ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5049

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,
Plaintiffs-Appellants,
v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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July 27, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), defendant-appellee Federal Election Commission ("Commission" or "FEC") hereby certifies as follows:

(A) Parties and Amici. Citizens for Responsibility and Ethics in Washington and Melanie T. Sloan were the plaintiffs in the district court and are the appellants in this Court. The FEC was the defendant in the district court and is the appellee in this Court. Campaign Legal Center and Dēmos filed a brief as *amici curiae* in support of appellants in this Court. There were no *amici curiae* in the district court.

(B) Rulings Under Review. Appellants appeal the February 22, 2017, order of the United States District Court for the District of Columbia (Contreras, J.) granting the FEC's motion for summary judgment and denying the appellants' motion for summary judgment. The district court's order appears in the Joint Appendix ("J.A.") at 861; the Memorandum Opinion may be found at 2017 WL 706155 (D.D.C. Feb. 22, 2017) and is reprinted at J.A. 862-88.

(C) Related Cases. There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

CREW	Citizens for Responsibility and Ethics in Washington and Melanie Sloan
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
J.A.	Joint Appendix

INTRODUCTION

After much careful consideration and a difficult investigation during administrative enforcement proceedings against a group called the Commission on Hope, Growth and Opportunity ("Nonprofit"), the Federal Election Commission ("Commission" or "FEC") divided evenly over whether to take action against the group, and so the agency dismissed the case. The Commissioners who voted not to proceed, and thus form the controlling group, explained that they had done so because Nonprofit was defunct, the passage of five years implicated the statute of limitations, and the matter was a poor vehicle to decide unresolved legal issues in an oft-contested area of campaign finance law. Based on those factors, the Commissioners concluded that "the most prudent course was to close the file consistent with the Commission's exercise of its discretion." (J.A. 769.)

The fundamental question this appeal presents is whether the Commission acts contrary to law when it dismisses an administrative complaint as a matter of prosecutorial discretion, without deciding the merits of every claim alleged. Every court to consider the issue has concluded that the Commission retains prosecutorial discretion and may exercise it so long as it does so reasonably. And because the controlling Commissioners provided a reasonable explanation for the exercise of that discretion here, the district court's order upholding the agency's decision should be affirmed.

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The district court below held that the Commission's dismissal of the administrative complaint filed against Nonprofit by Citizens for Ethics and Responsibility in Washington and Melanie Sloan (collectively "CREW") was not contrary to law because it was the result of a reasonable exercise of the Commission's prosecutorial discretion. The issues presented for review are:

1. Whether it is "contrary to law" within the meaning of 52 U.S.C. § 30109(a)(8)(C) for the Commission to dismiss an administrative complaint as an exercise of prosecutorial discretion without conclusively addressing the merits of the complainant's claims.

2. Whether the district court correctly concluded that the Commission's dismissal of CREW's administrative complaint against Nonprofit was not contrary to law pursuant to 52 U.S.C. § 30109(a)(8)(C) because the controlling Commissioners' exercise of prosecutorial discretion was reasonable.

3. Whether a party aggrieved by a Commission dismissal of its complaint may challenge, pursuant to 52 U.S.C. § 30109(a)(8), the Commission's past dismissal of other administrative complaints filed by third parties asserting similar legal issues.

STATUTES AND REGULATIONS

All applicable statutory provisions are contained in the Brief of Appellants.

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The Commission is a six-member independent agency vested with exclusive statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA"). Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, 52 U.S.C. § 30106(b)(1); to investigate possible violations of FECA, *id.* § 30109(a)(1)-(2); and to "have exclusive jurisdiction with respect to civil enforcement of" FECA, *id.* § 30106(b)(1).

This lawsuit involves judicial review of the Commission's handling of an administrative complaint that alleged violations of certain campaign finance reporting and disclosure provisions. (J.A. 249-64.) Specifically, CREW alleged that Nonprofit was a group that was required to report its contributors and spending and had not done so, and also that it had failed to include required disclaimers in its advertising. (*Id.*)

As a general matter, FECA establishes a two-tiered reporting system for groups to publicly disclose the financing of certain kinds of election-related communications. Groups who meet a statutory threshold described below and have as their major purpose federal campaign activity are classified as "political committees," which must register with the Commission, file periodic reports

identifying those who have contributed in excess of $200, and meet other organizational, record-keeping, and public filing requirements. *See* 52 U.S.C. §§ 30102, 30103, 30104(a)-(b). Groups that fall outside the definition of a political committee need only report spending on particular communications that meet certain criteria. *Id.* § 30104(c), (f).

FECA defines a 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 during a calendar year." *Id.* § 30101(4)(A). "This broad definition, however, is less universally encompassing than at first it may seem, for [FECA's] definitional subsections limit" the scope of "the key terms 'contribution' and expenditure.'" *FEC v. Akins*, 524 U.S. 11, 15 (1998). Those terms cover "only those contributions and expenditures that are made 'for the purpose of influencing any election for Federal office.'" *Id.* (quoting statutory definitions recodified at 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i)). Concerned that the bare statutory definition might reach too far into protected First Amendment activity by covering "groups engaged purely in issue discussion," the Supreme Court further limited the definition of political committee so that it would "only encompass organizations that are under the control of a candidate or the major purpose of which is the

nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).

Buckley, however, provided only limited guidance regarding the key question of how to determine an organization's "major purpose." *See id.*; *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012). To fill this gap, the Commission has adopted a policy of determining political committee status through case-by-case adjudication. *See Rules and Regulations: Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007); *see Real Truth*, 681 F.3d at 551 (upholding the Commission's case-by-case approach to the major purpose test). Under this approach, the Commission determines through a fact-specific analysis whether a group's spending on "Federal campaign activity" is "sufficiently extensive," including by comparison to its activities "unrelated to campaigns." 72 Fed. Reg. at 5601. In addition, the Commission analyzes the group's "public statements," which "can also be instructive in determining an organization's major purpose," and may examine internal statements of purpose as well. *Id.*

If a group does not meet the definition of a political committee, FECA requires disclosure of more limited information. Those groups need only make disclosures if they spend more than a minimal amount on "independent expenditures" (communications that expressly advocate the election or defeat of a

clearly identified federal candidate) or "electioneering communications" (broadcast communications that refer to a clearly identified federal candidate close in time to an election and are targeted to the relevant electorate). 52 U.S.C. § 30104(c), (f). Moreover, these reports need only disclose certain information related to the group's spending on such communications. *See id.* § 30104(c)(2), (f)(2); 11 C.F.R. § 104.20(c)(9).

Groups airing these kinds of candidate-related advertising must also comply with FECA's specific disclaimer requirements. *See* 52 U.S.C. § 30120. Those provisions require independent expenditures and electioneering communications to include written and aural disclaimers identifying the person who paid for the communication and stating that it was not authorized by any candidate or candidate's committee. *Id.* § 30120(a)(3), (d)(2).

FECA also establishes specific rules to govern most Commission enforcement actions. *See* 52 U.S.C. § 30109(a)(1). Those rules require the Commission to engage in a multistep administrative process to determine whether any civil FECA violations have occurred. Upon receiving information that a FECA violation might have occurred — either through a complaint from outside the agency or in the course of its administrative duties — and any response to the allegations, the Commission must determine whether there is "reason to believe" that the respondent has committed a violation of FECA. *Id.* § 30109(a)(2). If the

Commission makes such a finding, it then conducts "an investigation of such alleged violation" to determine whether there is "probable cause to believe" that a FECA violation has occurred. *Id.* § 30109(a)(2), (4). If the Commission makes such a probable cause finding, it must then "attempt, for a period of at least 30 days" but "not more than 90 days," to "correct or prevent" the "violation by informal methods of conference, conciliation, and persuasion." *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, FECA authorizes the FEC to institute a *de novo* civil enforcement action in federal district court. *Id.* § 30109(a)(6)(A). When considering allegations under its ordinary enforcement procedures, the Commission has no authority to impose administrative remedies on FECA violators outside of the conciliation process or an enforcement action in federal court. *See id.* § 30109(a)(5)-(6).[1]

At each of these administrative enforcement stages, the affirmative vote of at least four Commissioners is required for the agency to proceed. 52 U.S.C. § 30109(a)(2), (4)(A), (6)(A). If at any point there are not four votes to proceed and the agency dismisses the case, FECA permits "[a]ny party aggrieved" by the dismissal to file suit in the District Court for the District of Columbia to obtain

[1] *Compare id.* § 30109(a)(4)(C) (describing administrative-fine procedure for certain reporting violations); 11 C.F.R. § 111.31 (granting discretion to the Commission regarding deployment of administrative fine procedures).

judicial review to determine whether the decision was "contrary to law." 52 U.S.C. § 30109(a)(8)(A), (C). Should the court find the Commission's dismissal to be unlawful, FECA requires the court to "direct the Commission to conform" with the court's ruling "within 30 days." *Id.* § 30109(a)(8)(C). If, and only if, the Commission fails to conform within that time period, the complainant may bring "a civil action to remedy the violation involved in the original [administrative] complaint." *Id.*

II. FACTUAL BACKGROUND

A. Initial Commission Proceedings Involving Nonprofit

The Nonprofit matter was brought to the FEC's attention by two separate administrative complaints, which were filed by the Democratic Congressional Campaign Committee (and its executive director) and by CREW on October 4, 2010, and May 23, 2011, respectively. (J.A. 23, 249-64.) These initial complaints alleged that Nonprofit had financed advertisements against Democratic congressional candidates in the 2010 election campaign but had failed to report them as independent expenditures or electioneering communications, and also that the advertisements failed to include proper disclaimers. (J.A. 23-24.) Approximately one year after filing its first complaint, CREW amended it to add the allegation that despite Nonprofit organizing as a section 501(c)(4) nonprofit organization under the Internal Revenue Code, it in fact was a political committee

under FECA. (J.A. 392-408.)[2] CREW asked the Commission to "impose sanctions appropriate to these violations and take such further action as may be appropriate." (J.A. 407.)

