*, 842 F.2d [at 449 & n.32]. The statute explicitly requires that decisions of the Commission "with respect to the exercise of its duties and powers under the provisions of th[e] Act shall be made by a *majority* vote of the members of the Commission" . . . .

FEC Reply Supp. Mot. to Dismiss 4, *CREW v. FEC*, 209 F.Supp.3d 77 (D.D.C. 2016) (No. 1:14-cv-01419-CRC) (emphases in original), *appeal dismissed*, No. 16-5343 (D.C. Cir. Apr. 4, 2017). The FEC's admissions, along with this Court's limitation of *Mead* to precedential rulings, confirm that the no-action Commissioners' interpretations lack the "force of law."

A panel of this Court may put aside prior circuit decisions if an "intervening Supreme Court decision 'effectively overrules'" them, or "in fact turn[s] out to be incompatible with" them. *Perry v. Merit Sys. Prot. Bd.*, 829 F.3d 760, 764, 766 (D.C. Cir. 2016) (citation omitted),

rev'd on other grounds, 2017 WL 2694702 (U.S. June 23, 2017). Given *Mead*'s narrowing of *Chevron*'s scope, this Court can—and should—clarify that interpretations made by three-Commissioner blocs are unworthy of *Chevron* deference.[5]

B. The controlling bloc's interpretation of the statute of limitations is not entitled to deference.

Even if deadlock deference were appropriate in some cases, it would not apply here. The no-action Commissioners argued primarily that the statute of limitations on any disclosure claims had run, so the FEC would not likely succeed in any enforcement action. JA768-69. But the district court should not have deferred to this misguided argument, because it falls outside the *Chevron* framework.

As a general matter, "[i]t is an open question in this Circuit whether we afford *Chevron* deference to agency interpretations of statutes of limitations." *Kaufman v. Perez*, 745 F.3d 521, 527 (D.C. Cir. 2014). Here, however, it would be inappropriate to defer. To begin with, "a statute of limitations is a general legal concept with which the

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[5] Alternatively, the panel may seek an endorsement to overrule from the en banc Court. U.S. Court of Appeals for the D.C. Circuit, *Policy Statement on* En Banc *Endorsement of Panel Decisions* 1-2 (Jan. 17, 1996), https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/$FILE/IRONS.PDF.

judiciary can deal at least as competently as can an executive agency." *Bamidele v. INS*, 99 F.3d 557, 562 (3d Cir. 1996). The FEC cannot claim deference for provisions about which it has no specialized knowledge. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012).

Chevron deference may be appropriate when a statute of limitations is "embedded" in a complex regulatory scheme over which an agency has authority and expertise. *Intermountain Ins. Serv. of Vail v. CIR*, 650 F.3d 691, 707 (D.C. Cir. 2011), *vacated on other grounds*, 132 S. Ct. 2120 (2012). But FECA does not contain a statute of limitations provision. Instead, the FEC relies on 28 U.S.C. § 2462, a general time limit on certain government actions. One agency cannot command *Chevron* deference for interpretations of a statute enforced by many. *See Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000). This Court has held that, "because § 2462 is a statute of general applicability rather than one whose primary administration has been delegated to [one agency], we interpret it *de novo*." *Id.* It should do so here as well.

C. The statute-of-limitations provision unambiguously forecloses the controlling bloc's arguments.

The controlling bloc's interpretation of the statute of limitations would fail even under *Chevron*. Disclosure and political committee registration are equitable remedies that lie outside the bounds of the statute of limitations. Therefore, the controlling bloc's reading "cannot survive even with the aid of *Chevron* deference." *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 754 (D.C. Cir. 2012).