Nonprofit responded to the complaints by generally denying that any FECA violations had occurred. Nonprofit counsel William Canfield stated that the group was engaged in "a public-outreach effort focused on macro-economic issues" and that its "cable television issue-oriented announcements" merely "set-forth the public positions previously taken by legislators on Capitol Hill." (J.A. 268-71.) Nonprofit argued that no FECA violations occurred because the communications identified in the administrative complaints were "specifically issue oriented and [did] not advocate the election or defeat of any identified federal candidate." (J.A. 269.) Moreover, the group stated, any technical errors with respect to disclosure were "made in good faith" because each advertisement contained a disclaimer explaining that Nonprofit had paid for the communication and because records of Nonprofit-sponsored communications were publicly available in logs broadcasters maintain as required by the Federal Communications Commission. (J.A. 271.) Canfield also explained, after receiving CREW's amended

[2] Commission staff had already prepared a report analyzing whether Nonprofit was a political committee. (J.A. 277.) Commission staff ultimately withdrew that report to further consider it and to provide Nonprofit with an opportunity to respond to the new claim. (J.A. 310, 342.)

administrative complaint, that Nonprofit was an "inactive client" and that he did not expect to provide legal services to the organization in the future. (J.A. 426.)

CREW's amended administrative complaint contained financial information regarding Nonprofit's activities and attached Nonprofit's 2010 Form 990 federal tax return. (J.A. 410-24.) This tax return reported $4.77 million in 2010 spending. (J.A. 410.) The vast majority of that money went to a company called Meridian Strategies, to which Nonprofit paid approximately $4.3 million for "media placement," $275,000 for "media production," and $105,175 for "advertising and technology." (J.A. 417.)

Although Nonprofit's tax returns did not further delineate its spending on public communications, CREW's amended administrative complaint included an "estimated cost of air time" for the advertisements that were at issue in its complaint. (J.A. 394.) Based on these estimates, CREW surmised that Nonprofit had spent approximately $2.3 million to broadcast the communications identified in the administrative complaint, or 53% of the amount it paid to Meridian Strategies for media placement. (J.A. 404.) CREW "assum[ed]" that this 53% ratio also applied to Nonprofit's reported media production costs, and so CREW estimated that Nonprofit spent $145,000 to produce the advertisements. (J.A. 405.) Using these estimates, CREW contended that Nonprofit was a political committee because it had spent $2,459,000 on the production and placement of the

communications cited in the amended administrative complaint, which amounted to 51.5% of total spending. (J.A. 405.)

The FEC's Office of General Counsel prepared a report in December 2013 analyzing whether there was reason to believe Nonprofit had committed FECA violations. (J.A. 431.) Based on the allegations in the administrative complaints, the report recommended that the Commission find reason to believe that all of Nonprofit's identified communications should have been reported as independent expenditures or electioneering communications, and that they did not include proper disclaimers. (J.A. 437.) The report also recommended that the FEC find reason to believe that Nonprofit satisfied the statutory threshold for political committee status, because it had made more than $1,000 in expenditures to broadcast several communications that "contain[ed] express advocacy." (J.A. 461-62.)

Relying on the estimate of costs supplied by CREW, the report further recommended that the Commission find reason to believe that Nonprofit's major purpose was the nomination or election of federal candidates. Commission staff noted that Nonprofit "allegedly spent over $1.7 million on express advocacy communications and over $530,000 on non-express advocacy communications that support or oppose a clearly identified federal candidate," which accounted for "all of [Nonprofit's] known advertisements." (J.A. 468.) At the same time, however,

the Office of General Counsel acknowledged that these figures did not reflect "the full extent of [Nonprofit's] spending during the 2010 calendar year." (J.A. 463.) Therefore, it was "unclear at th[at] stage whether" Nonprofit's election-related spending had been a majority of its budget. (J.A. 468.)

On September 16, 2014, the Commission unanimously found reason to believe that Nonprofit had violated FECA by failing to report the communications cited in the administrative complaints as independent expenditures or electioneering communications, and the agency authorized an investigation into those alleged violations. (J.A. 476-77.) There were not four Commissioner votes, however, to find reason to believe that the disclaimers included in Nonprofit's advertising were insufficient or that Nonprofit should have registered as a political committee. (J.A. 476-77.) Instead, the Commission unanimously decided to "[t]ake no action at th[at] time" on those alleged violations. (*Id.*) In a Factual and Legal Analysis explaining the vote, the Commissioners observed that the amended administrative complaint raised "the additional question of whether [Nonprofit] satisfies the definition of 'political committee,'" but the Commission left that question open. (J.A. 489.)

B. The Commission's Investigation

Following the FEC's finding of reason to believe that reporting violations occurred, the Office of General Counsel launched a formal investigation.

However, Commission staff immediately encountered difficulty in determining the scope of Nonprofit's activities. Canfield, the attorney who had previously represented Nonprofit before the Commission, explained that Nonprofit had "terminated its activities" in 2010 and that he "no longer served as its" general counsel. (J.A. 503.) Nonprofit's fiscal year 2011 tax return, filed in May 2012 with the Internal Revenue Service, indicated that it had terminated. (J.A. 497, 819.) James Powell, who was listed on Nonprofit's tax filings as its President and Executive Director, told Commission investigators that his primary role was limited to "writing and producing the T.V. ads that [Nonprofit] ran" during the 2010 election cycle. (J.A. 493.) Powell further indicated that the allegations concerned events that "took place five years ago" and that he could only answer "to the best of his recollection." (J.A. 546.) Nonprofit's treasurer, James Warring, informed the Commission that his firm had done "accounting and tax work" for Nonprofit in 2010 and 2011 but he did not have any financial records relating to Nonprofit. (J.A. 496.) Scott Reed, who according to public reports had been affiliated with Nonprofit, stated "that he had been involved with too many political committees since 2010 to have a clear recollection" about his work with the group. (J.A. 638.)

Notwithstanding the passage of time, Commission investigators were able to obtain some financial records and other materials through subpoenas. These

materials included a Nonprofit planning document outlining the group's goal of making "an impact" by focusing on "key issues including financial reform, energy, taxes, pharmaceuticals, health care and other key concerns, with the primary focus on the policies of the current Congress and the Obama Administration specific to job creation, business growth and economic recovery." (J.A. 514.) A PowerPoint presentation indicated that Nonprofit's "mission" was to "advance the principle that sustained and expanding economic growth is central to America's economic future." (J.A. 519.)

Some documents also suggested that Nonprofit intended to engage in some express advocacy to further its policy goals. For example, the planning document stated that one of Nonprofit's goals was to "make an impact" on the group's "key issues" by "using express advocacy in targeted Senate races," and it listed states that were "potential targets" for the organization. (J.A. 514.) A fundraising letter also discussed plans to "focus[] on running independent expenditure campaigns." (J.A. 578.)

C. Second General Counsel's Report

On July 23, 2015, the Office of General Counsel issued a second report reiterating its earlier recommendation that the Commission find reason to believe Nonprofit had violated FECA's disclaimer and event-driven reporting provisions and recommending that the Commission find reason to believe Nonprofit was a

political committee based on updated information from the Office's investigation. (J.A. 653-55.) Commission staff acknowledged that they were "not able to definitively itemize Nonprofit's spending on independent expenditures versus electioneering communications." (J.A. 650.) Because of Nonprofit's incomplete records, the Office of General Counsel utilized the media-spending estimates submitted by CREW to calculate that 77% of Nonprofit's spending on advertising, or 74% of its total expenditures, paid for communications that the Office classified as independent expenditures. (*See* J.A. 650-51.) Those estimates, however, accounted for only about $2.2 million of spending, while Nonprofit itself had reported more than double that figure. (J.A. 643, 650.) In light of this discrepancy, the Office of General Counsel suggested that the Commission assume that the unaccounted-for spending was made at the same 77% ratio between independent expenditures and other advertising. (J.A. 650-51.)

Commission staff then analyzed Nonprofit's organizational and fundraising documents. Although the report acknowledged that Nonprofit's stated purpose was to educate the public on matters of economic policy, the Office of General Counsel observed that its internal planning documents reflected "an electioneering purpose." (J.A. 652.)

Upon considering this report, three FEC commissioners advocated abandoning the disputed political committee violation to move forward with the

FECA violations on which the Commission was unanimous. (J.A. 872.) The remaining three commissioners, however, preferred to gather more facts on the political committee issue. (J.A. 872.)

D. Third General Counsel's Report

After further investigation, the Office of General Counsel submitted a third report summarizing the final steps of the investigation on September 25, 2015. Commission staff used newly obtained bank records to conclude that 85% of Nonprofit's total spending in 2010 went toward advertisements, all of which were independent expenditures or electioneering communications. (J.A. 736.) This number went down to 61% of total Nonprofit spending if only independent expenditures were considered. (J.A. 737.)

These new calculations included more than just Nonprofit's actual expenses to pay for media production costs and airtime. In addition to those costs, the calculations included, as expenses for independent expenditures and electioneering communications, commissions that Nonprofit paid to vendors in part for fundraising services. (*See* J.A. 748, 754-55.) Nonprofit's vendors confirmed that these were commissions that covered their "work on the [Nonprofit] project in general." (J.A. 712-13.) The Office of General Counsel had also uncovered during its investigation that Nonprofit had paid $1.1 million in remaining funds to three individuals after all advertising disbursements had been made. (J.A. 731.)

According to Mihalke, Nonprofit distributed this remaining money as a "fundraising commission." (J.A. 731.)

Under the Office of General Counsel's analysis, excluding either the general, uncategorized commissions to Nonprofit's vendors or the fundraising commission did not affect the analysis because in either case, Nonprofit's spending on independent expenditures was more than 50% of Nonprofit's total spending. (J.A. 737-38.) If, however, *both* the uncategorized commissions *and* the fundraising commission were excluded, Nonprofit's spending on express advocacy was only 47% of its lifetime spending. (*See* J.A. 737-38, 754-55.) These proportions also depended on the Office of General Counsel's categorization of the Nonprofit advertisements as containing express advocacy. (J.A. 734-35.)

The Commission voted on the Office of General Counsel's recommendations on October 1, 2015. (J.A. 757.) Only three of the six Commissioners supported the recommendations. (*Id.*) Unable to obtain the required four votes to proceed with further enforcement, the Commission voted five to one to close the file. (J.A. 758.)

The three Commissioners who voted against finding reason to believe explained their vote in a statement of reasons. As these Commissioners voted not to proceed with enforcement, their decision is controlling 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). The controlling Commissioners' statement began by noting the "procedural and evidentiary difficulties" that had plagued the Commission's investigation. (J.A. 766.) As they explained, the Commission's initial investigation was unable to "build a sufficiently detailed record of [Nonprofit's] activities" to separate the organization's spending on an advertisement-by-advertisement basis. (*Id.*) Following that investigation, these Commissioners had "advocated [moving forward on] the obvious disclosure violations—while time still remained under the five-year statute of limitations." (*Id.*)

The controlling Commissioners explained that the ensuing investigatory activities revealed that Nonprofit was a defunct organization. (J.A. 766.) Nonprofit had "filed termination papers with the IRS in 2011," meaning the group "no longer existed." (*Id.*) Its financial records indicated that Nonprofit had no funds with which to pay any fine. (J.A. 769.) Nonprofit's counsel had resigned and "there did not appear to be any agents of [Nonprofit] with whom the Commission could conciliate or who could otherwise bind the defunct organization." (*Id.*) Without anyone willing to negotiate on Nonprofit's behalf, the controlling Commissioners concluded that "any conciliation effort would be futile." (*Id.*) Moreover, the passing of additional time meant that the statute of limitations on the disclosure violations had "effectively expired." (J.A. 766.) For

these reasons, the controlling Commissioners concluded that "any further enforcement action in this matter was a pyrrhic exercise," and that "this case did not warrant the further use of Commission resources." (J.A. 766, 769.)

The controlling Commissioners did not resolve the merits of the political committee allegations against Nonprofit. These Commissioners stated that the Office of General Counsel had submitted its July 2015 investigative report "less than three months before the statute of limitations would expire for the alleged reporting violations." (J.A. 768.) While investigators continued to pursue leads on the broader political committee allegations, those leads "raised novel legal issues" such as how to account for "vendor commissions and other general payments to officers or directors or vendors" that the Commissioners had "no briefing or time to decide." (J.A. 769.) The controlling Commissioners observed that during that time, "the case had become an academic exercise." (*Id.*)

Given these considerations, the controlling Commissioners concluded that "the most prudent course was to close the file consistent with the Commission's exercise of its discretion in similar matters." (J.A. 769.) In support of that final sentence, the controlling Commissioners cited *Heckler v. Chaney*, 470 U.S. 821 (1985), and several earlier Commission matters in which the FEC had decided not to pursue enforcement for reasons including that the committee involved had

terminated, the age of the case, and the unlikelihood of collecting any monetary penalty. (J.A. 769-70.)

E. District Court Proceedings

After CREW sought judicial review pursuant to 52 U.S.C. § 30109(a)(8), the district court granted the Commission's motion for summary judgment, holding that the Commission's dismissal decision was not contrary to law. (J.A. 888.) The district court recognized that the Commission had "made a series of choices all of which culminated" in its conclusion that the case was "not worth pursuing." (J.A. 879.)

First, the district court agreed with the controlling Commissioners' conclusion that "the face of the statute of limitations suggested that the expenditure-based claims were time-barred, at the latest, in October 2015, shortly before the FEC issued" its statement of reasons. (J.A. 880.) Although CREW provided several arguments that the Commission could have pursued notwithstanding the face of the statute of limitations, the district court concluded that none was so "close to watertight" that it was unreasonable for the Commission to decline to pursue them. (J.A. 881.)

Second, the district court recognized that the controlling Commissioners had not reached the merits of the political-committee claim but rather had declined to decide "novel legal issues" in the context of this matter. (J.A. 883.) The district

court held that the Commission "had a rational basis for concluding that" these unresolved issues "existed in this case, and that resolving them in this forum would have been a 'pyrrhic' exercise fraught with litigation risk." (J.A. 884.) As the court noted, CREW had not provided any authority that "definitively resolve[d] how to treat vendor commissions." (J.A. 884.) And although "the controlling commissioners may well have agreed with CREW's interpretation, it was rational for them to conclude that continued prosecution was unjustified in light of the litigation risk that the 'novel' issues presented." (J.A. 884-85.)

Third, the district court concluded that the controlling Commissioners were reasonable in considering the legal and practical difficulties of pursuing a defunct entity that had no officer willing to engage in conciliation with the FEC. (J.A. 886-87.) Here again, the district court rejected CREW's argument that the Commission acted unreasonably because it possibly "*could* have obtained a remedy" if it had elected to pursue a more aggressive enforcement strategy. (J.A. 887.)

SUMMARY OF THE ARGUMENT

After analyzing CREW's allegations and the available evidence, three FEC Commissioners voted to dismiss CREW's administrative complaint in an exercise of prosecutorial discretion. While Commission dismissals are judicially reviewable under the contrary to law standard, the Supreme Court and this Court

have consistently held that the Commission receives great deference in setting enforcement priorities, analyzing the likelihood of success, and ultimately deciding whether to pursue a matter. The controlling Commissioners exercised that discretion reasonably, and the district court correctly upheld that decision.

CREW's suggestion that all Commission dismissals based on prosecutorial discretion should be held contrary to law in order to enable private citizen enforcement suits is contradicted by FECA's plain text and unanimous judicial authority affirming the Commission's prosecutorial discretion. FECA permits a private right of action only after a court order finding that the Commission has acted contrary to law and a subsequent failure by the Commission to conform to that order. These procedural steps, which are virtually unique among federal citizen-suit provisions, indicate that Congress intended private suits to be rare. Recognizing the Commission's prosecutorial discretion is perfectly consistent with that statutory scheme.