The statute on which the Commissioners rely, section 2462, provides a five-year limitations period for suits seeking a "civil fine, penalty, or forfeiture." As this Court has held, however, section 2462 bars only *punitive* government actions. *Johnson v. SEC*, 87 F.3d 484, 487-88 (D.C. Cir. 1996). It does not bar actions brought for "purely remedial and preventative" relief, such as cease-and-desist orders or other equitable relief to remedy violations. *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010), *abrogated in part by Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

Even if it were a matter of first impression in this circuit, section 2462 clearly does not apply to enforcement actions seeking disclosure or registration. Unlike remedies that constitute penalties or forfeitures

under section 2462, *see Kokesh*, 137 S. Ct. at 1642-43, orders requiring disclosure or political committee registration are not meant to punish or to deter others. They merely ensure the offending party's compliance with the law. *See Drath v. FTC*, 239 F.2d 452, 454 (D.C. Cir. 1956); *see also SEC v. Kokesh*, 834 F.3d 1158, 1162 (10th Cir. 2016) ("We fail to see how an order to obey the law is a penalty."), *rev'd on other grounds*, 137 S. Ct. 1635. Moreover, equitable remedies under FECA are compensatory. Offenders must register with and disclose their spending to the FEC, which must in turn provide the statutorily required information to the ultimate victim of the offender's failure to file: the public. *See* 52 U.S.C. §§ 30104(a)(11)(B); 30111(a)(4).

Thus, as the FEC itself has acknowledged, district courts in this circuit have held that the FEC may seek equitable relief for FECA violations even where penalties for those violations would be time-barred. *FEC v. Christian Coal.*, 965 F. Supp. 66, 71-72 (D.D.C. 1997); *FEC v. Nat'l Republican Senatorial Comm.*, 877 F. Supp. 15, 20-21 (D.D.C. 1995). And the FEC has not contested that equitable relief, in the form of compliance orders, is available under FECA to remedy violations of registration and reporting requirements.

Whether reviewing section 2642 *de novo* or under *Chevron*, the statute unambiguously allows suits seeking compliance with disclosure and registration laws. This is so whether the plaintiff is the government or a private actor in a FECA-authorized citizen suit. The FEC's power to seek disclosure, however, is even more secure, as "statutes of limitations are construed narrowly against the government." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 95 (2006).

The FEC argues, however, that under the Ninth Circuit's ruling in *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996), section 2462 may preclude equitable relief for FECA violations whenever it would preclude penalties. JA233. *Williams* based its holding on the "concurrent remedy" doctrine, under which "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy." 104 F.3d at 240.

But *Williams* is not the law of this Circuit. Its holding is squarely at odds with this Court's decision in *Riordan*, holding that section 2462 did *not* bar the SEC's claims for remedial equitable relief—even though it would bar claims for civil penalties arising from the same violations. 627 F.3d at 1234-35; *see also Christian Coal.*, 965 F. Supp. at 71-72

(concurrent remedy doctrine inapplicable where equitable remedy is "independent of the legal relief available," as under FECA). *Williams* has also been widely criticized, and explicitly rejected by two circuits, because the concurrent remedy doctrine does not apply to government actions brought in its sovereign capacity. *See United States v. Telluride Co.*, 146 F.3d 1241, 1248-49 (10th Cir. 1998); *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997). *Williams* does not limit the FEC.

The district court determined that it does not matter whether *Williams* is correct, since the circuit split itself creates "litigation risk." JA880. But the no-action Commissioners never made this argument in their statement of reasons, JA766-69; it was asserted for the first time in the FEC's summary judgment memorandum. JA233, 880. It is a core tenet of administrative law that "courts may not accept [] counsel's *post hoc* rationalizations for agency action"; "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). In contrast to the OGC's later justification, the no-action Commissioners merely asserted that "the statute of limitations effectively foreclosed further enforcement efforts." JA769. They did not

claim that legal uncertainty created litigation risk. Further, as noted above, their statement conflicts with this circuit's precedent.