There is no other basis to disturb the dismissal of CREW's administrative complaint. The controlling Commissioners carefully analyzed the evidence against Nonprofit and concluded that the age of the alleged violations implicated the statute of limitations; that Nonprofit was defunct, which made required conciliation a futile endeavor; and that the matter presented novel legal issues regarding the test for determining whether a group was a political committee

required to meet comprehensive organizational and reporting requirements. Each of these factors was an independent reasonable basis for the controlling Commissioners to vote not to pursue further enforcement without deciding the merits of the case. CREW argues, in essence, that if it was possible for the Commission to have pursued Nonprofit under any of a series of enforcement theories it identifies, the agency was required to do so, but that is not the law. The district court properly upheld the dismissal of CREW's administrative complaint under the highly deferential standard of review.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court order granting summary judgment *de novo*. *See Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). Under FECA, a court may set aside a Commission order dismissing an enforcement complaint only if it is "contrary to law." *Id.*; 52 U.S.C. § 30109(a)(8)(C). This means that the Commission's decision to dismiss cannot be disturbed unless it was based on "an impermissible interpretation of the Act" or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). In other words, the Commission's decision need only be "sufficiently reasonable to be accepted by a reviewing court." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (internal quotation marks omitted). The contrary

to law standard is "[h]ighly deferential" to the Commission's decision, and it "permits reversal only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Hagelin*, 411 F.3d at 242 (internal quotation marks omitted).

II. CONSISTENT WITH FECA, COURTS HAVE UNIFORMLY ACCORDED PROSECUTORIAL DISCRETION TO THE FEC

A. The Commission Has Prosecutorial Discretion in Enforcing FECA

As the district court recognized, the controlling Commissioners' rationale for dismissing CREW's administrative complaint was not predicated on any substantive decision on the merits of CREW's allegations or any conclusion that no FECA violation had occurred. Indeed, these same Commissioners had previously voted to pursue enforcement against Nonprofit on alleged violations that they viewed as "obvious." (J.A. 887.) The controlling Commissioners ultimately voted not to proceed, however, as an exercise of discretion in light of the practical and legal difficulties identified in their statement of reasons. (J.A. 769.)

As a federal law enforcement agency that must consider such concerns in pursuing its statutory responsibilities, the Commission unquestionably has the authority to dismiss cases as an exercise of prosecutorial discretion. The Supreme Court has expressly recognized that the Commission may decline to pursue an

enforcement matter *even if* that means some potential FECA violations go unpunished. *FEC v. Akins*, 524 U.S. 11, 25 (1998). In *Akins*, the Court considered a similar challenge to the Commission's decision that a group was not required to disclose its donors and expenditures because it was not a political committee as defined in FECA. *Id.* at 14-15. In the course of discussing the challenger's standing to sue, the Court explained that "[o]f course" the Commission could "still have decided in the exercise of its discretion not to require [the group] to produce the information," and that would have remained true "*even had* the FEC agreed with respondents' view of the law" that FECA required disclosure. *Id.* at 25. Indeed, that is ultimately what happened. After the Supreme Court remanded the case, the Commission elected not to pursue certain reporting violations, in part as an exercise of its "prosecutorial discretion" because "any further investigation would be frustrated by problems of proof and the expiration of the applicable statute of limitations." *Akins v. FEC*, 736 F. Supp. 2d 9, 16 (D.D.C. 2010). That rationale was upheld on judicial review. *Id.* at 21-24.

This Court has similarly recognized the Commission's discretion to dismiss administrative complaints notwithstanding potential FECA violations. *See CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) ("No one contends that the Commission must bring actions in court on every administrative complaint. The Supreme Court in *Akins* recognized that the Commission, like other Executive

agencies, retains prosecutorial discretion."). And district courts have routinely applied this principle to Commission dismissals for prosecutorial discretion. *See, e.g.*, *La Botz v. FEC*, 61 F. Supp. 3d 21, 34-35 (D.D.C. 2014); *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) ("The FEC is in a better position than [plaintiffs] to evaluate the strength of [plaintiffs'] complaint, its own enforcement priorities, the difficulties it expects to encounter in investigating [plaintiffs'] allegations, and its own resources."), *vacated on other grounds by* 725 F.3d 226 (D.C. Cir. 2013); *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988) ("[I]f the Commission is not altogether as autonomous as the office of a prosecuting attorney, it is nevertheless surely committed to the Commission's discretion to determine where and when to commit its investigative resources." (citation omitted)).

CREW does not dispute that the Commission retains significant discretion over how and whether to proceed with its enforcement actions. (*See* CREW Br. 22 (conceding that "the FEC has discretion about whether or not to take a particular action" (internal quotation marks omitted)); Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. 32 (Docket No. 19), *CREW v. FEC*, No. 15-2038 (D.D.C. filed July 28, 2016) ("Like other agencies, the FEC enjoys prosecutorial discretion . . . .").) CREW instead argues that all FEC discretionary dismissals should nevertheless be deemed contrary to law because to do otherwise would eliminate their "right" to bring a private action under FECA. (CREW Br. 22-38.)

In the forty-year history of FECA's citizen-suit provision — which includes many discretionary dismissals — no court has adopted CREW's view of the law.

FECA's text squarely contradicts CREW's argument. Three statutory conditions must be met before a private litigant may bring its own civil action to redress alleged FECA violations. First, the litigant must file an administrative complaint with the Commission, which may either act on the complaint or choose not to do so. *See* 52 U.S.C. § 30107(e); *In re Fed. Election Campaign Act Litig.*, 474 F. Supp. 1051, 1053 (D.D.C. 1979). Second, if the Commission elects to dismiss the administrative complaint, the private litigant must obtain a declaration from the district court that the dismissal was contrary to law. 52 U.S.C. § 30109(a)(8)(C). Third, the Commission must fail "to conform with such declaration within 30 days." *Id.* Then, and only then, may a private litigant bring a lawsuit in his own name to redress an alleged FECA violation. *Id.*

Recognizing the permissibility of prosecutorial discretion does not invalidate any portion of this statutory scheme. That is because Commission decisions not to prosecute, unlike those of most agencies, remain subject to judicial review. *Akins*, 524 U.S. at 26; *see Heckler*, 470 U.S. at 832. When the Commission dismisses an administrative complaint, even as an exercise of prosecutorial discretion, it must explain its rationale for doing so. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987). On judicial review of that decision,

courts evaluate the Commission's exercise of discretion to determine whether it depends on any errors of law or is otherwise unreasonable. *Orloski*, 795 F.2d at 161; *see also CREW*, 475 F.3d at 340 ("At this stage, judicial review of the Commission's refusal to act on complaints is limited to correcting errors of law.").

If the Commission supplies reasonable grounds for invoking its discretion not to pursue a matter, its decision is not contrary to law and the condition precedent for a private right of action is never triggered. *See* 52 U.S.C. § 30109(a)(8)(C). In the event the Commission's rationale for not pursuing a case is unreasonable — or if the Commission makes errors of law in its analysis — that exercise of discretion would be rejected on judicial review and the matter would be remanded to the agency. *Id.* If the Commission failed to conform to such a court declaration, a complainant could bring a civil action in its own name. *Id.* Each potential court determination and resulting circumstance is fully consistent with the plain statutory text. In contrast, CREW's argument is inconsistent with FECA's text because it would permit a private right of action even when the Commission acted reasonably in exercising its discretion to dismiss and its analysis did not depend on any impermissible legal judgments.

The fact that Commission dismissals based on prosecutorial discretion remain subject to reasonableness review is sufficient to respond to CREW's contention here. If the Commission relied on an arbitrary or otherwise

impermissible rationale for invoking its discretion, that dismissal would be declared contrary to law on judicial review. *See La Botz v. FEC*, 61 F. Supp. 3d 21, 33 n.5 (D.D.C. 2014) (rejecting hypothetical argument that the Commission could use its prosecutorial discretion in a way that was racially discriminatory because the "hypothetical would likely not survive an arbitrary and capricious challenge").

B. Congress Intended Private Suits Enforcing FECA to Be Rare

The extremely limited circumstances that trigger a private action under FECA make clear that Congress intended such suits to be rare. *See* 52 U.S.C. § 30109(a)(8)(C). The Commission has the sensitive task of regulating political activities of the nation's elected officials and other political actors. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (noting that the Commission must decide "issues charged with the dynamics of party politics"); *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (describing the unique role of the FEC in having the sole purpose of regulating "core constitutionally protected activity"). The Commission's authority is "considerable" and its power "potentially enormous," including the authority to "conduct investigations, authorize subpoenas, . . . and initiate civil actions." *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015) (citing 52 U.S.C. § 30107). Congress provided for an independent commission and

procedural safeguards to ensure that enforcement actions in this area would not be used as a partisan or political weapon. *See id.*; H.R. Rep. No. 94-917, at 3 (1976) ("It is . . . essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse . . . .").

Had Congress intended to provide for citizen suits upon the mere election of the Commission not to prosecute as a matter of prosecutorial discretion, it could easily have done so. Many other federal statutes permit citizen suits upon the mere declination of the relevant federal agency to pursue enforcement. For example, federal employment antidiscrimination statutes explicitly permit "persons aggrieved" to file employment discrimination lawsuits if the Equal Employment Opportunity Commission dismisses or fails to act on a charge filed with that commission within a specified time. 42 U.S.C. § 2000e-5(f)(1). Some federal environmental protection statutes authorize "any citizen" to commence a civil action to redress potential violations upon sixty days' notice to the Environmental Protection Agency. 33 U.S.C. § 1365. In fact, of the citizen-suit provisions CREW cites in its brief, FECA's is the *only* one that requires judicial review and disapproval of the agency's action before a citizen suit may be filed. (*See* CREW Br. 37-38.) Far from reading FECA's provision consistently with these other statutes, this Court should respect Congress's decision to impose additional barriers to citizen suits in the campaign finance area. *See Whitfield v. United*

States, 543 U.S. 209, 216 (2005) (observing that Congress's inclusion of a requirement in several statutes but exclusion of it in another "clearly demonstrat[es] that it knows how to impose such a requirement when it wishes to do so").

The long history of judicial review of the Commission's handling of enforcement cases indicates that Congress's statutory scheme is operating as intended. Although judicial review of Commission dismissals is appropriately deferential, courts have on occasion declared such dismissals contrary to law. *See, e.g.*, *CREW v. FEC*, 209 F. Supp. 3d 77, 95 (D.D.C. 2016). When they have done so, the Commission has almost universally fulfilled its duty to conform to those decisions in the first instance. (*See, e.g.*, Add. 14-15 (holding that Commission conformed to district court ruling that had deemed dismissal contrary to law).) And although the conferral of a private right of action under FECA is accordingly rare, it has happened. *See Democratic Senatorial Campaign Comm. v. Nat'l Republican Senatorial Comm.*, No. 1:97-cv-1493 (D.D.C. filed June 30, 1997).[3]

[3] In that case, the court held that the Commission's delay in completing an investigation in a matter was unlawful and ordered the Commission to take action on the administrative complaint within 30 days. When that did not happen, the administrative complainant filed suit in its own name against the respondent. *Democratic Senatorial Campaign Comm. v. FEC*, No. Civ. A 95-0349, 1996 WL 34301203, at *1 (D.D.C. Apr. 17, 1996); FEC Record 1-2, Vol. 23, No. 10 (Oct. 1997), https://transition.fec.gov/pdf/record/1997/oct97.pdf.

Under CREW's approach, however, the Commission would not be able to dismiss on discretionary grounds even the most technical reporting violations involving very small amounts of money without opening the door to a private lawsuit. Expanding the circumstances in which private complainants can bring suit in this way would raise the specter of partisan federal law enforcement suits against candidates and political party committees each time the Commission elected not to pursue a complaint that asserted FECA claims that were potentially meritorious but too insignificant for the Commission to pursue. With an easier ability to file *de novo* enforcement suits and then investigate defendants armed with subpoena authority, partisan actors could thereby obtain the "enormous power" that Congress intended to grant to the Commission subject to considerable "safeguards." *Combat Veterans*, 795 F.3d at 153. The campaign finance law could become a partisan sword to mire political opponents in litigation. The statute was structured to avoid precisely that danger.

C. CREW's Challenge to the FEC's Prosecutorial Discretion Lacks Support

In essence, CREW argues that it is contrary to law for the Commission to exercise its prosecutorial discretion to dismiss an administrative complaint without addressing the merits of the case. (*See* CREW Br. 26.) But it provides no citation to any principle of law that an agency is required to resolve the merits of every case presented to it. *See, e.g.*, *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986);

cf. N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (upholding agency's decision to settle "an enforcement action without resolving any of the legal issues raised in the Order to Show Cause initiating that action").[4]

For their part, *Amici* liken the Commission's prosecutorial discretion to a claim of qualified immunity under 28 U.S.C. § 1983 to suggest that the Court (and derivatively, the Commission) resolve all FECA interpretive issues *before* deciding whether the Commission's exercise of discretion was reasonable. (*Amici* Br. 28.) Under the qualified immunity doctrine, a government official is immune from suit under section 1983 unless the plaintiff can establish: (1) a violation of a constitutional right; and (2) that the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Even in that very different context, however, courts are not required to resolve the merits of the underlying constitutional issues before determining whether the constitutional right at issue was clearly established, as *amici*'s own case shows. *Id.* at 236-37. This is because requiring courts to determine the constitutional merits "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the

[4] CREW faults the district court for citing *Rose*, arguing that it did not address the contrary to law standard. (CREW Br. 34.) The analysis in that case, however, clearly supports the district court's conclusion that the Commission receives substantial deference in setting its own enforcement priorities and allocating investigative resources. *See Rose*, 806 F.2d at 1091.

case." *Id.* Just as the Commission here reasonably declined to address the merits of CREW's political committee claim against Nonprofit, *Pearson* counsels against requiring decision makers to engage in "an essentially academic exercise." *Id.* at 237; *see* J.A. 769.

Nor does the district court's recognition that the Commission may dismiss as a matter of prosecutorial discretion require or permit discovery into the FEC's budget, personnel, and workload. (CREW Br. 26, 32-33.) Review of agency action, including review of Commission dismissals under section 30109(a)(8), is limited to the record that was compiled before the agency except in very limited circumstances. *See, e.g.*, *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226-27 (D.C. Cir. 1993). As a result, the Commission's rationale for acting as it did must stand or fall on the basis of the record before the agency, "not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).[5]

In any event, CREW takes an erroneously cabined view of the controlling Commissioners' rationale in this case. The controlling Commissioners did not

[5] CREW's cases do not establish that discovery would be warranted to review a prosecutorial discretion dismissal. In *United States v. Armstrong*, the Supreme Court considered what preliminary showing was required for a criminal defendant to be entitled to discovery into whether he was selectively prosecuted because of his race. 517 U.S. 456, 458 (1996). Unlike in *Armstrong*, however, CREW has made no credible allegation of any unconstitutional conduct by the Commission that would warrant discovery. *See Marshall Cty.*, 988 F.2d at 1226.

conclude that the FEC lacked sufficient resources to pursue the case. (*See* CREW Br. 37.) Rather, their analysis was predicated on a considered judgment of the facts in the record, the prospects for fruitful conciliation with Nonprofit, and the likelihood that the Commission could obtain particular remedies including monetary relief. *See Heckler*, 470 U.S. at 831 (explaining that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise"). After analyzing the relevant factors in this matter, the controlling Commissioners essentially concluded that the evidentiary and legal difficulties presented by it were not worth the effort. Those decisions were reasonable and thus lawful, as explained in more detail below.

III. THE CONTROLLING COMMISSIONERS' EXERCISE OF DISCRETION IN THIS CASE WAS REASONABLE

A. The Commission Is Not Authorized to Unilaterally Remedy Violations Through FECA's Standard Procedures

CREW's primary objection on appeal to the controlling Commissioners' exercise of discretion is that the Commission uncovered the names of Nonprofit's contributors in the course of its investigation and therefore could have publicly released them without incurring any additional expense. (*See* CREW Br. 39-41.) The Commission, however, lacks the statutory authority to unilaterally remedy such alleged violations of FECA, and the controlling Commissioner's analysis was reasonable in any event.

The Commission could not have imposed remedial penalties like corrective disclosures unilaterally. Unlike many federal agencies, the Commission generally has no authority to order remedies for violations of the statute it enforces.[6] Rather, if the Commission concludes that there is probable cause to believe that a group has violated FECA, it must either reach agreement with the group on a remedy through conciliation or file a *de novo* civil action in federal district court. 52 U.S.C. § 30109(a)(6). As this Court has recognized, the "Commission has no authority to order anyone to report anything." *CREW v. FEC*, 475 F.3d at 340.

CREW relies on the same 2007 *CREW* case just cited as support for the notion that "the FEC has released [similar] information in the past" (CREW Br. 39), but the Commission has done no such thing. That case centered on the allegation that a corporation's sharing of a list of activists with a campaign constituted an unlawful corporate in-kind contribution. 475 F.3d at 337-38. The activist list at issue was already publicly available, however, as the respondents confirmed. *Id.* at 338. It bears little relationship to the donor list at issue in this case, which has never been public.

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[6] The Commission has authority to unilaterally impose administrative fines for a limited category of violations that involve the late filing of or failure to file required reports, but this category does not include the failure to register as a political committee and is available only when the Commission elects to handle matters through its administrative-fine procedure rather than its default enforcement procedures. *See* 52 U.S.C. § 30109(a)(4)(C); 11 C.F.R. § 111.31.