The no-action Commissioners have "made a clear error in judgment," and read section 2462 in a manner that is "contrary to law." *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). Therefore, this Court should "set aside the FEC's dismissal." *Id.*[6]

D. There is no reasonable barrier to seeking disclosure from CHGO.

As CREW correctly explains, (Br. 47-52), the no-action Commissioners' other rationales for staying their hands do not pass any level of judicial review. The controlling bloc provided two justifications beyond the statute-of-limitations issue: first, that CHGO had become defunct; and second, that "novel questions" prevented them from deciding the political committee question. JA874-75. Neither of these views withstands the slightest scrutiny. Stripped of their erroneous assertion that the statute of limitations had expired, the no-action Commissioners had no reason to avoid enforcement.

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[6] *Amici* adopt CREW's arguments (Br. 45-46) as to why the statute of limitations has not, in fact, run at all.

i. CHGO is not beyond the FEC's reach.

The controlling bloc claimed that enforcement would be a "pyrrhic exercise" in this case, because CHGO had "filed termination papers with the IRS in 2011" and "did not appear to [have] any agents" to bind it. JA769. This is incorrect. That an organization dissolved itself with the IRS does not preclude the FEC (or CREW) from seeking a remedy.

CHGO is, under any rational analysis, a political committee. *See infra* pp. 22-25. CHGO therefore has a duty to register and file regular reports. 52 U.S.C. §§ 30103(a), 30104(a)(4). This prevents the statute of limitations from running, CREW Br. 45-46, but it also gives CHGO an ongoing obligation to file reports until it terminates *with the FEC*. *Id.* §§ 30103(d), 30104(a)(4). Indeed, to hold otherwise would be to reward intentional evasion of the law, providing immunity so long as organizations dissolve before the FEC can authorize enforcement.

Nor does CHGO's defunct status bar equitable enforcement. For both political committee and event-driven reporting violations, the FEC or CREW can look to CHGO's senior staff to seek the documents it needs—even if the FEC cannot bind CHGO itself or obtain monetary relief. *See* CREW Br. 47-48. Additionally, if need be, the FEC or CREW

could sue CHGO's treasurer in his personal capacity for the relevant documents. Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 5-6 (Jan. 3, 2005).

Moreover, the no-action Commissioners declined to move forward on either claim in 2015 after having voted in *favor* of doing so on the disclosure claim in 2014. Yet the Commissioners knew at both of these times that CHGO had allegedly dissolved without assets. *See* JA787 n.54. Their refusal to seek enforcement in 2015 on grounds that did not prevent them from voting to do so in 2014, with no further explanation, was arbitrary and capricious.

ii. CHGO is clearly a political committee.

Contrary to the no-action Commissioners' claims, no "novel questions" prevented a finding of political committee status. As CREW rightly notes (Br. 48-52), CHGO is a political committee under even the most conservative estimate of what spending counts toward the major-purpose test. Indeed, the Commissioners did not affirmatively dispute OGC's determination that, even "under [their] own theory, CHGO spent 61 percent of the over $4.8 million total it spent over its organizational lifetime on express advocacy." JA763. They merely stated that they

were not "persuaded" by OGC's analysis, without providing any of their own. JA769 n.16.

The only indication the no-action Commissioners gave as to why they discounted OGC's analysis was a footnote citing two of their prior statements of reasons. JA768 n.13. These statements said that only organizations spending a majority of their money on express advocacy are political committees. JA883.

Even under this rule, however, the no-action Commissioners could only dispute CHGO's political committee status because the OGC counted "vendor commissions and other general payments to officers or directors or vendors." JA769 n.16. According to the Commissioners, this raised "previously unconsidered questions of how to analyze such disbursements." *Id.* FEC regulations clearly count such "payments" as qualifying expenditures when the vendors or officers are helping the group to influence an election. 11 C.F.R. § 100.111(a). But the no-action Commissioners refused to actually *analyze* CHGO's expenditures, instead claiming—contrary to FEC regulations—that they did not know whether to count these payments. Because they inexplicably

rejected the OGC's calculations, which were based on FECA's clear terms, they have committed an abuse of discretion.