As the district court below recognized, the Commission had good reason not to unilaterally release Nonprofit's confidential donor list: doing so would implicate serious First Amendment concerns. (J.A. 886.) As noted above, the Commission is "unique among federal administrative agencies, having as its sole purpose the regulation of core constitutionally protected activity." *Van Hollen*, 811 F.3d at 499 (internal quotation marks and alteration omitted). Because of this, the FEC must carefully consider the "First Amendment rights of the political organizations it investigates" when making public its investigatory materials. *AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003). The concerns over compelled disclosure are only heightened when the names of a group's "members" are collected through the Commission's subpoena power, and when information considered for public release "played no meaningful role" in the Commission's "decisionmaking process." *Id.* at 175-76, 78. To address the concerns identified in *AFL-CIO*, the Commission amended its disclosure policy to no longer automatically release for public disclosure subpoenaed records obtained during the investigation of an enforcement matter, like the records CREW would have the Commission release here. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,703 (Aug. 2, 2016). By releasing the files as CREW seeks here, the Commission would be going beyond the disclosure

policy, which is tailored to accommodate constitutional concerns, to release information that was not critical to the Commissioners' analysis.

Even if the Commission had the authority to do everything CREW asks unilaterally, CREW is wrong to imply that resolving the contested issues in this case and releasing confidential internal financial information and donor lists would be costless. (*See* CREW Br. 39.) Undertaking that course would have required the Commission to spend administrative time and effort resolving murky legal issues implicating the First Amendment rights of third parties in a contested case.[7]

CREW's argument also begs the question whether Nonprofit was, in fact, required to disclose its donors. (*See* CREW Br. 40.) The Supreme Court has confirmed that FECA's provisions requiring disclosure of donors are constitutional in the context of entities that are political committees, concluding that those disclosure requirements are substantially related to a sufficient governmental interest. *Buckley*, 424 U.S. at 80. But the Court reached that holding only after applying a narrowing construction to limit the types of groups that are required to disclose such contributions, recognizing that "compelled disclosure, in itself, can

[7] Moreover, CREW falsely equates its own "certain litigation" challenging the Commission's enforcement decisions with potential litigation over Nonprofit's donor information. (CREW Br. 40, n.4.) CREW's argument on that point confuses the likelihood than an action might presage litigation with the likelihood that the Commission's position will be affirmed. The Commission reasonably determined that a dismissal decision was a legally defensible position, and that pursuing further enforcement with so many evidentiary, practical, and legal barriers was too great a risk.

seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. In order to implement the Court's holding, the Commission conducts a fact-intensive examination to determine a group's major purpose in order to assess whether the group should be deemed a political committee. *See supra* p. 5. Not all aspects of that analysis have been resolved as the Commission makes case-by-case determinations, and the controlling Commissioners exercised the agency's prosecutorial discretion to avoid these complex and contested legal issues. *See infra* pp. 52-55.

B. CREW's Broad-Based Challenge to the Commission's Handling of Prior Administrative Complaints Is Beyond the Scope of Judicial Review Available Here

Unable to establish that the controlling FEC Commissioners abused their discretion in *this* matter, CREW attempts to broaden the case to challenge the same Commissioners' analysis in *other* matters involving FECA's political committee provisions, arguing that the Commission has abdicated enforcement of FECA's political committee rules. These claims are baseless.

CREW's abdication argument depends on material that is beyond the scope of the administrative record in this case. (*See* CREW Br. 43 (citing studies that were not presented to the Commission in the underlying enforcement process).) CREW presented these materials to the district court, but they were never before the Commission at the time of the agency decision under review here. (*See* J.A.

44-47.) As a result, they are not properly considered in light of the "black-letter administrative law that . . . a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). The district court properly did not rely on these materials in its ruling below, and this Court should similarly disregard them.

Any abdication claim, moreover, was not properly presented to the district court and it remains improper here. FECA's text limits judicial review of complaint dismissals to "the complaint" at issue — it does not permit wide-ranging judicial oversight over the Commission's enforcement processes. 52 U.S.C. § 30109(a)(8)(C). CREW's litigation complaint followed this guidance by asserting a single claim limited to the Commission's treatment of the Nonprofit enforcement matter. (*See* J.A. 39-42.) But the Court should reject CREW's attempt to broaden the scope of review beyond what is permitted by the statute. In a previous case, CREW similarly argued that the Commission's approach to the political committee analysis over several prior administrative proceedings amounted to a "'de facto regulation.'" *CREW v. FEC*, 164 F. Supp. 3d 113, 118 (D.D.C. 2015). The court rejected CREW's attempt to mount "'an across-the-board challenge'" to the Commission's treatment of these previous matters,

holding that the "exclusive remedy" for aggrieved parties is to "challenge those particular decisions under the judicial review provision of FECA." *Id.* at 120.

CREW's attempt to relitigate that issue in the guise of an abdication claim should likewise be rejected. FECA provides judicial review only for a party "aggrieved by an order of the Commission dismissing a complaint *filed by such party*," and so CREW lacks standing to challenge the dismissal of administrative complaints filed by others. 52 U.S.C. § 30109(a)(8)(A) (emphasis added); *see also Judicial Watch v. FEC*, 293 F. Supp. 2d 41, 45 (D.D.C. 2003) ("[T]he plain language of the statute makes clear that [judicial review] is only available to parties to the administrative complaint.").

Any challenge to the Commission's handling of these prior administrative matters would also be untimely. FECA requires that any petition for review of a Commission dismissal "shall be filed . . . within 60 days after the date of dismissal." 52 U.S.C. § 30109(a)(8)(B). Any failure to comply with that 60-day limit "divests the . . . court of jurisdiction." *Jordan v. FEC*, 68 F.3d 518, 519 (D.C. Cir. 1995). The most recent dismissal CREW cites other than the Nonprofit matter occurred on November 18, 2014. (J.A. 244). CREW's litigation complaint was filed more than a year past that date and is therefore untimely as to all of the other matters to which CREW cites. (*See* J.A. 43.)

Even if FECA permitted such a broad-based attack on the Commission's enforcement authority, CREW's abdication argument is meritless. The only case CREW cites to support its claim is inapplicable here. *See Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). That decision relied on an agency's failure to take action against regulated entities that the *agency itself* had concluded were engaged in statutory violations. *See Wash. Legal Found. v. Alexander*, 984 F.2d 483, 487-88 (D.C. Cir. 1993) ("The availability of the APA injunction suit in *Adams* was thus premised in part on the fact that HEW itself had determined that certain educational institutions were in violation of Title VI, and had nevertheless taken no action against them."). Here, however, CREW fails to show that the FEC made such findings as to the political committee status of the entities involved.

CREW does not even demonstrate that the Commission's decisions in the contested cases it identifies were contrary to law. In only one of the Commission matters CREW alludes to was the Commission decision ultimately found contrary to law on judicial review. *See CREW v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016). And in that case, the Commission properly conformed with the district court's contrary-to-law finding. (*See* Add. 13-15.)

CREW may disagree with the way the Commission has analyzed past matters in which complainants alleged violations of FECA's political committee provisions, but even assuming that CREW could show that the agency erroneously

failed to enforce certain FECA provisions in those matters, it would gain CREW nothing, as all that is at issue here is whether the Commission acted unreasonably in *this* matter. In sum, CREW's abdication argument adds nothing to its case.

C. CREW's Other Arguments Do Not Render the Controlling Commissioners' Exercise of Discretion Unreasonable

None of CREW's other arguments shows that the controlling Commissioners' decision was unreasonable. In essence, CREW argues that if it was arguably *possible* for the FEC to pursue a particular enforcement theory, then the agency was *required* to pursue it. But that is not the law.

1. The District Court Properly Upheld the Controlling Commissioners' Legal Conclusions

As an initial matter, neither CREW nor *amici* identify any portion of the dismissal decision that reaches an impermissible legal conclusion. Both argue that the controlling Commissioners' analysis of the statute of limitations was impermissible, but neither quibbles with the only definitive legal conclusion the Commissioners actually reached regarding the limitations period: that on the face of the statute of limitations, claims asserting violations of FECA's event-driven expenditure-based claims become time-barred after five years. (J.A. 769, 880.)

That legal conclusion is correct. *See* 28 U.S.C. § 2462; *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996). The advertisements that form the basis of CREW's administrative complaint aired between September 25 and November 2,

2010. (J.A. 394.) Assuming each advertisement was an independent expenditure or electioneering communication that Nonprofit was required to disclose in a report filed with the FEC, the violation would have occurred when those reports were due — *i.e.*, within 24 to 48 hours of the advertisement, depending on the type of communication. *See* 52 U.S.C. § 30104(f)(1), (g)(1)-(2); 11 C.F.R. § 104.20. And the Commission became aware of the allegations that these advertisements should be reported nearly contemporaneously. (*See* J.A. 23 (alleging that a complaint was filed with the FEC on these advertisements on October 4, 2010).) The final Commission vote in this matter occurred on October 1, 2015, about five years later. (J.A. 757.) Now, nearly seven years after the events in question, the limitations period is surely closed.[8]

CREW attempts to show that the Commission's legal conclusions were incorrect by misrepresenting both the dismissal decision and the district court opinion. Contrary to CREW's claims, the controlling Commissioners never stated that all "enforcement was blocked by the statute of limitations" (CREW Br. 44); instead, they merely stated that the "obvious" event-driven reporting violations "became time barred" shortly before their statement of reasons was issued

[8] *Amici* suggest that the limitations period in section 2462 does not apply to disclosure and political committee registration, but they do not dispute that the expiration of the time period would bar a claim for civil penalties. (*Amici* Br. 16-20.)

(J.A. 769).[9] Similarly, the controlling Commissioners never concluded that "enforcement against a 'defunct' entity was impossible" (CREW Br. 44); they concluded that Nonprofit's termination prevented the Commission from conciliating with it and made further enforcement efforts an "academic" and "pyrrhic exercise" (J.A. 769). And far from "refus[ing] to adopt" this reasoning (CREW Br. 44), the district court recognized these distinctions, observing that in using the term "pyrrhic," "the controlling commissioners acknowledged that the prosecution may be able to proceed, but that doing so would come at so high a cost as to make any victory comparatively hollow" (J.A. 874, n.2).

Having failed to identify any erroneous legal conclusions in the decision under review, CREW argues that the controlling Commissioners were unreasonable in declining to address the other legal theories it has identified for the first time in its court challenge. As the district court recognized, however, none of those legal theories are so watertight that the controlling Commissioners acted

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[9] CREW repeatedly argues that the statute of limitations has not run on the political committee claims against Nonprofit (CREW Br. 45), but the controlling statement of reasons did not suggest that the period had completely run with respect to every alleged violation. Rather, that statement recognized that the limitations period on the disclosure violations, *i.e.*, the claim that Nonprofit failed to make event-driven reports of its independent expenditures and electioneering communications, had run and that the time limits were more broadly "impending," "effectively foreclos[ing] further enforcement efforts." (J.A. 768-769.) The controlling Commissioners did not state that the statute of limitations completely barred any further enforcement action on the political-committee claim.

unreasonably in declining to address them during the administrative proceeding. (J.A. 881.)

2. Potentially Applicable Exceptions to the Statute of Limitations Do Not Render the Dismissal Unreasonable

CREW argues that the controlling Commissioners' analysis of the statute of limitations was unreasonable for three reasons: (1) because the Commission could have pursued claims for equitable relief such as disgorgement notwithstanding the statute of limitations; (2) because the political committee claim is a continuing violation; and (3) because Nonprofit's alleged fraudulent concealment tolled the statutory period. But even assuming CREW is correct that these arguments remained available, that would still not make the controlling Commissioners' analysis unreasonable. No legal principle requires an administrative agency to pursue every possible legal argument in favor of enforcement. *See CREW*, 475 F.3d at 340 ("No one contends that the Commission must bring actions in court on every administrative complaint."); *Akins*, 736 F. Supp. 2d at 16. Such a rule would compel the Commission to press forward in every enforcement matter so long as there was at least some non-frivolous basis for doing so, regardless of the severity of the alleged violation, the agency's enforcement priorities, or its assessment of the likelihood of success. It would virtually eliminate prosecutorial discretion. *See Heckler*, 470 U.S. at 831 (describing the factors an agency must weigh in deciding whether to bring an enforcement action).

In some cases, a decision not to pursue a course of action as a matter of discretion might be unreasonable, but CREW has made no such showing with regard to the limitations period. Statutes of limitations like section 2462 promote the "'basic policies'" of "'repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). Moreover, "[s]tatutes of limitations are intended to 'promote justice'" in part by preventing cases from being brought after "'evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Rather than being unreasonable, the agency dismissal at issue here plainly furthers such policies.

Each purported exception to the statute of limitations that CREW identifies is fraught with uncertainty and litigation risk. CREW acknowledges that courts have divided on whether claims for equitable relief survive expiration of the statute of limitations. CREW Br. 45; *compare Williams*, 104 F.3d at 240 (holding that section 2462 bars untimely claims for equitable relief), *and Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1018 (8th Cir. 2010), *with FEC v. Christian Coalition*, 965 F. Supp. 66, 71 (D.D.C. 1997). CREW minimizes, however, the vindication of the controlling Commissioners and the district court that came in the

intervening *Kokesh v. SEC* decision. 137 S. Ct. 1635 (June 5, 2017). CREW now mentions only "injunctive relief to correct a failure to disclose," but there was certainly litigation risk in the Commission pursuing disgorgement for violations outside the section 2462 period as CREW explicitly sought below. (CREW Br. 45.) At least with respect to disgorgement as practiced by another agency, the Supreme Court concluded claims for disgorgement must be brought within five years of the date the claim accrues. *Id.* Moreover, even if the Commission were to conclude that further pursuit of equitable relief was warranted, the agency was not required to test that theory in this particular case.

Nor does the rule that the statute of limitations is tolled during periods of certain continuing violations render the controlling Commissioners' dismissal decision unreasonable. *See Earle v. District of Columbia*, 707 F.3d 299, 306-07 (D.C. Cir. 2012). As relevant here, this Circuit has "occasionally recognized" a continuing violation where "the text of the pertinent law imposes a continuing obligation to act or refrain from acting." *Id.* at 307. That articulation of the doctrine does not apply to one-time FECA disclaimer and reporting provisions, which require particular statements to be included in certain advertising and impose discrete obligations to report those communications at a particular time. *See* 52 U.S.C. §§ 30104(c)(2), (f)(1), 30120(a)(3), (d)(2). And, as already mentioned, the controlling Commissioners never suggested that the statute of

limitations totally barred further enforcement proceedings on CREW's political committee claim. As a result, CREW's continuing violations theory fails to establish that the dismissal decision was unreasonable.

The Commission was also not compelled to argue that Nonprofit's alleged fraudulent concealment tolled the statute of limitations. Even "deliberate concealment of material facts" relating to a defendant's wrongdoing tolls the statute of limitations only "until [a] plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Smith v. Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979); *see also Sprint Commc'ns Co., L.P. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996). Here, two administrative complaints were filed with the Commission extensively detailing Nonprofit's advertising activities and political spending beginning in October 2010. (J.A. 23-24.) The Commission would therefore be hard-pressed to argue that it remained unaware of the basis of any potential FECA charges it could bring against Nonprofit. *See Williams*, 104 F.3d at 241 (rejecting Commission-asserted fraudulent concealment theory on the basis of information that had been available to the Commission through disclosure reports).

In sum, none of the statute of limitations theories that CREW presents is so certain that it was unreasonable for the Commission to fail to pursue it. Even if CREW were ultimately correct on these legal points, some of which limit the

potential remedies that could be obtained, the Commission was not required to pursue every non-frivolous argument in this case.

3. The Controlling Commissioners' Conclusion That "Any Conciliation Effort" with a Defunct Entity "Would Be Futile" Was Not Unreasonable

The same confusion between what is possible and what is required pervades CREW's argument that the Commission retains authority to seek remedies against defunct entities. In their dismissal decision, the controlling Commissioners noted that Nonprofit had "no money" and that "there did not appear to be any agents of [Nonprofit] with whom the Commission could conciliate or who could otherwise legally bind the defunct organization" and concluded that it would be "futile" to engage in "any conciliation effort." (J.A. 769.) As the district court recognized, these Commissioners "did not completely rule out the possibility of proceeding on these grounds," but they did correctly identify logistical and remedial problems with moving forward. (J.A. 885, 886.)

The administrative record plainly supports the conclusion that Nonprofit's termination raised barriers to further enforcement proceedings. Nonprofit filed papers with the Internal Revenue Service showing that it had terminated more than three-and-a-half years prior to the Commission's final vote on CREW's administrative complaint. (J.A. 819.) The group's 2011 tax return also showed that Nonprofit itself has no remaining assets. (J.A. 819.) None of the witnesses

interviewed during the Commission's investigation would take responsibility for the organization, making it certain that no conciliation agreement would be reached. (*See* J.A. 500, 503.) Under the circumstances presented here, it was not unreasonable for the controlling Commissioners to determine that "any conciliation effort would be futile" and that further enforcement actions would be "a pyrrhic exercise." (J.A. 769.)