Moreover, the no-action Commissioners' rule itself relied on impermissible interpretations of Supreme Court precedent: the Commissioners claimed that only express advocacy could constitutionally count toward political committee status, despite a raft of precedent saying the opposite. *See CREW*, 209 F. Supp. 3d at 89-93. In fact, for the purposes of disclosure and registration requirements, no constitutional line separates express advocacy and electioneering communications. *Citizens United*, 558 U.S. at 369-71; *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc). Given this clear precedent, nearly all of which piled up before the FEC voted in this case, the no-action Commissioners operated contrary to law in ignoring it. Indeed, they have since developed a new framework for analyzing electioneering communications, acknowledging that their express-advocacy-only position was untenable. CREW Br. Add. 12.

The no-action Commissioners' rigid rule also violates duly promulgated FEC policy. "The FEC determines a group's 'major purpose' on a case-by-case basis, taking into account the group's

allocation of spending, public and private statements, and overall conduct." JA865. The FEC's adopted guidance, imbued with the force of law under *Mead*, requires such case-by-case scrutiny. Political Committee Status, 72 Fed. Reg. 5595-02, 5601 (Feb. 7, 2007) (Suppl. Explanation & Justification) ("2007 E&J"). Thus, while "an organization can satisfy the major purpose doctrine through sufficiently extensive spending," the FEC must conduct a case-by-case, "fact-intensive" analysis. *Id.* This analysis looks at public statements, and "*requires* the Commission to conduct investigations . . . that may reach well beyond publicly available advertisements." *Id.* (emphasis added).

By applying a blanket 50% express-advocacy rule, the no-action Commissioners tried to substitute their legally powerless views for the *Chevron*-worthy guidance of the full FEC. *See supra* Part I.A. Such a displacement is particularly damaging here, since the other factors the FEC must consider point overwhelmingly toward a finding of political committee status. *See* CREW Br. 49. Like each of their other misguided interpretations, the no-action Commissioners' refusal to follow the 2007 E&J is contrary to law, and must be set aside.

II. This Court Should Decide the Legal Issues in this Case

The court below refused to resolve any of the supposed legal uncertainties the FEC raised, holding instead that these uncertainties *themselves* gave the Commissioners a "rational" basis not to act. JA879. This reasoning fuses two separate doctrines, prevents CREW from seeking relief, and could indefinitely bless FEC non-enforcement. This Court should not repeat the district court's mistake.

First, the court below conflated FECA's contrary-to-law standard with the doctrine of prosecutorial discretion. It stated that the FEC's decisions "on how to best allocate its resources" should not be disturbed "unless the plaintiff shows that the FEC acted contrary to law *by abusing its discretion*." JA877 (emphasis added). This leaves out the entire first prong of the contrary-to-law standard, which asks whether the Commission's decision resulted from "an impermissible interpretation" of the law. *Orloski*, 795 F.2d at 161. The district court relied on the FEC's post hoc position that its deadlock was all about litigation risk, JA878-85, even though the Commissioners themselves based their decision primarily on incorrect interpretations of FECA and the statute of limitations, JA768-69. When Commissioners wrap legal

determinations in the fig leaf of prosecutorial discretion, judges cannot avert their eyes from what is underneath. They must decide if the underlying interpretations are wrong.

Second, CREW seeks a contrary-to-law finding so it can sue CHGO itself under FECA's citizen-suit provision, 52 U.S.C. § 30109(a)(8)(C). By refusing to decide between the parties' competing views of how clear the relevant laws are, the district court has made it impossible for CREW to satisfy its first prerequisite to litigate. That approach effectively nullifies FECA's citizen-suit provision. CREW Br. 22-38.

Third, and perhaps most dangerously, the district court has authorized the FEC to abandon its duties under FECA. Applying that court's misguided approach, recalcitrant Commissioners could refuse to enforce FECA—citing a court split or any whisper of legal doubt—and rely on the judiciary to grant them prosecutorial discretion. As long as Commissioners claimed that the state of the law is uncertain, the same doubt could be cited indefinitely to block future actions.