CREW argues that the Commission retains authority to pursue enforcement against former Nonprofit associates in their individual capacities (CREW Br. 47-48), but again, CREW cites no authority suggesting that the Commission *must* do so in every case. The only case law CREW cites actually proves the opposite. (*See* CREW Br. 48 (citing *Combat Veterans for Cong. Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 12 (D.D.C. 2013)).) In that case, the district court held that the Commission had *not* abused its discretion in declining to pursue a treasurer in his individual capacity, which is precisely the opposite of the argument CREW makes in this case. *Combat Veterans*, 983 F. Supp. 2d at 15. This Court affirmed that holding "for the reasons given" by the district court. *Combat Veterans*, 795 F.3d at 159. In sum, CREW fails to show that the Commission's analysis of the logistical difficulties it would face if it elected to pursue a defunct entity was unreasonable.

4. The Controlling Commissioners Reasonably Declined to Resolve Novel Legal Issues in the Context of This Matter

The controlling Commissioners also reasonably decided that the case against Nonprofit was a poor vehicle to decide novel legal issues presented by the case. Although the controlling Commissioners did not "delv[e] too deeply" into the merits of the political committee issue (J.A. 875), they observed that the Office of General Counsel's analysis of the evidence uncovered during its investigation implicated "novel legal issues" which had not been briefed and which there was little time to resolve (J.A. 769).

The precise issue the controlling Commissioners identified was how "vendor commissions and other general payments to officers or directors or vendors" should be accounted for in the "political-committee-status-analysis." (J.A. 769.) The Commission's investigation uncovered three of these transactions which were not exclusively attributed to the costs of producing and airing advertisements: (1) an approximately $300,000 payment to Mihalke, which he explained covered a "commission for media placement" but also covered other non-advertising work such as "general media consulting, fundraising and strategy" (J.A. 712-13); (2) a $1.1 million payment described as a "fundraising commission" paid to Mihalke and two others (J.A. 717); and (3) payments totaling approximately $300,000 to a separate Nonprofit vendor owned by Karen Boor (J.A. 754-55). Had the

Commission moved forward with enforcement, it would have had to decide how to account for these payments.

Citing 11 C.F.R. § 104.20(a)(2), CREW argues that the Commission has already decided these issues. (CREW Br. 51.) It has not. That regulation addresses only payments that are the "[d]irect costs of producing or airing electioneering communications." 11 C.F.R. § 104.20(a)(2). It does not address general commission payments that cover other types of expenses in addition to production and airing costs. *Id.*[10] As the district court concluded, "CREW does not cite to any authority that definitively resolves how to treat vendor commissions." (J.A. 884.) In light of the other procedural, evidentiary, and legal problems here, it was certainly reasonable for the controlling Commissioners not to resolve contested issues of law in this case. (*See* J.A. 769.)

Other evidence regarding Nonprofit's major purpose is similarly inconclusive. CREW's assertion that the controlling Commissioners did not address evidence of Nonprofit's "organizational purpose" is simply wrong. (CREW Br. 49.) The controlling Commissioners explained that Nonprofit's

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[10] Nor are general payments to vendors covering both electoral advocacy and non-electoral activities covered by 11 C.F.R. § 100.111(a). (*Amici* Br. 23.) That regulation only covers payments "for the purpose of influencing any election for Federal office." 11 C.F.R. § 100.111(a). Here, however, Nonprofit claimed to have engaged in non-electoral activities and issue advocacy. (J.A. 268-71.) Notwithstanding section 100.111(a), the Commission would have had to determine how to distinguish between those activities in the major purpose analysis.

"stated purpose was to educate the public on matters of economic policy formulation" and that it described itself as an "economic think tank on tax, trade, budget, and economic growth policies." (J.A. 766-67 (internal quotation marks omitted).) To be sure, other evidence in the record indicated that Nonprofit intended to engage in "express advocacy in targeted Senate races." (J.A. 514.) But at most this suggests that there was conflicting evidence on Nonprofit's major purpose, and it was not unreasonable for the controlling Commissioners to decline to resolve the issue.

Finally, another district court's decision about the Commission's treatment of a separate administrative complaint filed by CREW does not affect the analysis here. *See* CREW Br. 49-50; *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016). As an initial matter, that opinion was issued nearly a year after the Commission's dismissal under review, and so the controlling Commissioners cannot have been unreasonable for failing to consider it. Indeed, CREW told the district court that the issues litigated in that case "need not be decided here." Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. 44 n.24 (Docket No. 19), *CREW v. FEC*, No. 15-2038 (D.D.C. filed July 28, 2016).

In fact, the controlling Commissioners never reached a final conclusion as to which of Nonprofit's advertisements constituted express advocacy, which were electioneering communications, and which should be counted or excluded from the

political-committee analysis. (*See* J.A. 768 (noting that the controlling Commissioners "did not agree with the express advocacy analysis included in OGC's report").) Had the Commission completed that analysis, it is possible it might have concluded that some advertisements the Office of General Counsel determined to contain express advocacy in fact did not, which would have changed the analysis of Nonprofit's spending. None of this was necessary, however, in light of the decision to dismiss as a reasonable exercise of prosecutorial discretion.

IV. THIS APPEAL PROVIDES NO OCCASION TO REVISIT THE QUESTION WHETHER LEGAL INTERPRETATIONS OF AN EVENLY DIVIDED COMMISSION WARRANT *CHEVRON* DEFERENCE

As it was based on the Commission's prosecutorial discretion, the controlling Commissioners' analysis was not predicated on any substantive interpretation of FECA or a determination on the ultimate merits of CREW's administrative complaint. Nonetheless, *amici* argue (*Amici* Br. 5-13) that the Court should overturn its longstanding precedent holding that statutory interpretations that result from evenly divided Commission votes are eligible for *Chevron* deference. *See, e.g.*, *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000).

There is no need to reach that question in this case. The district court's opinion did not rely on the *Chevron* doctrine, and that case is not even cited in the opinion. The dismissal decision instead implicates an entirely separate type of deference: the deference the Commission receives for the manner it conducts

enforcement investigations and exercises its prosecutorial discretion. *See Rose*, 806 F.2d at 1091; *Democratic Senatorial Campaign Comm.*, 831 F.2d at 1134-35 & n.5.

Amici argue otherwise based on a single sentence in the district court's recitation of the legal standard. (*Amici* Br. 6; J.A. 876.) But there is no indication that the district court applied *Chevron* deference in this case. The district court repeatedly explained that it did not need to resolve the merits of contested legal issues to decide the case. (*See* J.A. 880 ("[w]ithout determining which side of the split is more persuasive"); J.A. 882 ("Of course, the Court need not resolve this legal issue to determine that the FEC had a rational basis for not proceeding."); J.A. 886 ("The Court need not resolve whether release in this case would violate the First Amendment.").) It also concluded that the controlling Commissioners had similarly declined to reach a final conclusion about the FECA-related issues involved. (J.A. 884-85 ("Although . . . the controlling commissioners may well have agreed with CREW's interpretation, it was rational for them to conclude that continued prosecution was unjustified . . . ."). None of this calls for *Chevron* deference, and so there is no need for this Court to address *amici*'s argument.

Amici rely heavily (*Amici* Br. 6-8) on *United States v. Mead Corp.*, 533 U.S. 218 (2001), but that decision does not call into question the traditional deference the Commission receives in enforcement matters. *Mead* held that generally

unexplained tariff classifications were not entitled to *Chevron* deference because there was "no indication that Congress intended such a ruling to carry the force of law." *Id.* at 221. But the Court also explained that the type of delegated authority that warrants deference "may be shown in a variety of ways, as by an agency's power to engage in adjudication . . . or by some other indication of a comparable congressional intent." *Id.* at 227. This Court conducted a detailed analysis in *Sealed Case* and found more than sufficient indications of Congressional intent, observing that even an FEC enforcement decision produced by deadlock is "part of a detailed statutory framework for civil enforcement . . . analogous to a formal adjudication" that "assumes a form expressly provided for by Congress." 223 F.3d at 780 (internal quotation marks omitted). Therefore, "nothing in *Mead* . . . directly contradicts *Sealed Case*" and it remains binding Circuit precedent. *CREW v. FEC*, 209 F. Supp. 3d at 85 n.5.

Nor does *Fogo De Chao (Holdings) Inc. v. United States Department of Homeland Security* require this Court to reevaluate *Sealed Case*. 769 F.3d 1127 (D.C. Cir. 2014). That case rejected deference to an agency decision that was the product of a more informal adjudication within the agency, rather than a more formal adjudication or notice-and-comment rulemaking. *Id.* at 1136. The dismissal at issue here was the product of the relatively formal administrative

process that was analyzed in *Sealed Case* and determined to fall "on the *Chevron* side of the line." 223 F.3d at 780.

CONCLUSION

For the foregoing reasons, the district court's order granting the Commission's motion for summary judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,947 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2017, I electronically filed the Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system, which will serve all counsel of record.

I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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