This tactic creates a vicious catch-22 for complainants. The first prong of the *Orloski* test, as well as FECA's citizen-suit provision, often

requires a court to determine the meaning of statutory provisions. Yet, under the Commissioners' argument, the very existence of legal uncertainty would suffice to end a case, without ever clarifying the underlying statute. Like a claim of qualified immunity, "[r]epeated successful interposition of the [litigation-risk] defense in similar cases could stunt the development of the law and allow government officials to violate [FECA] with impunity." Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 Sup. Ct. Rev. 139, 149. This is exactly what the district court validated. By refusing to decide whether the Commissioners' legal interpretations were wrong, it gave them room to assert the same alleged ambiguities over (and over) again.

This Court ought not magnify the district court's error. Rather, it should decide whether Commissioners impermissibly interpret the laws they apply *before* deciding whether their fear of litigation was reasonable. *Cf. Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Definitive statutory interpretation is "especially valuable with respect to questions" like those here, which "do not frequently arise in cases in which a [litigation-risk] defense is unavailable." *Id.* This Court should correct the lower court's error and resolve the legal issues in this case.

III. This Case Is Part of a Long Pattern of Deliberate FEC Delays and Deadlocks

This suit does not exist in isolation. Indeed, it is merely one example of a larger problem plaguing the FEC. While the agency is designed to deadlock in some difficult cases, *Pub. Citizen*, 839 F.3d at 1171, in recent years a three-Commissioner bloc has rendered the FEC increasingly dysfunctional, so that it often fails to apply the law. This Court should not treat three Commissioners' blanket refusal to carry out their statutory mandate as a permissible exercise of discretion.

In 2008, a three-member bloc began "to vote in lockstep," "essentially deadlocking the agency's decision-making" and "[grinding] the FEC to a slow crawl."[7] Though FECA contemplates that a complaint will trigger a response within 120 days, 52 U.S.C. § 30109(a)(8)(A), recent enforcement times have dragged far beyond this. A 2015 analysis found "the FEC had 'a backlog of 191 serious enforcement cases, with more than a quarter of these still unresolved more than two years

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[7] Nancy Cook, *He's Going to Be An Enabler*, Politico (Feb. 21, 2017), http://www.politico.com/magazine/story/2017/02/trump-mcgahn-white-house-lawyer-214801.

after'" a complaint was filed.[8] Another report by Commissioner Steven Walther identified 78 pending cases, of which 50% had been pending for more than a year, and 23% for more than two years; 29% had languished for at least a year after OGC submitted its report.[9]

Many of these delays stem from disagreements between the Commissioners, including over whether delays are even a problem.[10] As an FEC staffer explained in a 2016 study on the agency's low morale: "I spend lots of time working on projects that end up sitting for months or years because the Commission deadlocks or holds over discussion."[11] When Commissioners delay votes on enforcement actions, cases can

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[8] R. Sam Garrett, Cong. Research Serv., R44319, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress* 11 (Dec. 22, 2015), https://fas.org/sgp/crs/misc/R44319.pdf ("CRS Report") (citation omitted).

[9] Comm'r Steven T. Walther, Motion to Set Priorities and Scheduling on Pending Enforcement Matters Awaiting Reason-to-Believe Consideration 2-3, app. 1-6 (July 14, 2015), https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-41-a.pdf.

[10] CRS Report at 11.

[11] Off. of Inspector Gen'l, Fed. Election Comm'n, *Root Causes of Low Employee Morale Study* 4 (July 2016), https://transition.fec.gov/fecig/documents/RootCausesofLowEmployeeMoraleStudy-FinalReport-OIG-15-06.pdf.

crawl past the five-year statute of limitations on monetary relief.[12] This is one such case.

In addition to delay, the no-action bloc frequently forces deadlock. The FEC cannot take substantive actions, or even close files, without four votes. 52 U.S.C. § 30106(c). This allows three Commissioners to block movement either toward or against enforcement. Between 1996 and 2006, only 3.3% of votes on the six-member Commission—and 4.3% of votes in periods when the Commission had only five members—failed to garner four Commissioners on either side.[13] But what was once rare has become commonplace over the last decade.

The anti-enforcement bloc has drastically reduced the number of enforcement votes the FEC takes, from an average of 727 per year from 2003 to 2007 to an average of just 178 per year from 2008 to 2013[14]—a drop-off that occurred immediately after the anti-enforcement bloc coalesced in 2008. Within this narrowed set of votes, deadlock rates

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12 CRS Report at 11.

13 Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 Election L.J. 167, 176 tbl. 5 (2009).

14 Pub. Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* 1 (Apr. 2015), https://www.citizen.org/sites/default/files/fec-deadlock-update-april-2015.pdf.

have accelerated. The Congressional Research Service found that the FEC deadlocked on 13% of closed matters under review ("MURs") in 2008-09, and 24.4% in 2014.[15] Then-Commissioner Ann Ravel's 2017 *Dysfunction and Deadlock* report found further deterioration: deadlock accounted for 30% of all enforcement votes for MURs that closed in 2016, compared to only 2.9% for MURs closed in 2006.[16] Indeed, the FEC deadlocked on at least one substantive vote in *37.5%* of MURs closed in 2016.[17] And, while no MURs were *closed* due to a deadlocked vote in 2006, 12.5% were by 2016.[18] The MUR at issue in this case is one of them.

There is no question that delay and deadlock are part of a concerted effort to reduce enforcement, based on three Commissioners' contested views about issues beyond the scope of their statutory mandate. The no-action Commissioners have admitted so themselves. "No action at all, they say, is better than overly aggressive steps that

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15 CRS Report at 9-10.

16 Ravel Report at 9.

17 *Id.* at 10.

18 *Id.*

could chill political speech."[19] Commissioner Goodman has even opposed moving cases expeditiously because he believes that more claims are filed against "Republican-leaning" than "Democratic-leaning" entities; he asserts that Commissioners must maintain "discretion" to halt enforcement actions to avoid a "disparate impact" on "Republican" groups.[20]

These views have led the no-action Commissioners to take positions at odds with FECA itself, such as by voting to allow a super PAC to "produce an ad that was 'fully coordinated' with a candidate—without having it count as a coordinated communication under federal election law."[21] These Commissioners' actions have left the FEC "mired

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[19] Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. Times (May 2, 2015), https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html.

[20] Paul S. Ryan, Opinion, *Republican FEC Commissioner Admittedly Blocking Complaints Against Republicans*, The Hill (June 4, 2015), http://thehill.com/blogs/congress-blog/campaign/243828-republican-fec-commissioner-admittedly-blocking-complaints (quoting FEC, *Archived Captions of Entire Meeting* (May 21, 2015), https://www.fec.gov/resources/updates/agendas/2015/transcripts/Open_Meeting_Captions_2015_05_21.txt).

[21] Marian Wang, *FEC Deadlocks (Again) on Guidance for Big-Money Super PACs*, ProPublica (Dec. 2, 2011), https://www.propublica.org/article/deadlocks-again-on-guidance-for-big-money-super-pacs/single.

in an ideological standoff," such that "there has been virtually no enforcement of the campaign finance laws."[22] This has resulted in "lack of disclosure and political committee registration, employer coercion, candidates' personal use of campaign funds, and foreign national contributions."[23]

This case is thus one illustration of a troubling pattern, in which a bloc of Commissioners delays and deadlocks the FEC to avoid enforcing laws with which it disagrees. These Commissioners have "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007). When this happens, even the normally permissive rules of prosecutorial discretion must give way to meaningful judicial review. *Id.*; *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (en banc).

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[22] Matea Gold, *Trump's Deal with the RNC Shows How Big Money Is Flowing back to the Parties*, Wash. Post (May 18, 2016), https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html.

[23] Ravel Report at 2, 12-20.

CONCLUSION

For the foregoing reasons, this Court should reverse.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

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